

## Holidays during sick leave – the latest

The Employment Appeal Tribunal (EAT) in the case of *Fraser v South West London St George's Mental Health Trust UKEAT/0456/10* have clarified unresolved issues in this long running saga.

It has now been held that workers who are on sick leave must request to take paid holiday at the time they are absent and if they don't they lose the right to holiday pay after the end of the leave year in question.

Some Q and A's reflecting the current position:

**1. I thought that previous case law had already held that this was the case?**

There were conflicting decisions of the EAT. The Kigass case in 2002 had generally held that workers lose their right to holiday pay if holiday was not requested and taken. However later cases had suggested that the right to accrued holiday pay could carry over although may only be claimed on termination of employment. To complicate things further, a European case, Pereda had suggested that the right to be paid for accrued holiday pay could be deferred by the worker.

**2. So if a worker is on sick leave for part of a holiday year, what happens?**

They continue to *accrue* holiday and could take the holiday later on in the holiday year. However if the holiday year ends whilst they are still off sick, and they have not requested to take the leave (or requested to defer it – see below) then they lose it.

**3. What if a worker is off sick for an entire holiday year, and that year ends before they have requested to take the holiday or defer it?**

As the law presently stands, they lose it, and cannot claim holiday pay either in future years or on termination of employment.

**4. If a worker on sick leave requests to take holidays, what should I do?**

You should normally allow this, (and pay the worker holiday pay) – although as an employer you have the right under the Working Time Regulations (WTR) to serve a counter notice to defer the taking of holidays.

**5. Why would a worker want to take holiday during sick leave?**

Good question. They may wish to do so if they have exhausted their right to sick pay and would therefore be unpaid – if they are taking holiday then they must receive holiday pay (usually at normal rates of pay). In contrast if a worker is still in receipt of full pay during sick leave (eg receiving company sick pay) then presumably they would not wish to take holiday leave as this will not benefit them – however see below the issue of deferment.

Please contact Lee Jefcott on 0161 618 1538 or e-mail [lee.jefcott@blueskylaw.co.uk](mailto:lee.jefcott@blueskylaw.co.uk) for more information.

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## 6. What if a worker on sick leave requests to defer their accrued holiday and take it next year?

They *may* have the right to do so. Previous case law has suggested that this is the case and the current EAT decision did not have to address this issue (as the worker in that case had not requested deferment). However the EAT stated that if the worker had requested deferment then her employer “might have been obliged to accede to that request”. The WTR state that the first 4 weeks of holiday may only be taken in the holiday year in which they are due. However, European decisions conflict with this and Employment Tribunals have had to construe the WTR in the light of giving effect to the European Directive under which they were made so have been allowing carry over, eg where the worker could not take the holiday.

## 7. Does the above case help employers then?

Yes, because it clarifies that workers lose the right to holiday pay unless they ask to take the holiday during the current leave year or ask for a deferment.

## 8. How much deferment do we have to permit?

Interesting question. European caselaw has suggested that unlimited carry over would be contrary to the Directive. Employers should take a reasonable view – perhaps limiting the allowed carry over to 4 weeks only each year

## 9. Is there a legal obligation on employers to inform their staff of the right to request or defer holidays?

No.

**Watch this space – the law above is correct as at 11<sup>th</sup> November 2011 – but the Court of Appeal are going to consider matters further in a case called *Larner*. Also, the Government’s Modern Workplaces consultation suggests reform of the WTR to address the issue of carry over.**

**Confused? Still have questions? Give me a call or drop me an email (details below)**

**Lee Jefcott  
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**(Phew! I now need a holiday!)**

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