

ARTICLE: Employees can reschedule their holiday if they are off-sick

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A recent case in the European Court of Justice (ECJ) has opened up the possibility that employees who are off-sick during a period which they have booked as annual leave, might be able to reschedule their holiday for a later date. This case is directly effective for UK public sector employers, while the Working Time Regulations 1998 (WTR) would need to be amended before it applied to private sector employers.

Background and *Stringer*

This case follows on from the previous ECJ ruling in the joined cases of *Gerhard Shultz-Hoff v Deutsche Rentenversicherung Bund and Stringer and ors v HMRC* (<http://www.davidsonlargelaw.com/downloads/feb09holiday&sickleave.pdf>) where the ECJ held that annual leave entitlement continues to accrue even while an employee is off-sick. If an employee was unable to exercise his right to take annual leave, he should be allowed to carry it over into another leave year and take it then. This is in direct conflict with the WTR which do not allow leave to be carried over.

The case of *Stringer* came before the House of Lords earlier this year, when the issue of the conflict between the ECJ ruling and the WTR was not addressed due to a concession made by the parties (please see our article at: <http://www.davidsonlargelaw.com/downloads/jul09stringerHol.pdf>) However, the issue appears to have surfaced again with the recent ECJ judgment in the Spanish case of *Pereda v Madrid Movilidad SA*.

Facts

Under Spanish law, periods of annual leave are scheduled by mutual consent between employees and employers. Each employer is required to establish a "leave schedule" for all employees and must make employees aware of their scheduled leave dates not later than two months before the leave is due to start. The employer in this case imposed additional requirements to ensure that not more than 10% of a professional group are on annual leave at any one time. Employees would be notified of leave before the two month deadline under national law, and changes could be made up to 45 days before the leave started, unless a justified need required otherwise.

Mr Pereda worked for Madrid Mailidad SA as a driver who removed illegally parked vehicles from public highways. He had agreed with his employer that he would take a period of leave from 16 July to 14 August 2007. Unfortunately due to an accident at work on 3 July 2007, Mr Pereda ended up being unable to work until 13 August 2007, which corresponded with all but two days of his holiday. On his return, Mr Pereda asked his employer to allocate him a new period running from 15 November to 15 December 2007. This request was rejected without any reasons being given, so Mr Pereda took his case to the Spanish court. The court referred a question to the ECJ as to what should occur when an employee is off-sick during a period of annual leave.

The ECJ ruling

Much as it did in *Stringer*, the ECJ considered the purpose behind and the importance of the European provisions for annual leave as compared to sick leave (which is not regulated by European law). The purpose of paid annual leave is to provide the employee with a period of

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rest, relaxation and leisure; in contrast, sick leave is given to an employee so that they can recover from being ill. The ECJ held that since the reasons behind these two entitlements were different, so it should follow that a worker on sick leave during his planned annual leave has the right on his return to request his annual leave is rescheduled. This should be so, even if the leave falls to be taken in another leave year since the purpose and effect of rest leave is still effective, even if that leave is deferred.

Implications for UK employers

As mentioned above, this ruling will only directly affect the public sector. The WTR still applies to the private sector and does not allow leave to be rolled over into another year.

In practice, many public sector employers (and some private sector employers) already allow employees to reschedule their annual leave should they be off-sick just beforehand. Indeed, in the case of *Pereda*, the employee went off-sick before his period of leave even started. However, this case opens up the possibility of abuse by employees who go away on holiday then return and report that they were ill while they were away (perhaps through flu or food poisoning). They will claim they did not get the full use of their holiday and so wish to reschedule, placing both administrative and financial burdens on their employer.

This ruling raises many uncertainties for employers. Many will have sick pay policies in place, requiring employees to notify the employer in a timely and particular manner of their illness, which the employee may be unable or unwilling to comply with if they are away or abroad. For those employers who only offer Statutory Sick Pay (SSP), an employee who returns from full-paid leave will have been overpaid if they claim they were ill and so only entitled to SSP. If the employee has already been paid for their leave, the employer will face the unpleasant task of having to recover wages. It will take a comprehensive tribunal case or direct guidance from the government, who have so far remained silent, to answer the questions raised by *Pereda*.

If you would like further information on any of the matters above, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.