

Just what should our sickness policies say?

2009 was the year in which European case law shook up our approach to sickness and holidays in the UK.

First there was the ruling of the European Court of Justice (ECJ) in the *Stringer v HMRC* case. It held that workers accrue annual leave whilst sick and should be paid at their normal rate for it, apparently finding that if they don't use their holiday leave it should be carried forward into the next leave year. That carry-over is expressly prohibited by our Working Time Regulations. To get around that that prohibition the safest course is to designate part of the sick leave as holiday (and pay it as holiday) before the holiday year expires.

Then there was the *Pereda* decision relating to a situation where a worker has scheduled annual leave but falls sick. The ruling of the ECJ was that worker can request to take the holiday at another time. The employer can insist that the holiday be taken at a time that suits them so long as it doesn't seek to take away the right of the employee to take that holiday. Where the rules on carry-over would mean the employee lost out because time to reschedule the leave ran out, the ECJ decision requires the employer to relax those rules and allow carry-over (a bit like you are required to do these days with maternity leave).

It is worth noting that if you work in the private sector that the *Pereda* decision is not directly enforceable in the UK yet. At some point a UK decision will follow the European one but until then some employers are taking the view they won't amend their policies until forced to. Others are making the changes now, following the public sector where the decision can be enforced, knowing that it is only a matter of time until they must change their rules on carry-over, building into their policies the requirement for a doctor's certificate as proof of absence.

It is also worth being aware that it is not clear whether the *Pereda* decision applies to 4 weeks holiday (covered by the EC Directive) or the 5.6 weeks holiday covered by our Working Time Regulations. I won't bore you with the technical legal arguments but you could, for now, decide to limit any change in your policy to 20 days per year only, with an excess not taken because of ill-health absence being lost.

Is it too much to hope that we will get greater certainty in this area during 2010?

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