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Being off sick is no holiday: Statutory holiday entitlement of employees on sick leave

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A recent decision of the Court of Appeal has sought to clarify the holiday entitlement of employees on sick leave. In ***NHS Leeds v Larner***, a worker who was off sick for a whole year was allowed to carry over holiday from one leave year into the next, despite not having made a formal request to do so.

Facts

Mrs Larner, an NHS clerical officer in Leeds, had been absent on sick leave from January 2009 until April 2010, when her employment was terminated for capability. Mrs Larner subsequently lodged a Tribunal claim for her holiday entitlement in respect of the leave year April 2009 to March 2010, which she had not used whilst off sick. NHS Leeds argued that she was not entitled to any payment on termination as she had neither made a request to use that annual leave nor asked for the holiday entitlement to be carried forward into the next leave year. The case ended up in the Court of Appeal, where the judges ruled in Mrs Larner's favour. They decided that as Mrs Larner was on sick leave for a whole holiday year, her entitlement was not "lost" at the end of that year but automatically carried forward into the next year without the need for a formal request. Mrs Larner's subsequent termination during her sick leave crystallised her right to receive payment in respect of that untaken statutory holiday entitlement.

Commentary

This case is interesting for a number of reasons.

1. On first glance, it seems in direct conflict with the provisions of the **Working Time Regulations,** which are clear that any holiday not taken in a leave year will be forfeited (the so-called "use it or lose it" policy). However, the Working Time Directive (the underlying European legislation which the Working Time Regulations seek to implement) does not contain any reference to holiday being forfeited if an employee fails to request it. *Larner* confirmed that Article 7 of the Working Time Directive has "direct effect", ie. a worker can rely directly on a combination of that article and the *Larner* decision to seek holiday carry over. As a result, private sector employers need to comply notwithstanding that UK legislation is defective in this respect.

2. Another point thrown up by *Larner* involved the respective concepts of sickness absence and holiday. In this case, the court impliedly accepted that the absence due to sickness and the right to enjoy "a period of relaxation and holiday" were mutually exclusive and concluded that due to her being unwell, Mrs Larner did not have the opportunity to exercise her right to holiday. This appears to conflict with the reasoning in the earlier case of ***Stringer v HMRC*** where the Court indicated that a worker was able to request holiday whilst on sick leave. Indeed, employees who are off sick with no contractual sick pay entitlement often seek to take holiday, if only to receive pay for that limited period.

3. The Court did not provide guidance as to how to assess whether an employee has had the opportunity to take holiday. Take the example of an employee who is sick from January to September, returns to work for the whole month of October, and then goes off until the end of December – in this case, has the employee had sufficient opportunity to take their holiday, such that they cannot request carry over?

4. In implementing the Working Time Regulations, the **UK** Government chose to allow employees more than the minimum amount of holiday envisaged by Europe – namely, 5.6 weeks as opposed to 4 weeks. It is yet to be seen whether employees can require the full 5.6 weeks' holiday provided for by domestic legislation to be carried over or whether the effect of the decision applies only to the minimum provided for by the Working Time Directive.

Practical tips

Some of the outstanding issues above may be addressed in the Government's proposed amendments to the Working Time Regulations (following the "Modern Workplaces" consultation published in May 2011) and no doubt many residual points will be addressed in future Tribunal decisions. In the meantime, employers may find the following practical tips to be of use:

- It is worth keeping any "use it or lose it" provision in your holiday policy. The Larnerdecision was handed down in the context of statutory holiday only, so arguably any additional contractual holiday can be granted subject to whatever conditions an employer wishes to impose – which includes forfeiture of holiday not taken at the holiday year end. If you do permit limited carry over of holiday, then for the same reason it is worth stipulating an expiration date by which this must be taken (although the extent to which a cut-off would be effective for statutory holiday is unclear).

- Employers can provide that no contractual holiday (ie. in excess of statutory) accrues during sick leave. This would help to minimise a financial "windfall" for employees who are off on long-term sick leave, should their employment terminate before they return to work.

- Employers should try to proactively manage an employee's holiday whilst they are off on long-term sick leave. This approach minimises operational disruption when the employee returns (particularly if the employee would otherwise try to take large amounts of accrued holiday in one go) and mitigates the financial impact of paying an employee accrued holiday, potentially in respect of a number of years.

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