

NHS on the wrong side of sick pay ruling

The recent Employment Appeal Tribunal (EAT) decision in *NHS Leeds v Larner*^[1] provides useful clarification of the right for employees to receive payment in lieu of their accrued but untaken holiday leave following a period of extended sick leave which culminates in a dismissal.

The facts in this case are relatively straightforward. Mrs Larner commenced working for NHS Leeds in April 2000. On 5 January 2009 Mrs Larner commenced a period of sick leave which culminated in her dismissal by NHS Leeds on 6 April 2010. Mrs Larner was dismissed on the grounds of her incapacity.

The substantive issue before the EAT concerned the NHS Leeds' decision not to pay Mrs Larner in respect of the annual leave that she had accrued in the most recent pay year (which ran between 1 April 2009 and 31 March 2010). NHS Leeds' argued by reference to Regulation 15(1) of the Working Time Regulations 1998 that Mrs Larner was not entitled to receive any payment in respect of her accrued but untaken holiday entitlement because she had not given NHS Leeds any notice of her intention to take annual leave. However, Mrs Larner (relying on the earlier authorities of *Stringer*^[2] and *Pereda*^[3]) argued that her incapacity gave rise to a presumption that she had not been well enough to exercise her right to take annual leave and that consequently her entitlement to annual leave had automatically rolled over into the next pay year under Regulation 13.

In a concise judgment the EAT confirmed that Mrs Larner's analysis of the relevant case law was to be preferred. This meant that Mrs Larner's inability to take annual leave had caused her statutory leave entitlement to automatically roll over into the next pay year without any requirement for Mrs Larner to formally request that it should do so.

The automatic roll over of Mrs Larner's annual leave entitlement from one pay year to the next, meant that NHS Leeds' decision to terminate Mrs Larner's employment created an obligation for it to pay Mrs Larner in lieu of her accrued but untaken annual leave entitlement for the 2009-2010 pay year.

Interestingly, in this case, the EAT went on to stress (obiter) that the position would likely be different in the case of a fit employee who had failed to request all or part of his/her annual leave entitlement (especially if the contract of employment (as many do) contained an express prohibition on the right to carry annual leave over).

[1] *NHS Leeds -v- Larner* [2011] UKEAT 0088_11_2907

[2] *Stringer v HMRC* [2009] IRLR 214

[3] *Pereda v Madrid Movilidad SA* [2009] IRLR 959

About the author

Nathan Combes is an Associate Employment Lawyer with the Legal 500 rated Employment Team at Lee & Priestley LLP in Leeds.

Contact the author

Email: Nathan.Combes@leepriestley.com

Twitter: @yorkshirelawyer

Web: www.leepriestley.com

Blog: <http://faccendaschicken.wordpress.com/>

Disclaimer

The information and commentary set out above does not, and is not intended to, amount to legal advice to any person or organisation on a specific case or matter. The reader is strongly advised to obtain specific, personal advice from a suitably qualified lawyer about any particular case or matter and not to rely on any of the information, analysis, comments, views or opinions expressed above (the same having been provided free or charge and for general information purposes only).