



## HR Broadcast – Sickness absence during notice periods

A question that we are regularly asked concerns what an employer should do as regards pay when an employee, who is signed off sick, resigns giving notice.

Sickness absence can always be a problem for employers; especially so when it happens during a departing employee's notice period. Assuming that you do not have an Occupational Sick Pay scheme in place many employers believe that it is in order to pay the departing employee statutory sick pay (SSP) only during their period of absence through sickness when they are working their contractual notice, but is this correct?

To determine the answer we must go back to the law and what the Employment Rights Act (ERA) of 1996 states. The Act states that the employer must pay full pay during the statutory notice period where an employee is "incapable of work because of sickness or injury". In the case of a resignation the statutory notice period is always one week, but in the case of a dismissal effected by the employer, e.g. a redundancy, it is one week for each complete year of service to a maximum of twelve weeks.

So if an employee has say one month's contractual notice, that includes one week's statutory notice, this means that the statutory part of the notice period should be paid at full pay and any additional contractual amount may be paid at SSP. The statutory notice is the first part of the notice period and any additional contractual notice follows on.

There is however an exception to the rule. Section 87(4) of the ERA states that the employee's rights to statutory notice pay does not apply if the

contractual notice to be given by the employer is "at least one week more than statutory notice". This is the case if it is a resignation by the employee or a dismissal by the employer.

This particular situation was examined by the Employment Appeal Tribunal (EAT) in *Scotts Company (UK) Ltd v Budd 2003*, where Budd (B) was dismissed on three months' contractual notice after two years' sickness absence but was not paid any notice pay as he had exhausted all his sick pay entitlement. B was entitled to twelve weeks' statutory notice as he had been employed for over twelve years, and three months' contractual notice. He brought a claim for statutory notice pay but the EAT held that *Scotts Company (UK) Ltd* was not liable for it because B's employment contract provided for at least one week more than the statutory notice.

Had B only been entitled to receive statutory notice, his employer would have been liable to pay him full notice pay for twelve weeks. It is always the employer's notice that is looked at to decide if the contractual notice is at least a week more than the statutory minimum.

So, generally speaking, the first week of the notice period should be paid at full pay and the balance paid at your normal sick pay rates, e.g. SSP only. This rule does not apply where the contractual notice you are required to give under the employment contract is at least one week more than statutory notice.