SUMMARY

2010/55: Working time regulations to be interpreted in accordance with Pereda (UK)

<p>An employee whose pre-arranged annual leave coincided with a period of sickness was entitled to carry his leave entitlement over to the following year. The Working Time Regulations 1998 (the "WTR") should be interpreted purposively to achieve this result, so as to give effect to the decision of the ECJ in Pereda v Madrid Movilidad (C-277/08).</p>

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Facts

Mr Shah had booked four weeks' annual leave with his employer, but broke his ankle beforehand and was then off sick until after the holiday period had passed. Whilst off sick, he received sick pay and also paid holiday pay (at a higher rate) for the duration of his pre-booked holiday. On his return, he asked if he could claim back the holiday that he had been unable to take.

However, the holiday year had come to an end before his return to work. Regulation 13(9) of the WTR provides that annual leave under the Regulations "may only be taken in the leave year in respect of which it is due". Relying on this provision, the employer said that Mr Shah

could not carry forward his leave entitlement and so had effectively lost it.

Mr Shah brought Employment Tribunal proceedings relying on recent ECJ case law. In particular, the ECJ had ruled in *Pereda* that a worker who is ill during a period of pre-booked annual leave should, under the EC Working Time Directive (2003/88/EC - the "Directive") be able to reschedule the leave for a later date, even if that meant carrying it forward into a subsequent holiday year.

Employment Tribunal's decision

The Tribunal said it was clear that, in order to comply with the Directive, national law must allow an employee who falls sick during a period of annual leave to take that leave subsequently, either within the same holiday year or the next. The question was therefore whether the Tribunal could construe regulation 13(9) of the WTR in that way. The Tribunal noted that if it did not do so, Mr Shah would be left having to pursue a *Francovitch*-style claim - i.e. a claim against the UK government for its failure properly to implement the Directive. That would not provide an adequate remedy because, although he might receive financial compensation, he would not get back the leave he was seeking.

In interpreting regulation 13(9), the Tribunal looked at the approach of the Employment Appeal Tribunal ("EAT") in *EBR Attridge Law LLP v Coleman (No.2)* [2010] IRLR 10 (see *EELC 2010/9*). In that case, the EAT adopted a purposive construction of the UK's Disability Discrimination Act in line with the EC Equal Treatment Framework Directive by adding new wording. The EAT held that it was permissible to change the meaning of national legislation so long as this was compatible with its "underlying thrust" or "scheme".

The Tribunal in Mr Shah's case similarly concluded that allowing the carry over of annual leave in his circumstances was compatible with the primary and underlying health and safety purpose of the WTR. Accordingly, it added the following wording to the end of regulation 13(9):

"Save where a worker has been prevented by illness from taking a period of holiday leave, and returns from sick leave, covering that period of holiday leave, with insufficient time to take that holiday leave within the relevant leave year; in which case, they must be given the opportunity of taking that holiday leave in the following leave year".

When the WTR were read in this way, Mr Shah was entitled to take the holiday that he had been prevented from taking due to ill-health at some subsequent time in the following leave year. The Tribunal made a declaration to that effect.

It is understood that, on account of cost considerations, the employer will not be appealing this decision to the EAT.

Commentary

It would be wrong to assume that the claimant in this case was merely being greedy, in being paid holiday pay and then wanting to carry over the holiday as well. Mr Shah did in fact accept that, if he succeeded in being able to carry over the holiday, he may be called to account for the overpayment at the holiday rate whilst he was off sick.

This is only a first instance decision and so (unlike the EAT in *Coleman*) will not be binding on Employment Tribunals in future cases. However, in cases where the factual circumstances are very similar to those in *Pereda* (as here), and given the incompatibility of regulation 13(9) of the WTR and the Directive, it seems very likely that this decision will be followed.

Comments from other jurisdictions

Austria (Martin Risak): Under Austrian employment law this problem would not have arisen because the Holidays Act foresees that periods of sickness during an agreed annual leave longer than three calendar days do not count as leave taken. In any case, leave not taken within a year may be carried over into the next year and even further, as the Act provides that leave entitlement is only lost two years after the end of the year in which it accrued.

Germany (Dr. Gerald Peter Müller): This precise situation would not have been brought before a German employment tribunal. Whilst Section 7 paragraph 3 of the German Federal Leave Act rules that an employee's leave must be taken during the calendar year in which it accrued, the Act also provides for the automatic transfer to the following year of any portion of leave that could not be taken owing to pressing business needs or - as is applicable here - for reasons relating to the employee. Such a transfer, however, is of limited effect and expires with effect from 1 April of the year after the one in which the leave accrued.

If the facts had been slightly different, the rules of the German Act would have led to a similar problem: i.e. what would have happened if the employee had been ill until the end of the three-month transfer-period?

This question was answered by the ECJ in its ruling of 20 January 2009 (C-350/06 and C-520/06: *Schultz-Hoff* and *Stringer*): the claim for leave for the last year does not expire but must be granted to the employee after his recovery. The German Federal Employment Tribunal (*Bundesarbeitsgericht*) construes the applicable rules of the German Federal Leave Act accordingly.

While the reasoning of the Employment Tribunal, where the illness is relatively short, correctly emphasises the importance of granting leave in a way which avoids producing

a *Francovitch*-style claim, it is doubtful whether such reasoning would also hold if the illness was for very long - e.g. four years. Under such circumstances, the idea of granting leave in order to provide the employee with the means of getting the rest he needs would be somewhat frustrated. In Germany, the discussion about how such cases should be tackled is ongoing.

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