

SUMMARY

2012/56 Annual leave untaken due to illness carried over automatically (UK)

<p>A worker, who had not taken statutory annual leave because of long- term sickness absence, was entitled to carry the untaken leave forward to the next holiday year without making a prior request to do so. She could therefore claim payment in lieu for any unused statutory holiday on the termination of her employment.</p>

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Facts

Mrs Larner was a part time clerical officer for NHS Leeds, a public healthcare trust. She went on sick leave in January 2009 and was later diagnosed with chronic fatigue syndrome (ME) and depression. On commencing her sick leave, she had no pre-arranged annual leave. The employer's holiday year ran from 1 April to 31 March and Mrs Larner was absent throughout the entire 2009/2010 leave period. Her conditions of employment stated that annual leave would accrue during paid and unpaid sick leave, but a 2006 bulletin issued by NHS Leeds confirmed that annual leave could not be carried into the following year "unless in exceptional circumstances and a written request has been submitted and approved".

Whilst absent during the 2009/10 leave year, Mrs Larner made no request to take paid annual leave or to carry forward her untaken leave into the next year. She did not return to work, and NHS Leeds terminated her employment in April 2010 on grounds of incapability due to her continuing ill health. Following her dismissal, Mrs Larner received payment for the proportion

of her untaken holiday due for the 2010/2011 leave year, but not for that which accrued during 2009/2010. Mrs Larner brought a claim in the Employment Tribunal (ET) for unlawful deduction of wages, seeking payment for her full unused statutory holiday entitlement. She contended that article 7 of the European Working Time Directive (“the Directive”) entitles a worker who is unable to take paid annual leave because of sickness to take that leave at another time, if necessary in a subsequent leave year. This was on the basis, in particular, of the rulings of the European Court of Justice (ECJ) in *Stringer and others v HM Revenue & Customs* [2009] IRLR 214 and *Pereda v Madrid Movilidad SA* [2009] IRLR 959.

The right to paid annual leave is implemented in the UK by the Working Time Regulations 1998 (“the Regulations”), which provide workers with the right to take 5.6 weeks paid holiday in each leave year (i.e 1.6 weeks more than required by the Directive). Mrs Larner claimed payment in lieu of her entire 5.6 weeks’ statutory leave accrued during 2009/2010. Both regulation 15 of the Regulations, and NHS Leeds’ own policy, specify that employees’ must provide advance notice of any request to take annual leave. In addition, under regulation 13 of the Regulations, the four-week minimum entitlement under the Directive must be taken in the leave year to which it relates, or else it is lost, and the additional 1.6 weeks’ leave can only be carried forward into the next leave year by agreement.

NHS Leeds submitted that, as Mrs Larner had made no request to take or carry forward leave, her entitlement to it lapsed at the end of the leave year. Any carry over right under the ECJ’s interpretation of the Directive was not effective in this case as no request to do so had been made.

The Employment Tribunal’s Decision

The ET found in Mrs Larner’s favour, deciding that in light of recent ECJ rulings, workers on sick leave carry over statutory holiday automatically whether a request has been made or not. It was also not necessary for an employee to have taken annual leave but not been paid in respect of it, or to have attempted to take it, in order to be entitled to payment for it on termination of employment.

The Employment Appeal Tribunal’s Decision

Upholding the Employment Tribunal’s decision, the Employment Appeal Tribunal (EAT) held that the result of the ECJ decisions in *Stringer* and *Pereda* was that Mrs Larner was presumed not to have been well enough to exercise her “right to enjoy a period of relaxation and leisure” whilst signed off sick. It followed, as a matter of law, that she did not have the opportunity at any time during 2009/2010 to take her annual leave.

Accordingly, the EAT concluded that Mrs Larner had the right to have her leave entitlement under the Regulations carried over to the following year without having to make a formal request to do so. The right to be paid for that annual leave then crystallised on the termination of her employment.

The Court of Appeal's Decision

NHS Leeds submitted a further appeal to the Court of Appeal, on the ground that Mrs Larner could have taken paid leave during the course of her sickness absence and had clear opportunity to do so. Moreover, she did not comply with the notice requirements imposed by both NHS Leeds and the Regulations and made no request for paid annual leave, which would have been granted had she made it. Finally, the employer said, she could also have made a request that her untaken paid leave be carried forward, but she did not do so

In view of those missed opportunities - and relying in particular on the ECJ's judgment in *Pereda* which referred to an employee's right to carry over leave on their request - NHS Leeds argued that Mrs Larner was not entitled to payment for her 2009/2010 annual leave entitlement. She had lost it by neither using it at the time nor requesting its deferral. It was argued, in the alternative, that if Mrs Larner's leave was automatically carried forward, this applied only to the four weeks' annual leave afforded by the Directive and not to the additional 1.6 weeks under the Regulations.

The Court of Appeal upheld the judgments of the ET and the EAT and in doing so clarified the position as follows:

The right to annual leave under article 7 of the Directive is directly effective against an emanation of the state, such as an NHS trust.

|Under article 7, if a worker is unable or unwilling to take leave owing to sickness, they must be allowed to take it at another time, if necessary in a later leave year.

|It is not required of article 7 that a worker must make a request to take or carry forward annual leave.

|Furthermore, it is possible to interpret the Regulations so as to comply with article 7, by reading in additional words (in italics) into regulation 13: «leave to which a worker is entitled under this regulation may be taken in instalments, but it may only be taken in the leave year in respect of which it is due, save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave.» As a result, public and private sector employers are in the same position and must both allow statutory

leave to be carried over in these circumstances.

Commentary

There have been various conflicting UK decisions on the question of carrying over holiday entitlement for workers on sick leave, largely due to the apparent contradiction between the Regulations' prohibition on carrying leave over and the recent ECJ decisions requiring this to happen in certain circumstances.

In recognition of the problem, the UK Government has been consulting on a proposed amendment to the Regulations to state expressly that, where a worker has been unable to take annual leave due to sickness absence (or falls sick during scheduled annual leave), and it is not possible to reschedule the leave in the current leave year, he or she will be able to carry over the first four weeks of statutory leave into the following leave year. The outcome of the consultation is still awaited.

In the meantime, the Court of Appeal's latest ruling does not resolve all outstanding issues, but it does give a clear answer on whether employers can operate a "use it or lose it" holiday policy in relation to sick workers - the short answer being "no".

Unfortunately, the Court of Appeal did not decide the current position in relation to the additional 1.6 period of leave conferred by the Regulations. It did however refer (apparently with approval) to the recent case of *Neidel v Stadt Frankfurt am Main* [2012] IRLR 607, in which the ECJ decided that national law could prevent carrying over of any period of domestic leave over and above the basic four weeks, even where a worker had been unable to take this extra leave due to sickness. However, as this point had been raised late in the day in *Mrs Larner's* case, the Court declined to make a ruling on it.

Comments from other jurisdictions

Austria (Martin Risak): The Austrian legal situation is somewhat different. Holiday entitlements should be used in the year in which they arise but automatically taken into the next year if unused. In fact, they may be used within the next two years, before they become time barred. An employee therefore has three years to use his or her annual holiday entitlements – in the light of such provisions it is no surprise that disputes such as the one reported on do not occupy the Austrian labour courts.

Subject: Working time

Parties: NHS Leeds – v - Larner

Court: Court of Appeal

Date: 25 July 2012

Case number: [2012] EWCA Civ 1034

Hard copy publication: [2012] IRLR 825

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Creator: Court of Appeal

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