

THE BASIC RULES REGARDING LEAVE FOR EMPLOYEES

The BCEA regulates different types of leave, i.e. sick leave; annual leave; family responsibility leave and annual leave. Partly because of gaps in the Act itself and partly because the Act's provisions are sometimes difficult to interpret, there is quite a lot of confusion about the exact extent of employees' rights to the different types of leave. For example, when is leave paid and when not? Is pay for sick leave calculated differently from annual leave? May periods of sick leave, for example, overlap with annual leave? May employees receive notice of termination during periods of leave? And must employers extend annual leave if employees fall ill during their vacation?

Some of the answers to these questions lie in the wording of the Act, while others must be found in terms of general legal principles, particularly common law principles applicable to the contract of employment (which are often ignored by employers and employees when they read the Act).

The purpose of this note is to try and clear up some of the confusion around annual and sick leave in particular. Nevertheless, employers are advised to obtain detailed advice for their peculiar problems. Generally, it is also always good policy not to assume that one knows the provisions of the BCEA (or any other legislation, for that matter) but to read and re-read the relevant provisions each time questions of interpretation arise.

Some general remarks

The BCEA provisions regarding leave do not only apply to leave granted by an employer that is in excess of the minimum requirements of the Act. In other words, if the employer gives more than the Act requires, it may regulate the excess portion as it deems fit. For instance, the Act provides for a minimum of 15 calendar day's annual leave per year. The 15 days must be paid on the basis of the employee's whole remuneration package. If, say, the employer grants an additional 5 days, it may determine that for the additional days the employee will only receive her cash wage, excluding benefits. It may also allow for those days to be forfeited in certain situations, e.g. as a sanction for poor performance or absenteeism.

It is also worth noting that the employee's pay during periods of annual leave may be structured differently from periods of sick leave. This is dealt with below.

Annual leave

Annual leave must be taken as agreed or determined by the employer. If there is an agreement about this, e.g. that leave must coincide with a period of shutdown or the Christmas school holidays, then both parties must adhere to it. So too if the agreement says that all annual leave must be taken at once and not piecemeal.

If there is no such agreement, the employer is the one who determines when leave may be taken. In this instance, the only restrictions are that the leave must be given no later than 6 months after expiry of the 12-month leave cycle; the employee must be allowed to take leave consecutively, unless the contract of employment states otherwise; and she must be allowed to convert periods of unpaid leave into paid leave if she wants to and still has annual leave to her credit.

There is a mistaken view among some employees that they are entitled to simply call their employer and “put in” a day’s leave. Because the taking of annual leave, whether in whole or in part, depends on the employer’s agreement or direction, it may refuse to allow leave to be taken piecemeal. If it does grant it, it may be on an unpaid basis (unless the employee asks for it to be converted, as explained above) or it may decide to pay the employee but debit the employee’s annual leave balance.

How much must the employee be paid during annual leave? The employee is entitled to her cash wage *plus* benefits and allowances (excluding benefits that are purely at the employer’s discretion or necessary to allow the employee to work, e.g. travel or computer allowance). The BCEA refers to this as ‘remuneration’ and includes things such as shift allowances and overtime.

There are many complexities surrounding the calculation of leave pay. The BCEA states that the employee must be paid the amount that she “would have received” for working a period equivalent to the period of leave. The Act also states that the calculation must be based on her rate of remuneration immediately before going on leave. This implies that the calculation is not based on what she would have been paid during the actual period of her leave but what she did receive *before* going on leave. If the former was used, one could exclude things such as overtime and shift allowances because she wouldn’t be working overtime or shifts during her leave. Using the Act’s formula, one would have to look at the period before she goes on leave and determine what she earned in that period.

The calculation is straightforward if the employee’s remuneration does not fluctuate, e.g. she does not work overtime or receive shift allowances. In this event she simply gets paid what she was paid over the previous 15 days.

But where she worked overtime, shifts or on Sundays as part of their *normal* work pattern in the 15-day period prior to going on leave, her leave pay should include the amounts received for such work.

What happens if the employee’s remuneration fluctuates from period to period, e.g. she only works overtime during certain peak periods? In this case the Act requires that the employer should average the leave pay by looking not just at the 15 days before the employee went on leave (using our example) but at the 13 weeks (i.e. 3 months) prior to leave commencing.

Leave pay must be paid before the employee goes on leave unless the employee’s contract of employment provides for payment on the usual payday.

Contrary to a practice that is remarkably common, employees who fall ill while on annual leave, are not entitled to an extension of their annual leave.

Sick leave

Employees are not entitled to sick leave as of right, but only if they are too ill or injured to work. Where the absence lasts for longer than 2 days, a valid medical certificate must be provided. The same applies if the employee is absent from work on more than 2 occasions in any 8-week period, irrespective of how long the third and further absences lasted.

The Act makes a significant distinction between what an employee must be paid during sick leave versus periods of annual leave. As stated above, the basis for calculating annual leave pay is the employee's remuneration package as a whole. In the case of sick leave, the employee is only entitled to her "wage". This is defined in the Act as payment due for ordinary hours of work.

This potentially provides employers with a useful means of trying to combat sick leave abuse.