Accrual of holiday during long-term sickness

Some much needed clarity has now been given about the accrual of holiday during long-term sickness absence and a worker's ability to carry over unused annual leave into the next leave year.

What was decided?

The Employment Appeal Tribunal (EAT) in *Plumb v Duncan Print Group Ltd* has held that that a worker absent from work on long-term sick leave, who does not choose to take annual leave, can carry forward the four weeks' leave required under the EU Working Time Directive, but must take it within 18 months of the end of the leave year in which it accrued.

The EAT also held that the worker is not required to demonstrate that he or she was physically unable to take annual leave by reason of his or her sickness in order to be able to carry forward the leave.

The Claimant was employed by Duncan Print Group until February 2014. By that time, he had been on sick leave since April 2010 because of an accident. He neither took nor asked for annual leave until July 2013, when he wrote to his employer asking to take the leave that he had not taken since 2010. The employer agreed to pay for annual leave for the 2013/14 leave year but not in respect of 2010, 2011 or 2012. Following the termination of his employment, the Claimant brought a claim for payment in lieu of annual leave for these years.

The case only concerned the four weeks' leave required under the EU Working Time Directive and not any additional leave under Regulation 13A of the WTR – the EAT had previously held that the additional 1.6 weeks' leave under Regulation 13A is not eligible for carry forward.

Previous European cases have held that, if workers do not wish to take their holiday entitlement during a period of sick leave, then the holiday must be granted at a different time, even if that means it is carried over into the next leave year. The European case of Schulte also held that there is a limit to the length of time an employee on long-term sick leave can continue to carry over untaken statutory annual leave under the Working Time Directive. The Court said that the carry over period should be significantly longer than the leave year and held that the period of 15 months in that case was not contrary to the Directive. It did not go as far to say that 15 months should be treated as a minimum or whether it was merely an appropriate period on the facts of that case.

Amongst other things, the EAT considered whether any limitation ought to be placed on the right to carry over leave. The Claimant accepted before the EAT that the European case law allows for the imposition of limits on the length of time for which leave can be carried over but argued that, since no such limits had been provided for in the UK legislation or in his contract of employment, the carry-over period in his case was unlimited.

The EAT rejected this argument. It noted that the WTR provides that annual leave must be taken in the year in which it is due. Since the European case law indicates that the Directive requires at most 18 months of carry-over in such circumstances, the EAT held that that limit should be read into the Regulations. Therefore, they need only be read as permitting a worker to take annual leave within 18 months of the end of the leave year in which it accrued where he or she was unable or unwilling to take annual leave because of sickness. Accordingly, the Claimant was entitled to payment in lieu of annual leave for the 2012/13 leave year but no earlier.

It is worth noting that the parties have been given leave to appeal to the Court of Appeal, although we do not know whether the parties to the case will appeal.

What should employers do now?

Although the case may be appealed, employers should consider reviewing their contracts of employment and sickness policies and procedures. It might be open to employers to agree a slightly shorter carry-over period, although in the light of the European case law, this would probably have to be of at least 12 months.

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