

# BRIEF UPDATE

FROM THE EMPLOYMENT LAW DIVISION



## Sick Leave - A New Headache for Employers

The European Court of Justice (ECJ) has recently handed down yet another decision relating to the conflict between sick leave and annual leave entitlement. This most recent case, *Pereda v Madrid Movilidad SA* is likely to prove as unpopular with employers as their decision in *Stringer v HMRC*.

### *Stringer v HMRC*

As regular readers of our Brief Updates will know, the ECJ handed down their decision in *Stringer v HMRC* in January this year, making the following key findings:-

- Annual leave accrues during all periods of sick leave (including long-term sick leave).
- It is possible for an employee to request that paid annual leave is taken whilst absent from work on sick leave.
- If an employee is not permitted to take annual leave whilst off

sick, the accrued annual leave must be carried forward to the next leave year and be taken at another time.

- On termination of employment a payment in respect of accrued annual leave must be made to the employee at "normal" salary rates.

This case has potentially serious implications where employees are absent on long-term sick leave as they will continue to accrue entitlement to annual leave during their absence even if this spans several years. Employers who have Permanent Health Insurance Schemes in place may not have taken this additional cost into account when budgeting for staffing costs.

Furthermore, the House of Lords has now confirmed that claims for outstanding annual leave entitlement may be made under legislation dealing with unlawful deductions from wages as well as under the Working Time Regulations themselves. This means that employees may be able to bring claims for outstanding annual leave entitlement going back several years. It is not entirely clear how many years employees may backdate their claims but this is likely to be at least 5 years and claims could even date back to 1998, being the time when the Regulations were first introduced. In the case of offshore workers, the furthest back dating would be to 2003 which is when the Regulations were first extended to that sector.

### *Pereda v Madrid Movilidad SA*

In handing down its judgement in *Stringer*, the ECJ specifically pointed out that the purpose of sick leave and annual leave is different. Sick leave is provided to allow an unwell employee time to recover whilst annual leave is provided for the purposes of rest, relaxation and leisure.

That statement may have influenced their decision in *Pereda*. This case now goes a step further than *Stringer* in confirming that, whilst a worker may take annual leave during sick leave, where a worker does not wish to do so, that worker must be able to take the annual leave at a later date.

Mr *Pereda* was employed as a driver and he suffered an accident at work around 2 weeks before the commencement of his allocated period of 4 weeks annual leave. His injury meant that he was not fit to carry out work for a period of 6 weeks and this meant that his

recovery from his injury almost entirely overlapped with his planned annual leave. He requested an additional period of annual leave to take this into account but his request was refused. The ECJ's ruling confirms that his period of sickness should not have counted towards his annual leave entitlement and that he should therefore have been entitled to take an alternative period of annual leave at another time.

### **The Implications for Employers**

This ruling effectively allows employees to pick and choose which of these provisions (paid annual leave/sick pay) to rely on in order to maximise pay and/or time off work as best suits them and is likely to have wide-ranging implications for employers in managing absence in general.

For example, how are employers to deal with an employee who goes off for two weeks holiday in the sun and comes back to work claiming to have been suffering from a tummy bug for 7 of those days? The employee could potentially self-certify his absence for this period and can then insist on taking additional annual leave to make up for his sick leave during that time.

Employers should therefore take this opportunity to review their sickness absence and annual leave policies. For example, employers should consider implementing a policy of insisting on doctors certificates for all sickness (irrespective of the number of days) during annual leave.

Employers may take some limited comfort in the fact that these decisions of the ECJ relate to the 4 weeks annual leave provided for by the European Directive and it may not apply to the additional annual leave of 1.6 weeks, now provided for in terms UK Regulations. The decisions do not relate to any contractual annual leave provided for over and above 5.6 weeks and policies and procedures should therefore be reviewed to reflect that.

**The Employment Law Team will be running a two-part free Lunch and Learn session on the topic of absence management in light of these two key decisions.**

**Part One will focus on the effect of these two decisions in practice and how employers can amend their policies and practices in order to minimise their adverse effect.**

**Part Two will focus on effective ways of managing short-term and long-term absence including; making an absence management policy work for you, effective use of occupational health advisers, recognising when it is fair to dismiss and looking at the requirements of the Disability Discrimination Act.**

**These sessions will be held on 9 and 16 December 2009 at Union Plaza, between 12.30 and 2.00 and are aimed at HR professionals, in-house lawyers and employers.**

**If you would like to attend either of these sessions please register using the link below:**

[trainingsolutions@paul-williamsons.co.uk](mailto:trainingsolutions@paul-williamsons.co.uk)

If you would like more advice about the above topic you should contact any member of the Employment Law Team: -

Sean Saluja	<a href="mailto:SSaluja@paul-williamsons.co.uk">SSaluja@paul-williamsons.co.uk</a>
Margaret Gibson	<a href="mailto:MMGibson@paul-williamsons.co.uk">MMGibson@paul-williamsons.co.uk</a>
Geoff Clark	<a href="mailto:GXClark@paul-williamsons.co.uk">GXClark@paul-williamsons.co.uk</a>
Stuart Robertson	<a href="mailto:SRobertson@paul-williamsons.co.uk">SRobertson@paul-williamsons.co.uk</a>
Tricia Walker	<a href="mailto:TWalker@paul-williamsons.co.uk">TWalker@paul-williamsons.co.uk</a>
Jennifer Gardner	<a href="mailto:JAGardner@paul-williamsons.co.uk">JAGardner@paul-williamsons.co.uk</a>
Linda Beedie	<a href="mailto:LAJBeedie@paul-williamsons.co.uk">LAJBeedie@paul-williamsons.co.uk</a>
Gillian Sangster	<a href="mailto:GSangster@paul-williamsons.co.uk">GSangster@paul-williamsons.co.uk</a>
David Burnside	<a href="mailto:DBurnside@paul-williamsons.co.uk">DBurnside@paul-williamsons.co.uk</a>