

# DBULLETIN

## Annual leave and sickness absence The saga continues

The issue of the inter-relationship between holiday and sickness absence has been back before the courts again.

In 2009, the European Court of Justice (ECJ) and the House of Lords (now the Supreme Court) got involved in the issue of the relationship between holiday and sickness. At that time, the ECJ ruled that annual leave continued to accrue during sickness absence and that member states had to decide whether annual leave could be taken during sickness absence. The House of Lords then considered this within the framework of the UK's Working Time Regulations (WTR). They ruled that because the WTR did not permit annual leave to be carried over to the next holiday year, workers must be able to use their annual leave during their sickness absence.

The issue that employers were left to grapple with was whether workers who were absent on grounds of sickness actually had to submit a request to use their annual leave. Workers not on sick leave have to make a request and, subject to applicable policies, any leave not taken in a leave year would then be lost at the start of the next year: in effect a "use it, or lose it" approach. However, could the same be applied to sick workers?

Certainly some employers have been operating this "use it or lose it" practice and there has been some case-law support for it. Of course, most workers were not aware that they could request to use their annual leave whilst off sick and would not therefore have done so. However if they did request it, they would be entitled to the benefit of full pay for those days even if they had otherwise exhausted sick pay.

The EAT has now held that the "use it or lose it"

principle does not apply. An employee who is sick is presumed not to be well enough to take holiday and therefore accrued annual leave is not lost when the new leave year starts. One consequence of this is that an employee could be absent for a full year and not use any annual leave during that time. This means if they did return to work then they would be entitled to take 2 years worth of holiday in 1 year. Where an employer is trying to integrate someone back into the workplace after a long absence, this could be counterproductive.

The underlying rationale for the decision is also difficult. The right to annual leave has its roots in health and safety; it is supposed to enable workers to recuperate from the effort and stresses of that year. Whilst not to belittle the impact of a health condition that incapacitates a worker for over 12 months, it is a different kind of stress to that of being at work. This point has now received some recognition at EU level where an opinion has been given that allowing annual leave to be carried over indefinitely does not support what the law is trying to achieve. The ECJ is being invited to find that an expiry date on accrued annual leave of 18 months after the end of the year in which the leave is accrued is lawful.

In light of where the case law now stands, employers might think about giving notice to workers to take their holiday during sickness absence so that it is used up in the year to which it relates. The Government is already consulting

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on putting the right to carry over holiday (being the four week period derived from EU law), that cannot be used due to sickness absence, into the WTR. Whether an employer can require that annual leave be used during sick leave has not yet been tested under the WTR but would be unlawful under EU case law and given the direction of travel on this issue, UK case law could well follow suit. Such a policy may also only serve to extend the period for which sick pay is payable (if still payable) and lead to claims for disability discrimination and/or constructive unfair dismissal.

Devonshires is running a seminar on 13 September 2011 'Absence Management: How to deal with the sick or absent employee' which will include discussion on this issue. Contact the Business Development Department for more information on [seminars@devonshires.co.uk](mailto:seminars@devonshires.co.uk).

If you require further advice on this, please contact Amanda Harvey or Nicola Philp or your usual contact in our employment team.



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