

Employment law

European Court decisions
on rules for time off
could be a nightmare
when staff are ill

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Sickness sums may leave you needing a holiday

Uncertainty is part of life, and employment law! In 1998 the Working Time Regulations gave a right to four weeks paid annual leave to (almost) every worker. This has recently been extended to 4.8 weeks and will be further extended to 5.2 weeks in April 2009, but the uncertainty to which I refer is not the intricacies of the arithmetical calculations required to work out what annual leave should be given, nor how to calculate leave pay. It is the more fundamental uncertainty of "what is leave?" and "is it annual?"



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In 2002 the courts ruled that a worker off sick could give notice that he wished to take a period of annual leave, and he would then be entitled to holiday pay in respect of it, even though he continued to be sick during this period. To many this seemed absurd and in 2005 the Court of Appeal agreed and held that this was wrong – and all employers breathed a sigh of relief. The court pointed to the objective of the Working Time Directive, in that it is aimed at the health and safety of employees, and "leave" is leave from work.

But that is not the end. The case is on appeal to the House of Lords, which has referred matters to the European Court of Justice (ECJ). As a preliminary to its ruling (which may be expected in a few months), the advocate-general, at the beginning of 2008, gave her opinion on the matter.

She concluded that the right to accrue the minimum annual leave should not depend on the worker being fit and available for work; that after termination of the contract a worker is entitled to a payment to reflect accrued but untaken holiday leave, even where the worker was on sick leave for the full holiday year; but that workers may not take holiday while they are on sick leave.

In another case, she has also concluded that workers must be able to take annual leave on return to work, even if that occurs in the following leave year. There is of course no provision in the UK regulations for carry-over of leave to a new holiday year.

It used to be that the advocate-general's opinion was a reasonable indication of the likely outcome before the ECJ, but in recent years this has not always been the case. Given this, employers and workers remain uncertain as to what to expect in the way of holidays when a worker is off sick, and what is to happen when the worker returns to work or leave.

After that the reader may feel a holiday is needed!

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