PNB Circular 2014/23

POLICE NEGOTIATING BOARD

Independent Secretary:
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POLICE NEGOTIATING BOARD AGREEMENT

1. The Official and Staff Sides of PNB have reached an agreement on the carry-over of leave into the next year. Details are set out in the attached memorandum.

2. This PNB circular requires no changes to Police Regulations and Determinations.

3. Any enquiries about this circular should be addressed to the Independent Secretariat at the Office of Manpower Economics ☎ 020 7271 0472, to the Official Side Secretary ☎ 020 7187 7342 or the Staff Side Secretary ☎ 01372 352003/4. Enquiries to the Independent Secretariat relating to the interpretation of this circular should be made in writing.

21 August 2014

* PNB Circulars form a single numerical series. Those which in themselves provide authority to implement an agreement carry the serial number alone, while those which are advisory are designated as such after the serial number.

MEMORANDUM

Introduction

The PNB is aware that further clarity on the issue of carry-over of leave in the event of long-term sickness is awaited as there is currently some potential conflict between UK and European case law and UK statutory provisions.

The Government, through the Department for Business, Innovation and Skills (BIS), announced its intention to make the necessary changes to the UK Working Time Regulations to reflect the case law in its Modern Workplaces consultation in 2011.

The PNB is content to amend Police Regulations and Determinations to reflect any changes in this area, resulting from the Modern Workplaces consultation. However, at the time of writing there is no indication from BIS that a Government response is likely in the foreseeable future. Therefore, as an interim position the PNB has agreed to issue this circular to provide further clarity on this issue to all forces. This PNB circular does not provide any regulatory entitlement, but forces are encouraged to take account of this circular until the outcome of the Government's Consultation on Modern Workplaces is known. Until the UK Working Time Regulations are changed, forces should exercise the discretion currently provided in Police Regulations and Determinations to allow carry over in cases covered by this guidance to ensure compatibility with case law.

The opportunity has also been taken to include information on the carry-over of annual leave in the event of absence due to maternity leave (and other types of family leave).

Working Time Case Law

There have 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.

The wider case law has presented some conflicting views and some decisions which are difficult to interpret clearly.

However, the case law seems to have 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

has been lost, at a future point including carrying over into the next leave year if necessary (*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, this 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*).

Application to Police Regulations

Although statutory changes have not yet been made, it is clear that in certain respects Police Regulations do not fully reflect the key points from case law.

Carry-over of leave affected by sick leave

Police regulations already provide discretions for Chief Police Officers to allow officers to carry forward leave in prescribed circumstances. However, PNB is keen to ensure that Police Regulation 33 Annex O is being applied to enable officers to carry over leave entitlement (i.e. Working Time Directive; 4 weeks (pro rata leave entitlement for part time officers)) into the next leave year where an officer has been unable to take that leave because of (i) long term absence on sick leave which continues into a new leave year, and (ii) where the officer has been absent on long term sick leave but resumed duty late in the leave year and so had not had the opportunity to take all of their annual leave before the end of the leave year.

Sickness during pre-booked periods of leave

Where an officer is sick during a pre-booked period of leave they should be allowed to take that period of leave at another time subject to providing evidence that they were sick, for example a medical certificate.

Interim Guidance

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 police regulations to reflect statutory changes at this time and yet there is a need for police forces to acknowledge changes in case law. Therefore:

At present police officers will continue to accrue annual leave regardless of whether their sick leave is paid or unpaid. If an officer returns to duty from sick leave within the same leave year, they will be entitled to receive the leave entitlement for that year, less any leave they have already taken. Where an officer returns to duty late in the leave year and so not had the opportunity to take all their annual leave before the end of the leave year or if an officer returns to duty in a new leave year, they will be entitled to carry over 4 weeks' annual leave (in line with the Working Time Directive), less any annual leave or bank holidays already taken, to the new leave year. However, any annual leave carried over must be taken within 15 months of the end of the leave year in which it accrued. (*KHS v Schulte held that an employer can place reasonable limits on the length of time the employee can take any leave carried forward).*

Annual leave and maternity leave (and other types of family leave)

A woman who is to take maternity leave has two rights to leave: one to maternity leave and another to the annual leave provided by Police Regulations and Determinations and/or the Working Time Regulations for the annual leave year in question. She must be able to take both types of leave. In most cases this will not cause significant issues as the annual leave can be accommodated within the leave year(s) in question. However, there may be occasions when a woman will not be able to take her annual leave before her maternity leave starts. This may be due to the fact that her maternity leave will start close to the beginning of the annual leave year, or it may be that a woman had planned to start her maternity leave later in the leave year, but either she has been on sick leave or the baby has been born prematurely and she has therefore not been able to take her annual leave. It should be remembered that, as set out in PNB Circular 10/5 officers can take annual leave before, during (i.e. if there is a break in between two periods of maternity leave) or after maternity leave

If a woman is unable to take all of her annual leave in the leave year due to being on maternity leave she should be allowed to carry it over into the appropriate leave year when she returns to work. The European Court of Justice in the case of Gomez v Continental Industrias del Caucho SA held that a woman must be able to take the annual leave that she is entitled to at a time outside her maternity leave. Where a woman is unable to take her annual leave before she starts her maternity leave, for example, for the reasons set out above, exceptions should be made to carry over policies to allow women to carry the remaining period of leave into the appropriate leave year. For example, a woman will be able to carry over leave that she was unable to take into the leave year in which she returns. However, if there is insufficient time within that leave year to take her leave she should be able to carry over the remainder into the next leave year.

It should be remembered that a woman has the right to choose when to start her maternity leave, subject to fulfilling the requirements of Police Regulations and Determinations

Note: Forces should note that neither of these issues affects officers who have been able to take their annual leave in the relevant leave year. In accordance with Regulation 33 Annex O, any carry-over of annual leave into a further leave year will be limited to 5 days; (this can be increased at the discretion of the Chief Officer).