

SICKNESS AND HOLIDAYS

The European Court of Justice (ECJ) has recently ruled that workers who go on sick leave during a period that has been booked as annual leave for the purposes of the Working Time Directive should be allowed to reschedule their holidays. This is the case even if it means allowing the worker to carry leave forward into a subsequent holiday year.

According to the ruling, where a worker 'does not wish to take annual leave during a period of sick leave, annual leave must be granted to him or her for a different period'.

The ruling gives workers on sick leave a choice: they can take annual leave if they wish, but if they would prefer not to do so they can insist on postponing their scheduled annual leave and taking it at a later date, possibly even in a subsequent leave year if it is not possible to take leave before the current year ends.

Carrying forward leave

EU law states workers should be allowed to carry forward leave in some cases, but it is not yet clear that Working Time Regulations (WTR) requires, or even allows, this. The WTR clearly state that leave cannot be carried over from one year to the next (subject to a limited exemption covering the additional 1.6 weeks' leave introduced over recent years). So as the law currently stands, private sector employers may still be able to argue against leave being carried forward. There is, however, a risk of tribunals 'reinterpreting' the WTR to give effect to European law, despite their clear wording and employers that don't allow leave to be carried forward risk a tribunal finding that they have breached the WTR.

Rescheduling holidays

The ECJ ruling suggests that workers who fall ill during a period designated as annual leave may be able to insist on having their leave reclassified as sick leave and their annual leave 'reinstated' so it can be taken at a later date.

In the case before the ECJ, the claimant went on sick leave shortly before his annual leave was due to start. In those circumstances, the ECJ said, a worker should be allowed to reschedule leave if he or she wants to do so.

What if a worker falls ill after their annual leave has started? There seems to be no reason in principle for treating this situation any differently. But the question then is what evidence of illness must the worker produce in order to have their leave reclassified as sick leave? If the worker can produce medical evidence that they would have been unfit for work then that should suffice. But if the worker does not have that evidence, maybe because the illness lasts only a few days, or occurs when the worker is holidaying away from home, will employers be expected to take the worker at their word? Until the European or UK courts say otherwise, our view is that employers are entitled to require workers to produce convincing evidence of their illness and that it would have rendered them unfit for work before allowing workers to 'reallocate' holidays.

For further information please contact either Elaine Smith on 01903 706966 or Charlotte Hammond 01903 706981

Disclaimer

This information is for guidance purposes only and should not be regarded as a substitute for taking legal advice.

