



## **PARTNERS EMPLOYMENT LAWYERS**

### **...RADAR...**

## **EMPLOYERS BEWARE: EMPLOYEES MAY RECLAIM PAID HOLIDAY LOST THROUGH SICKNESS**

### ***Pereda v Madrid Movilidad SA***

The European Court of Justice (ECJ) has recently decided that the concepts of sick leave and paid annual leave (holiday) are mutually exclusive: therefore, an employee who is genuinely sick in that period cannot enjoy their annual leave and is entitled to take that period annual leave later (if that is what they wish).

### ***What does this mean?***

The fear for employers is that employees who are scheduled to take annual leave might abuse their annual leave entitlement by claiming to be sick when they are not, take the leave under the premise of sickness and then claim annual leave later.

It is as yet unclear whether the ruling covers the European minimum of four weeks' statutory leave or the British entitlement of 5.6 weeks. However, it is likely that the ECJ would expect the more generous national entitlement to be covered.

### ***How can an employer guard against abuse?***

Sickness absence can be a problem anyway for employers. But it is worth remembering that the employer is not powerless in this regard:

1. It is advisable to incorporate a clause in your employees' contracts that requires proof of sickness to be provided after the first seven days. An employee is not entitled to statutory sick pay for the first three days anyway, and it is relatively low, which may discourage abuse.
2. Make sure that there is a clause in the employees' contracts that enables 'claw-back' of any monies that are overpaid to the employee. Therefore, if they are scheduled to take annual leave, fall sick before or during that period and then claim their annual leave later, you can get back any money overpaid as annual leave (less any sick pay that you might have had to pay them). These clauses should include a right of set-off, so that you don't have to physically get the money owed from them because you can deduct it from future payment.

***Who should be most concerned?***

As it stands, this ruling affects only public-sector employees. However, it seems the Working Time Regulations will have to be amended in order to give the ruling further effect. This means that private-sector employers would be well advised to amend their existing policies on sickness absence in accordance with the ruling, in order to prevent future claims.

Whilst this ruling has the potential to affect all employers, it is small employers who are most likely not to have appropriate contractual provisions in place, as suggested above, to help guard against abuse. Moreover, small employers may find it more difficult to monitor and maintain the application of sickness policies, whereas large employers will generally have large human resources departments to do this.

***Is it likely to be a big problem?***

It is worth noting that this European ruling arose from a Spanish case, where the employer refused annual leave to be taken later, even though it did not deny the employee's sickness during the scheduled annual leave period, because annual leave has to be agreed in writing two months in advance in Spain. Without such constraints in this country, it is doubtful in these circumstances that a problem would ever have arisen.

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