

Employers Ask....

Holiday pay issues have featured high on the agenda for the last few months. Can a worker, who is off sick, ask to take annual leave during his period of sickness absence?

Yes. The European Court of Justice in the case of *Stringer and others v HM Revenue and Customs* (2009) IRLR 214 held that workers who are off on long-term sickness absence can take their annual leave and be paid for it whilst off sick. This has the effect that workers can receive up to 5.6 weeks paid annual leave whilst off sick. 5.6 weeks, which usually equates to 28 days' leave, is the statutory minimum holiday entitlement under the Working Time Regulations. This recently increased to 5.6 weeks from 1 April 2009.

What happens if a worker has some annual leave booked and then becomes ill? Can the worker ask the employer to allocate the annual leave for a different time, when the worker has recovered?

Until recently, some employers offered this option, usually at their discretion in cases of genuine absence. However, a recent Spanish case, again from the European Court of Justice, called *Pereda v Madrid Movilidad SA* (Case C-277/08) has caused employers in the United Kingdom to re-think their strategy. *Pereda*, a Spanish worker, had an accident at work a couple of weeks before his booked annual leave. He asked his employer if he could have the leave later on in the year, but the employer refused. A reference was then made to the European Court of Justice to consider whether this was contrary to the Working Time Directive. The court held that every worker is entitled to annual leave under the Working Time Directive. The principle is to uphold a period of actual rest. A worker who is on sick leave during a period of scheduled annual leave has the right to request and take the annual leave at another time when he has recovered.

As a result of this case, employers have had to consider how best to manage such requests. It may be that the way forward is only to agree to the re-allocation of annual leave if the worker is genuinely off sick, can produce medical evidence as proof and the annual leave would fall below the statutory minimum holiday entitlement, if he could not take it at another time.

Swine flu has also been in employers' minds. An employee has reported for work but says during the course of the day that she thinks she is developing swine flu. If we send her home, is she then on sick pay?

As with any employee who feels unwell at work, it is best to deal with the matter sensitively, discuss the situation with the employee and suggest to her that she should make the decision to go home and take sickness absence. On this basis, depending on the terms of the employee's contract, she will be entitled to Statutory Sick Pay or to the employer's contractual sick pay.

As a general principle, if an employee reports for work and is insistent that they are fit to perform their contractual duties, but the employer takes a different view and sends the employee home, without the employee's agreement, there is an argument that the employee could be entitled to full pay. At common law, if an employer decides not to provide the employee with work, there can be entitlement to full pay.

We have an employee who has been off sick with swine flu. He is receiving Statutory Sick Pay at the rate of £79.15 per week. He says that he is now fit to return to work. We think that he might be coming back to work too early for financial reasons. We are

also worried that he might still be contagious and so we want him to stay at home a while longer. How do we handle this situation?

You could ask the employee to provide a note from his GP to say that he is fit to return to work. Depending on the employee's role, you could also consider whether the employee could work at home for a short period of time, or in a private office at work. Although it is right to consider reducing the spread of swine flu to other employees, you have to balance this against the fact that if the employee can prove that he is fit to work (for example, by a doctor's note) and you do not provide him with work, he could be entitled to full pay.

This situation was considered by the Employment Appeal Tribunal (EAT) in the case of *Beveridge v KLM* (2000) IRLR765. Mrs Beveridge had been on long-term sickness absence, but had reported for work and provided a note from her doctor to say that she was fit to return. The employer, an airline, wanted their own doctor to examine her to see if she was fit to carry out her cabin crew duties, but there was a six week delay before the examination. The EAT found that she was entitled to be paid for that period, as she had reported fit for work but work was not provided by the employer.

Is it true there is a self-certification period of 14 days for employees with swine flu?

No. In spite of some newspaper reports, the seven calendar days of sickness absence which can be certified by the employee (so that a doctor's sick note is not required) has not been extended to fourteen days for cases of swine flu, although this may be considered as part of the Government's contingency plans if it is needed in the future.

We have seen an increase in recent years in the number of people choosing to undergo cosmetic surgery. How should an employer handle the sick pay and leave in these situations?

Statutory Sick Pay is based on a day of incapacity for work when the employee is 'incapable by reason of some specific disease or bodily or mental disablement of doing work' (from section 151(4), Social Security Contributions and Benefits Act 1992). The issue is whether the employee is capable or not of doing work and it is irrelevant whether or not the employee chose to undergo surgery or what the reasons were. The same principle applies where an employee is undergoing IVF treatment, which is another question often raised by employers. In either case, a doctor's sick note would be provided for sickness absence in the usual way.

Our most common maternity query relates to maternity leave and pension entitlement. What does an employee on maternity leave receive in terms of contributions towards pension entitlement?

Employer's pension contributions should continue during any period of paid maternity leave when the employee is in receipt of Statutory Maternity Pay (SMP), contractual maternity pay or both. The employer's contributions are calculated as if the employee were receiving normal remuneration. Any employee contribution is based on what she actually receives during the maternity leave period (that is to say, SMP, contractual maternity pay or both).

Work boots and staff uniforms keep getting lost! Can an employer ask a worker for a bond or deposit at the outset of the employment to prevent these items from disappearing?

Work boots are considered to be personal protective equipment under Health and Safety legislation and a uniform could be too, if it is an overall or a protective apron, for example. A

bond cannot be retained at the outset of the employment for this type of equipment, as this is contrary to The Personal Protective Equipment at Work Regulations 1992. It is not unlawful, however, to deduct the replacement cost if the employer has the contractual right to do so.

And finally – the serious issue of imprisonment! We have just heard that one of our employees is in prison. What should we do?

The answer depends on the length of the prison sentence and the reason for it. If the employee has been remanded in custody and he could be released after a successful bail application, the alleged offence was not connected with work and the employee has over a year's service, you may have to wait to see if he is given bail and can come back to work.

If the employee has been sentenced to a short term in prison after being found guilty of an offence, which is not connected in any way with work, and he has more than a year's service, you will have to consider whether you can keep his job open for him, bearing in mind that he may have time off for good behaviour. In both of these situations the reason for considering keeping the job open is to avoid the risk of an unfair dismissal claim.

On the other hand, if the offence or alleged offence was connected with work, it could be appropriate to dismiss for gross misconduct. If the offence was unconnected to work, but the sentence was quite long, for example two years or more, the dismissal may be fair, because an employer may not reasonably be expected to keep an employee's job open for that length of time.