SUMMARY

2011/62: No doubt about EU law (DK)

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Summary

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Facts

Under Danish law, employees are not entitled to replacement holiday if they fall ill during their holiday. This principle was called into question in September 2009 when the ECJ ruled in case C-277/08 (Pereda), which was about a Spanish employee who had fallen ill when his scheduled holiday began. The ECJ ruled that Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions which provide that a worker who is on sick leave during a holiday period is not entitled, after his recovery, to take his annual leave at another time.

With the ECJ's ruling, doubt was cast on whether the Danish holiday rules were compatible with EU law. Therefore, a task force was set up by the Danish Ministry of Employment to look into the matter. In October 2010, the task force published its report. However, the social partners could not agree on whether the Danish rules should be amended.

In the view of the Danish Minister for Employment at the time, if a case concerning the Danish rules was referred to the ECJ, the Court would probably conclude that the EC Directive precludes the Danish rules. However, he announced that the Ministry would await the outcome of a case pending before the Danish High Court before any new rules would be introduced.

The case in question concerns a tool maker who took three weeks' holiday in July 2009. Three days into his holiday he was injured and did not return to full health until his holiday was over. When he was given notice of termination shortly after his return, he claimed compensation for the 13 days of holiday he had lost as a result of the injury.

His employer refused the tool maker's claim because his holiday had begun on a day on which he would otherwise have worked, in this case on a Monday, and therefore the sickness commenced after the holiday had begun. Under Danish law, this means that the tool maker bore the risk of sickness. Had the sickness started at the weekend before the holiday began, the responsibility would have been on the employer.

The tool maker, however, argued that the Danish rules should be interpreted in light of the ECJ's ruling in *Pereda*, entitling him to compensation for the holiday he had lost.

In court, the employer argued that current law is still unclear, even with the ECJ's ruling. The employer therefore requested the High Court to ask the ECJ for guidance. The tool maker and his trade union, however, did not believe that a preliminary reference was necessary - in their view, it is clear from the ECJ's ruling in Pereda that Danish employees are entitled to replacement holiday in the event of sickness that occurs during their holiday.

Judgment

The High Court held that the issue of entitlement to replacement holiday has already been settled with sufficient clarity pursuant to the ECJ's ruling of 2009. Accordingly, there was no reason to ask for the ECJ's guidance in the matter.

Commentary

The Danish ruling indicates that the High Court was not in doubt about how to interpret the relevant EU law. However, the High Court ruling concerned only the issue of whether a preliminary reference to the ECJ should be made and therefore the High Court did not apply its interpretation of EU law to the case.

It is not yet known when the High Court will hand down its judgment as to whether the tool maker is entitled to replacement holiday for the 13 days of holiday he lost.

Subject: paid leave

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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