

JS/10/14

23 February 2010

Dear Colleague

ANNUAL LEAVE ARRANGEMENTS

The Scottish Negotiating Committee for Teachers is currently discussing the implications of European Court of Justice decisions and recent amendments to UK regulations in relation to annual leave arising from sickness and from maternity.

Separate legal advice has been taken on the following: **Stringer and Others v HMRC, Schutz-Hoff v Deutscheversicherung Bund, Pereda v Madrid Movilidad SA, Merino Gomez v Continental Industrias Del Caucho SA and The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2008.**

The Stringer case provides for employees who have been absent from work through sickness to have an entitlement to statutory leave (currently 28 days). This right derives from the European Working Time Directive. Advice from the Department for Business, Innovation and Skills (BIS) makes it clear that an employee may choose to take statutory leave at the same time as he/she is on sick leave and may also be entitled to carry forward the unused statutory entitlement to the next leave year.

The advice from BIS is appended in full.

Arising from the Merino-Gomez case and the amended regulations, a teacher who is on maternity leave accrues leave during the entire maternity leave period, with the leave to be taken upon return to work. The leave cannot be taken during the period of maternity leave, although an employee may wish to be paid the balance of leave beyond the statutory 28 days in lieu of holiday.

Pending agreement being reached within the SNCT in relation to the accrual of leave due to sickness absence and maternity, adoption and paternity leave, you are advised to note the above developments and areas of joint agreement thus far reached informally in the SNCT. You may also consider advising staff who may be affected by this interim advice.

Yours sincerely

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Working time case law

The interaction of annual leave and sick leave

In the two cases of Stringer and Pereda, the European Court of Justice (ECJ) ruled on the interaction of sick leave and paid annual leave under the Working Time Directive.

As a result of the ECJ ruling in Stringer:

- statutory entitlement to paid annual leave continues to accrue during sick leave, even if the employee is on sick leave for the whole year and does no work
- workers can take their statutory annual leave at the same time as sick leave and receive their normal rate of pay
- payments in lieu of leave upon termination of employment must include any untaken statutory annual leave even if the employee has been on sick leave for the whole of the leave year

The Stringer case then returned to the House of Lords. The practical effect of its judgment is that a worker may be able to make a holiday pay claim under the deduction from wages provisions of the Employment Rights Act 1996, not just under the Working Time Regulations 1998.

In the case of Pereda the ECJ ruled that where a worker fell sick shortly before pre-arranged annual leave, the worker can request to take the period of annual leave which overlapped with sickness as annual leave at a later date. The ECJ ruled that a worker who has been on sick leave for the whole or part of the leave year and has not had the opportunity to take the leave, must be allowed to carry-over that leave into the next leave year.

The combined effect of the rulings is that a worker can choose to take their statutory annual leave at the same time as sick leave, or the worker can choose to take the missed annual leave at a later date. A worker who has missed out on statutory annual leave due to sickness, may be able to carry-over the missed leave to the next leave year.

BIS will be consulting on possible amendments to the Working Time Regulations in light of the ECJ ruling.

Guidance for employers

A worker continues to accrue their statutory minimum holiday entitlement as normal while absent from work due to sickness, however long the period of sickness may be. Depending on the terms of their employment contract, they may also accrue any additional contractual annual leave that they would normally be entitled to.

In light of the European Court of Justice (ECJ) judgments, a worker on sick leave is entitled to take statutory annual leave at the same time, if they wish. If a worker makes this choice, you would have to pay them their normal holiday pay rather than company sick pay - or their normal holiday pay rather than no pay if their company sick pay period has ended - for the days that he or she wishes to treat as annual leave.

If the employee qualifies for statutory sick pay (SSP), you would carry on paying the worker SSP during the time on annual leave and count this sum towards the amount of holiday pay you would be making. To take annual leave at the same time as sick leave in this way, is clearly a choice a worker is most likely to make if they either:

- are on sick leave for a considerable period, and has run out of sick pay
- will be unable to take all the annual leave to which he or she is entitled on return to work shortly before the end of a leave year
- have no entitlement to contractual sick pay

If a worker becomes sick whilst on or just before they are due to take annual leave, they can choose to have the time off that they are sick changed to sick leave. They can then make arrangements to take the annual leave that they missed at a later date.

In these situations a worker will then be on sick leave. You will want to consider requiring evidence of their sickness in line with your usual sickness absence procedures and in line with any eligibility criteria for company sick pay. For example, to qualify for full pay whilst sick a worker could be required to inform you as soon as they reasonably can that they are sick and you could request medical evidence.

If a worker is unable to take all of their statutory holiday entitlement within a leave year because of illness, the ECJ judgment also means they may be entitled to carry forward the unused statutory entitlement to the next year.

Guidance for employees

If you are an employee of worker and you would like more guidance visit [Directgov](#).

Rolled-up holiday pay

Following an ECJ judgment on 16 March 2006 and more recent judgments in UK courts, rolled-up holiday pay (RHP) is considered unlawful and payment for statutory annual leave should be made at the time when leave is taken.

UK court judgements about rolled-up holiday pay

Robinson-Steele v PD Retail Services, Clarke v Frank Staddon Ltd, Caulfield & Others v Hanson Clay Products Ltd (formerly Marshalls Clay Products Ltd), 16 March 2006

ECJ ruling on DTI guidance on rest entitlement

The ECJ previously ruled that DTI (now BIS) guidance on rest entitlement was incompatible with the Working Time Directive specifically: employers must make sure that workers can take their rest "but are not required to make sure they do take their rest".

No change to UK law is required and we have removed this reference from the guidance.

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