

WRC issues first decision under the Sick Leave Act 2022

The Workplace Relations Commission (“WRC”) has published the first decision under the Sick Leave Act 2022 (the “Act”) in the case of [Karolina Leszczynska and Musgrave Operating Partners Ireland, ADJ-00044889](#). Helpfully for employers, the decision states that the intention of the legislation is to confer a benefit on employees with no contractual entitlement to paid sick leave and confirms a number of key points:

1. The Act in its entirety does not apply to employers who operate a sick leave scheme that confers benefits which are, as a whole, more favourable to the employee than statutory sick leave;
2. Contractual sick leave benefits which are either as favourable or more favourable than statutory sick leave will operate as a substitution for statutory sick leave;
3. In determining whether a company sick leave scheme is “as a whole” more favourable than statutory sick leave, regard must be given to all of the criteria set out at section 9. Where certain elements of the company scheme are less favourable than statutory sick leave, this will not disentitle an employer to rely on section 9 where the overall benefit granted by the employer’s scheme is more favourable.

Background

Ms Karolina Leszczynska (the “Claimant”) had been employed by Musgrave Operating Partners Ireland (the “Respondent”) in its Tyrellstown Supervalu store (formerly Superquinn) since 2007. Around 2000 people are employed by the Respondent and the terms and conditions of its employees are negotiated collectively with the trade unions Mandate and SIPTU. The Respondent operates a sick leave scheme which provides the following benefits:

- An employee with six months’ service is entitled to paid sick leave.
- 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.
- To be entitled to sick pay, employees must submit medical certificates on a weekly basis.

This claim centred on the Claimant’s absence from work for a period of four days in January 2023. In accordance with the terms of the Respondent’s sick leave scheme, the Claimant was paid for one day in respect of the fourth day of absence. The Claimant had learned of the Act from a friend and questioned her store manager as to why she was not entitled to statutory sick leave for the first three days of absence. The store manager advised that the Claimant was entitled to 40 days of sick leave under the Respondent’s sick leave scheme but that it did not apply for the first three days. The Claimant questioned this with HR, Citizens Information and the WRC and ultimately submitted a claim for adjudication under the Act to the WRC. Although she is a member of Mandate, the Claimant confirmed she did not seek advice from her trade union. The Claimant’s position was that as a hard-working employee who was seldom absent from work, the terms of the Respondent’s scheme were less favourable to her than the provisions of the Act.

Respondent’s submission

Mr Des Ryan, BL, instructed by Ibec, on behalf of the Respondent, stated that it was the Respondent’s case that the obligations under the Act do not apply because its employees have access to a sick pay scheme which, on the whole, is more favourable than statutory sick leave.

The legal position

In setting out the legal position, Mr Ryan submitted that section 5 of the Act provides that employees are entitled to three days of statutory sick leave in a year and the first day of absence due to illness or injury is the first statutory sick leave day. However, section 5 must be read in conjunction with two further sections, namely section 8 and section 9.

Section 8 provides, at subsection (1) that:

*(1) Nothing in this Act shall prevent the inclusion in a contract of employment of a provision that is -
(a) as favourable to an employee as, or
(b) more favourable to an employee than,
an entitlement to statutory sick leave in accordance with this Act, and any such provision shall be in substitution for, and not in addition to, that entitlement.*

Mr Ryan submitted that the word “substitution” must be given its plain meaning, signifying an alternative or replacement sick pay scheme. He further argued that the significance of this point is seen when analysing the non-application provision at section 9 of the Act:

(1) The obligations under this Act shall not apply to an employer who provides his or her employees a sick leave scheme where the terms of the scheme confer, over the course of a reference period set out in the scheme, benefits that are, as a whole, more favourable to the employee than statutory sick leave.

(2) In determining, for the purposes of subsection (1), whether a sick leave scheme confers benefits that are, as a whole, more favourable than statutory sick leave, the following matters shall be taken into consideration:

- (a) the period of service of an employee that is required before sick leave is payable;*
- (b) the number of days that an employee is absent before sick leave is payable;*
- (c) the period for which sick leave is payable;*
- (d) the amount of sick leave that is payable;*
- (e) the reference period of the sick leave scheme.*

Application of the Act

Mr Ryan submitted that the Respondent’s scheme conferred benefits which were, as a whole, more favourable than statutory sick leave and argued that in making her assessment, the adjudicator was required to consider each of the matters at (a) to (e) above, which were addressed in turn in the Respondent’s submission:

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

The Respondent’s scheme has a 26-week service requirement before sick leave is payable as compared to the 13-week service requirement before an employee will be entitled to statutory sick leave under the Act. However, as 89% of the Respondent’s employees have greater than 6 months service and the Claimant had 17 years service, it was argued that this point was not applicable to the Claimant and the Respondent’s scheme was more favourable to her.

