Employment news - autumn: Travel sickness - replacement holiday must be given

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Christina Morton
PROFESSIONAL SUPPORT LAWYER | UK

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A decision by the European Court of Justice (ECJ) in September that a worker who falls sick whilst on holiday can ask for holiday to be rescheduled to a later date has had a predictably hostile reception from UK employers. However, the effects of the decision might be more manageable than they first appear.

The decision in the case of Mr Pereda, an employee of the Spanish company Madrid Movilidad SA, was not surprising. Previous ECJ cases (Stringer and Schultz-Hoff) have established that annual leave is an inalienable right and that an employee who is not able to take holiday because of long term sick leave does not lose the entitlement, but should be permitted to take it at a later stage. Mr Pereda's case is a logical extension of this argument.

His circumstances were somewhat different from those of most UK employees making holiday requests from their employers. The system for organising annual leave at Madrid Movilidad SA is set out in a collective agreement with the works council. In order to ensure that there is enough cover, annual leave rotas are proposed in advance by the works council and then approved by the company. Further changes can normally only be made with 45 days' notice.

Mr Pereda was scheduled to take annual leave from 16 July to 14 August. However, he had an accident on 3 July, which forced him to be on sick leave until 13 August, with the result that all but two days of his annual leave coincided with his sick absence. He therefore asked the company to grant him an alternative period of annual leave from 15 November to 15 December. This request was refused without reasons.

Mr Pereda challenged the decision before the labour court in Madrid. The court referred the issue to the ECJ to establish whether it is contrary to the Working Time Directive for a worker who is on sick leave during a scheduled period of annual leave to be denied the right, following his recovery, to take the annual leave at another time. The ECJ decided that the company's position was contrary to the Directive, but the decision has ramifications for all holiday requests, not only those made in accordance with collective agreements.

In the UK, public sector employees will be able to rely on the decision directly. Private sector employers are governed by the Working Time Regulations, which currently do not reflect the decision. It is not clear whether the Government will take steps to amend them and until this is clear private sector employers may wish to wait before taking steps to respond.

In the wake of the decision, the most obvious practical problem for employers is the malingering employee who uses the ruling to request additional time off work, but has not in fact been ill enough to remain away from work. Employers will need to give some thought to the management of these situations. They may already have robust procedures in place for certification of sickness but these may now need to be extended, for example to cover situations where an employee has fallen sick, or alleges that he has fallen sick, whilst on holiday but away from home and his usual GP (for example on holiday outside the UK).

The current 'self-certification' rules form part of the statutory sick pay (SSP) regime and employers are not permitted to impose more stringent requirements that might deprive an employee of SSP. However employers can impose stricter sickness certification rules for an employee who is seeking additional holiday on the basis of an alleged illness during annual leave, for example by asking all such illnesses to be medically certified.

Employers also need to bear in mind that it is not uncommon for conscientious employees who have been working hard and are 'run down' or overtired to be ill whilst on holiday, as they may be more susceptible to colds and infections. The Pereda ruling may encourage employees in this category to ask for holiday to be rescheduled when in the past they might have hesitated to do so.

The extent to which employees in any category are inclined to take advantage of the ruling will also depend on how generous the employer's sick pay policy is. Whilst annual leave must be paid, sick leave need not be (over and above SSP). A sick pay policy that is not overly generous may be the most effective way of limiting the impact of the case, although employers need to exercise care before imposing any changes in policy. Entitlement to contractual sick pay might form part of the employee's contract of employment and, if so, employers will not therefore be able to make any changes unilaterally or without full consultation.

Finally, many employers already have, or have had in the past, provisions in their sickness or holiday policies that permit employees to take holiday at a later date if they are ill during annual leave. Hence many employers already have experience of managing a policy of this kind although they may also experience a surge in requests given the widespread coverage of this decision.

Authors

Christina Morton

PROFESSIONAL SUPPORT LAWYER | LONDON

Employment

 +44 20 7597 6654

 christina.morton@withersworldwide.com