

Sick Workers in UK Not Required to Make Leave Request to Enjoy Accrued Annual Leave Benefits

The Supreme Court recently held in *NHS Leeds v Larner* that the statutory right to 28 days annual leave or, if the leave cannot be taken before termination of employment, the right to a payment in lieu of untaken leave, is not conditional upon a sick worker having made a leave request to the employer in the relevant leave year.

This is an important decision because it clarifies two challenges which employers have faced as a result of domestic case law and which have been the subject of considerable debate: (i) whether a worker who is sick during a period of booked annual leave is automatically entitled to take the leave at another time; and (ii) whether a worker who is on long-term sick leave for the whole of a leave year is entitled to carry forward leave (or to a payment in lieu of leave accrued in preceding years on termination of employment) if no request for leave has been made. In both cases the answer is **yes**.

The Facts

Mrs Larner was absent from work for the whole of the 2009–2010 holiday year. The NHS terminated her employment on 8 April 2010 on capability grounds. She did not request annual leave during 2009/2010 and she did not ask to carry forward her annual leave to the following holiday year which started on 1 April 2010.

Following the termination of her employment, Mrs Larner claimed that she was entitled to a payment in lieu of untaken leave for the 2009–2010 holiday year. The NHS defended her claim on the basis that she had not requested the leave before the end of the 2009–2010 leave year.

The Supreme Court upheld Mrs Larner's claim and decided that having been unable to take her leave during the preceding leave year, she had been entitled to a payment in lieu of that leave on the termination of her employment in April 2010. As a state employer, the NHS was bound directly

by the European Working Time Directive and by recent decisions of the European Court of Justice, neither of which required a worker to submit a leave request in order to carry over leave which they could not take because they were sick.

The Supreme Court also went on to extend the application of its judgment to private employers in the UK. It did so by finding that the Working Time Regulations 1998 could also be read in line with the Working Time Directive so that where a worker is unable to take leave due to sickness, the entitlement to the lost leave is automatically carried over to the following leave year without the need for a request to be made.

Implications

Employers can now be in no doubt that where a worker is unable to take pre-booked leave due to sickness, the leave may be taken at a later date when the worker has recovered without a specific request being made. Similarly, workers who are off sick for the entirety of a leave year will be entitled to take the lost leave in the following year without submitting a request.

The effect of this decision is likely to be most significant for employers who have workers absent on long-term sick leave on their books. On termination of employment, those workers may be entitled to a significant payment in lieu of untaken leave accrued in preceding years where sickness has prevented the leave being taken, even where the worker has long since ceased to enjoy sick pay or other benefits.

This update was authored by Charles Wynn-Evans (+44 20 7184 7545; charles.wynn-evans@dechert.com) and Georgina Rowley (+44 20 7184 7800; georgina.rowley@dechert.com).

Practice group contacts

For more information, please contact the attorney listed, or any Dechert attorney with whom you regularly work. Visit us at www.dechert.com/employment.

Charles Wynn-Evans

London
+44 20 7184 7545
charles.wynn-evans@dechert.com

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