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

Statutory sick leave is payable from the first day of absence. The respondent’s scheme provides for three “waiting days”, with payment commencing from the fourth day. Mr Ryan acknowledged that the provisions in the Act are more advantageous than the provisions of the Respondent’s sick pay scheme but submitted that the difference is minor and is outweighed having regard to the benefits in the scheme “as a whole,” in accordance with section 9 of the Act.

3. The period for which sick leave is payable

The Respondent's scheme provides for up to eight weeks' paid sick leave, compared to the provision in the Act for three days' paid leave. Mr Ryan argued that the respondent's scheme was vastly more advantageous than statutory sick leave and this difference should be a significant consideration in the adjudicator's assessment of whether the respondent's scheme was "as a whole" more favourable than statutory sick leave.

4. The amount of sick leave that is payable

The rate of statutory sick leave payable is calculated in accordance with the *Sick Leave Act 2022 (Prescribed Daily Rate of Payment) Regulations, S.I. 607 of 2022*, which in the Claimant's case would be 70% of her average daily wages in the 13 weeks prior to her absence due to illness. In paying 100% of wages (less social welfare) for 8 weeks, the Respondent's scheme is well in excess of the statutory scheme and confers the benefit for far longer.

5. The reference period of the sick leave scheme

The reference period of 12 months in the Act and the Respondent's scheme are equally favourable, albeit that the Respondent's scheme refers to a "rolling" 12-month period and the Act is silent as to whether the reference to 12 months is in a "rolling" year or a calendar year.

Industrial relations considerations

Mr Ryan further asked the adjudicator to note that the Respondent's scheme was collectively bargained with its recognised trade unions and that it must be a policy objective of the WRC to both facilitate and respect collective bargaining agreements. Failure to do so would likely destabilise industrial relations in the company and result in the re-negotiation of a new scheme which mirrors the Act.

In summary, Mr Ryan argued as that the company's sick leave scheme is more favourable than the Act, the Act could have no application to the Respondent.

HR manager's evidence

The Respondent's HR Manager, Ms Siobhan Power, also gave evidence that prior to its enactment, there had been a meeting of the HR managers to consider the provisions of the Act and whether the Respondent's scheme was more favourable. They concluded that it was and that the Act therefore did not apply. Ms Power acknowledged that in this instance the Claimant was worse off under the Respondent's scheme but stated that the Respondent's scheme is more favourable on the whole and is more beneficial to employees when they are absent for longer. Ms Power noted that 89% of the Respondent's employees have greater than 6 months' service and there would be consequences for employees and the collectively bargained scheme if statutory sick leave had to be applied.

Adjudicator's findings

The adjudicator acknowledged that the purpose of the legislation is to confer a benefit on employees with no contractual entitlement to paid sick leave. The adjudicator found that the duration of paid sick leave in the Respondent's scheme, the amount of sick pay, the 26-week service requirement and the three-day waiting period combine to provide benefits that are, on the whole, more favourable than statutory sick leave. Accordingly, the Claimant's complaint was not well founded.

The adjudicator noted that the three-day waiting period mirrors the condition attached to the payment of Illness Benefit by the Department of Social Protection and that its logical purpose seems to be to discourage short term absence. The adjudicator commented that "where an employee is paid while they are out sick for a reasonable length of time, it is my view that it is not unreasonable for an

employer to adopt this approach.” As this is a common component of company sick leave schemes, this will undoubtedly be welcomed by many employers. Further, the six-month service requirement, when considered in conjunction with the other benefits conferred by the scheme as a whole, was not deemed to render the company’s scheme less favourable than statutory sick leave.

Significance for employers

Since the proposed introduction of statutory sick leave, Ibec has strongly expressed its view that employers should not be obliged to pay statutory sick leave where their employees are already in receipt of contractual sick leave entitlements. Throughout the legislative process, Ibec consistently communicated our concerns regarding the imprecise nature of the wording contained in the Act and called for more clarity for employers as to their obligations where they have a company sick pay scheme already in place.

This is therefore a welcome decision as it confirms that the WRC is required to consider all of the matters set out in section 9 in determining whether an employer operates a company sick leave scheme which is, on the whole, more favourable than the statutory provisions. Where the employer’s scheme is, on the whole, deemed to be more favourable than the statutory entitlement, the employer will not be obliged to pay statutory sick leave.

For further information, please contact Ibec’s employment law services team or your designated Ibec advisor.