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NATIONAL JOINT COUNCIL FOR LOCAL AUTHORITY FIRE AND RESCUE SERVICES

**To: Chief Fire Officers
Chief Executives/Clerks to Fire Authorities
Chairs of Fire Authorities
Directors of Human Resources at Fire Authorities**

Members of the National Joint Council

13 May 2013

CIRCULAR NJC/03/13

Dear Sir/Madam

SICK LEAVE – TAKING OF ANNUAL LEAVE

Background

1. Authorities are aware from circular NJC/10/11 that the Employers' Side of the NJC brought forward a claim in connection with the above matter and the Stringer and Pereda European Court of Justice rulings.
2. In response, the Employers' Side has said that it is clearly content to amend the provisions of the Grey Book to reflect statutory changes, however, these are still awaited. There have, however, been a number of case law developments in this area in which the UK courts and tribunals and the European Court of Justice have interpreted the provisions of the Working Time Regulations and the Working Time Directive as they have applied to particular sets of facts, working practices and collective agreements applying in workplaces in the UK and across Europe.
3. The case law has presented some conflicting views and some decisions which are difficult to interpret clearly. The government has recognised the need for further clarity in this area and to make amendments to the Working Time Regulations to comply with the decisions of the European Court of Justice. It has therefore consulted on proposed changes to the Working Time Regulations in its Modern Workplaces consultation. These legislative changes have not yet been finalised, but when they are they should bring much needed clarity to the statutory regime as it applies to the taking and

carry over of annual leave. We expect these changes to be finalised in the near future, which will provide a firm basis on which to make changes to the provisions set out in the Grey Book. In the meantime, the NJC has provided this interim guidance on measures to comply with the case law. The guidance will remain extant, subject to further developments in case law.

The Case Law

4. The right to be able to carry leave forward if it has not been taken due to sick leave comes from the European Court of Justice's interpretation of the Working Time Directive which provides for four weeks leave. For clarity, it does not apply to any additional leave provided through domestic implementation (currently an additional 1.6 weeks, capped at 28 days.) neither does it apply to additional contractual leave.
5. The case law has established four key points:
 - Where an employee's pre-arranged period of annual leave under the Working Time Directive (i.e. four weeks), coincides with a period of sickness the employee should have the opportunity to take a period of leave, equivalent to that which had been lost, at a future point (*Pereda v Madrid Movilidad*).
 - Where in any particular leave year, an employee is prevented from taking the annual leave provided for by the Working Time Directive (four weeks) as a result of prolonged sickness absence, the employee can carry forward this leave to another leave year (*HM Revenue and Customs v Stringer*).
 - However, leave cannot be carried forward indefinitely and the employer can place reasonable limits on the length of time the employee can take any leave carried forward (*KHS v Schulte*).
 - An employee who is on sick leave does not have to request to take or carry over Working Time Directive leave to obtain the right to have it carried over into the next leave year (*NHS v Larner*).
6. Although statutory changes have not yet been made, it is clear that some of the interpretations in case law exceed some current provisions in the Grey Book.

Interim Guidance

7. As this is a fluid situation with case law developing and the response to the Modern Workplaces consultation pending, it is not possible to update the Grey Book to reflect statutory changes and yet there is a need for employers to acknowledge changes in case law.
8. We have therefore developed this interim guidance on issues of the carry over of and payment for annual leave following sickness absence. **This**

interim guidance provides no contractual entitlement and the Grey Book will be amended as appropriate once the statutory position is clarified.

9. The paragraphs in the Grey Book which are affected are set out below with the proposed application.

Grey Book

10. Section 4, Part C, Paragraph 7 states:

'Leave not taken during the leave year shall be forfeited except that the employee may, at the discretion of the fire and rescue authority, take all or part of the outstanding leave by 31st March of the following year.'

In addition, the NJC issued guidance in 2002 as a consequence of the 'Kigass Aero Components Ltd v Brown EAT' case. In common with this guidance it was intended to be an interim position subject to the eventual resolution of issues similar to those covered in this circular. Whilst some of the guidance has been overtaken over the course of time the principle that employees should not have to return to work to take their leave remains the position.

- Interim application

The position in respect of contractual leave is unchanged. However, this may not resolve all issues in connection with carry over of leave.

Therefore, until such time as the Grey Book is amended to reflect the statutory changes, in the event of an employee being unable to take their Working Time Directive annual leave in the appropriate leave year as a result of long-term sickness absence, they are able to carry forward the untaken portion of their Working Time Directive leave (up to 4 weeks).

There is no definitive ruling on how long Working Time Directive leave can be carried forward for. Ultimately, it could be that limiting carry over to the next leave year is appropriate. However, currently, given there is a ruling which has decided that an employer's limit on a carry over period of fifteen months from the end of the leave year in which it was accrued definitely complies with the Directive then we would suggest that in the event of carry over, the period by which any Working Time Directive leave carried over in such circumstances must be taken ends fifteen months from the end of the leave year in which it accrued.

In summary, the Grey Book provides that an employee may, at the discretion of the FRA, carry over all or part of any untaken contractual leave to the next leave year, to be taken before 31 March. However, the Working Time Directive provides an overriding right to carry over the balance of the four weeks' Working Time Directive leave not taken due to sickness in the current leave year to the next leave year. Any such carried over leave must

be taken within fifteen months of the end of the leave year in which it accrued (or be paid in lieu on termination – see below).

- An example

If someone is carrying over five weeks' contractual leave and has taken at least four weeks' leave before 31st March of the next leave year, the right to carry over four weeks' Working Time Directive leave will also have been met. The employee would have no right at a later point to take the remaining week's leave that they had carried over but not taken.

If he/she has only taken three weeks by 31st March he/she would be able to take one week's leave after this date and within the fifteen month maximum carry over period.

11. Section 4, Part C, Paragraph 10 states:

'Payments in lieu of any leave accrued but not taken in the current leave year shall be made in cases of termination of employment. In the case of death this amount shall be paid into the employee's estate.'

- Interim application

A payment in lieu on termination will also be made for any untaken Working Time Directive leave that has been carried over from the previous leave year(s) subject to the fifteen month carry over period in accordance with the interim guidance above.

Conclusion

12. It is recognised that the above sets out an interim position until such time as the statutory position is clear, at which point:

- (a) as a minimum, the provisions contained in the Grey Book will be updated to reflect the statutory position;
- (b) the elements of the claim that may exceed that new statutory position will be considered.

13. An FRA will wish to consider if its current arrangements comply with case law, and if that is not the case, to put in place appropriate changes mindful that there may be a need to adjust the current position for some employees e.g. to ensure that an affected employee has been given the correct opportunity to carry forward Working Time Directive leave.

Yours faithfully

SIMON PANNELL

MATT WRACK

Joint Secretaries