

The WRC issues first decision relating to Ireland's Sick Leave Act 2022

Insights - 13/12/2023

The Irish Workplace Relations Commission (the "**WRC**") has published its first decision under the recently enacted Sick Leave Act 2022 (the "**Act**"), in the case of Karolina Leszczynska and Musgrave Operating Partners Ireland, ADJ-000044889. The case has provided clarification for employers on their obligations surrounding statutory sick pay ("**SSP**") as provided for under the Act in instances where it already operates a company sick pay policy.

| Background

Ms Leszczynska (the "**Claimant**") had been employed by Musgraves Operating Partners Ireland (the "**Respondent**") as a shop assistant since 2007. The terms and conditions of her employment were negotiated collectively by SIPTU and the trade unions Mandate. The Respondent operates a sick pay policy as per the below:

- An employee must have six months service in order to qualify for sick pay under this policy.
- The first three days of absence are unpaid "waiting days" and paid sick leave commences on the fourth day of absence.
- Employees are entitled to eight weeks' full pay in a rolling 12-month period (less any social welfare benefit).
- The daily rate of pay is based on the average of the employee's weekly hours in the 13 weeks preceding the fourth day of absence, divided by five.
- Employees are also required to submit medical certificates on a weekly basis in order to avail of company sick pay.

In January 2023, the Claimant was absent from work due to illness for four days. Due to the "waiting days" set out in the company's sick pay policy, the Claimant was only paid for the

fourth day of her absence. The Claimant argued that under the Act, employees with at least 13 weeks' service and who provide a medical certificate from day 1 of their absence are entitled to be paid for three days of sick leave in 2023.

The Claimant's manager informed her that under the Respondent's sick pay policy, she was entitled to 40 days (8 weeks) of paid sick leave per year, but that the first 3 days of sick leave were unpaid. The Claimant then lodged a claim to the WRC submitting that she was a hardworking employee who was seldom absent from work, and that the Respondent's sick pay scheme was less favourable than the benefits provided for under the Act.

What does the Act provide?

During 2023, an employee will be entitled to three paid days while absent due to illness, which will increase incrementally over the coming years. SSP is currently to be paid at a rate of 70% of an employee's normal weekly pay, up to a maximum of €110 per day. To qualify for SSP, employees must have at least 13 continuous weeks service with their employer and provide a medical certificate to cover the period of absence during which SSP is being claimed for.

Legal representation for the Respondent, Mr Des Ryan BL, placed a significant focus on sections 8 and 9 of the Act. Section 8 of the Act states that an employer is permitted to include a provision in an employment contract that is "*as favourable*" or "*more favourable*" to the benefits provided for under the Act and crucially, that any such provision "*shall be in substitution for, and not in addition to, that entitlement.*" Mr Ryan BL submitted that the word "*substitution*" should be given its plain meaning i.e. an alternative or replacement sick pay scheme would satisfy an employer's obligations under the Act.

Further, Mr Ryan BL also examined section 9 of the Act which states that the obligations contained within the Act shall not apply to an employer who provides its employees with a sick leave scheme under which the benefits are more favourable than the Act when taken "*as a whole*". It was his argument that when determining what is considered to be "*more favourable as a whole*" the following factors must be considered:

The period of service of an employee that is required before sick leave is payable.

- The Respondent's Policy: 6 months
- The Act: 13 weeks

The number of days that an employee is absent before sick leave is payable.

- The Respondent's policy: Payable after 3 days of absence.
- The Act: Payable from day 1 of absence.

- **The period for which sick leave is payable.**
- The Respondent's policy: Payable for 8 weeks.
- The Act: Payable for 3 days in 2023.

The amount of sick leave that is payable.

- The Respondent's policy: Full rate of an employee's pay less any Illness Benefit that may be payable.
- The Act: Payable at a rate of 70% of an employee's wages, capped at a daily maximum of €110 per day.

The reference period of the sick leave scheme.

- The Respondent's policy: Any rolling 12-month period.
- The Act: The Act is silent whether the reference period mentioned therein is a 12-month rolling period, or if it is intended to refer to a calendar year.

The outcome of the case

The Adjudication Officer (the "AO") found that the purpose of the legislation was to confer a benefit on employees with no contractual entitlements to be paid whilst absent due to illness. He found that the 8 weeks' pay offered by the employer was more favourable than what was offered under Act. The AO acknowledged that the three-day waiting period under the Respondent's policy was unpaid, but stated that it mirrors the conditions required to receive Illness Benefit from the Department of Social Protection, which is used to discourage short term absences from work. The AO also considered the fact that the Complainant has been an employee of the Respondent since 2007 and therefore the issue of service did not carry as much weight in this particular instance.

Lastly, the AO also acknowledged the fact that the terms and conditions that applied to the Respondents' employees emerged from collective bargaining with the employees' unions. Mr Ryan BL urged the WRC to give this fact due consideration as it must be a policy objective of the statutory body to facilitate and respect collective bargaining agreements. Failure to do so would likely destabilise industrial relations with the Respondent and potentially result in the renegotiation of a new company sick pay scheme.

In light of the above, the AO found that the Respondent's sick leave policy was more favourable than the benefits conferred under the Act and therefore the Complainant's complaint was not well founded.

What does this mean for employers?

Up until now, the law was unclear and uncontested as to whether employers would be required to amend their sick pay policies to provide for the incremental payments as required under the Act. Accordingly, this is a welcomed decision from the WRC as it provides clear guidance for employers when assessing employee absences due to illness and whether their own existing sick pay policy needs to be amended.

Employers who already operate sick pay policies or are considering implementing sick pay policies should familiarise themselves with this decision and, sections 8 and 9 of the Act as well. The factors listed at (i) – (iv) above should also be considered when reviewing/implementing sick leave policies. In doing so, employers will be better placed to assess whether employees will be entitled to any additional payments outside of the existing minimum conditions provided for under the Act.

For further information on the Sick Leave Act 2022 or for assistance in preparing/updating company policies, please contact our team via their contact details below.

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