

Happy Holidays? - What is the current position regarding sick leave & holiday pay?

One of the most challenging and uncertain areas of employment law is the vexed issue of holiday entitlement for employees who are off sick. There have been numerous cases in the last 12 months, and regrettably the guidance given by the courts is neither consistent, nor readily understandable. Here we seek to provide some guidance on the law as it currently stands, but with the caveat that it is difficult to predict how a court or tribunal will deal with any particular issue.

What if an employee falls ill during (or just before) pre-booked annual leave?

The European Court stated that the employee would be able to take their holidays at an alternative time. That case has subsequently been followed by Employment Tribunals in the UK. The potential for abuse is clear, but there may be a distinction between an illness that wipes out the entire holiday, and (for example) an employee having food poisoning for one day while on holiday in Corfu.

Does an employee who is off on long term sick continue to accrue holiday entitlement?

It now appears to be accepted that the full 5.6 weeks statutory leave will continue to accrue during periods of sickness absence, although it may be that any more-generous contractual entitlement will not accrue.

Can you insist that employees take their holidays during a period of sickness absence?

The answer appears to be "No" – holidays must be a period of restful relaxation from work, and this would not be achieved if the employee was unwell.

Can an employee insist on taking holidays during a period of sickness absence?

Probably, if the employee gives notice in the usual way. While the Working Time Regulations do allow employers to refuse requests for annual leave, it is likely that in a case such as this, employers would need to have a better reason than the simple fact that the employee was off sick.

Where an employee cannot (or will not) take their holidays due to period(s) of either short or long term absence, can they carry those holidays forward to the next holiday year?

The European Court decisions in Pereda and Stringer both state that an employee must be entitled to carry holidays forward into a subsequent holiday year if required so that they can enjoy the benefit of their annual leave entitlement. That would not necessarily be an indefinite carry-forward, but at least allow the employee to carry the holidays forward to the next holiday year. There has been much debate as to whether the European Court's decision applies only to public sector employers in the UK, but there are a number of UK cases where the Employment Tribunal has applied this finding in relation to private sector employers also.

Must an employee request to take (or carry forward) holidays during annual leave year to avoid losing them?

This remains unclear. Two cases both stated that the right to carry forward holidays was automatic, whether the employee requested to take (or carry forward) the holidays or not. One other case stated that unless an employee either gives notice to take holidays (but is unable to take them) or specifically asks for holidays to be carried forward to a later period, there is no right to carry forward holidays and annual leave entitlement is lost at the end of the holiday year. Guidance is awaited from a higher court.

Where does this leave us?

Employers need to tread with caution. Certainly if an employee asks to be allowed to carry over holidays to the next holiday year, the safest course of action would be to allow this. Employers should also note that the government is likely to amend the legislation in this area, and there may soon be a specific statutory right to carry forward annual leave to the next holiday year (amending the current provisions in the Working Time Regulations which explicitly state that holidays cannot be carried forward). Watch this space!

In this edition

Happy Holidays? - What is the current position regarding sick leave & holiday pay?

Some guidance on this challenging and uncertain area of the law.

What has the team been up to?

An overview of employment issues dealt with over the past 12 months.

What will 2012 bring?

If certain proposed changes are implemented by the government, this will mean a significant shift in the framework of UK employment law practice, and will mean an interesting and busy year for all employers and bto's employment team!

Increase in Compensation Limits

What's new?

What has the team been up to?

As ever, we dealt with a wide range of employment issues and most work for clients is “behind the scenes” advising them on strategic employment issues allowing them to maintain business as usual. We have also represented clients in a variety of Employment Tribunal cases, we supported clients through redundancies, disciplinary procedures etc. and advised on the employment aspects of various property and corporate deals. A few of the highlights of the past 12 months include:

- Management of a large scale redundancy procedure for a client closing its Scottish site, with a Compromise Agreement being signed by over 250 employees.
- Douglas handled a number of tribunal cases relating to the TUPE regulations including a complex claim relating to the funding of Law Centres, which started out with some 15 claimants and 23 respondents.
- Caroline appeared on Newsnight Scotland discussing the employment law implications of homosexual clergy.
- Caroline acted in a high profile claim against the Scottish Football Association brought by its former head of Referee Development.

What will 2012 bring?

There may be a number of changes on the horizon for you. The government has recently announced, or is consulting about, a number of potential changes which, if implemented, will be relevant to you and all employers. Highlights:

- Increasing the qualifying period of service for a claim of unfair dismissal to 2 years (likely to apply from April 2012).
- Encouragement of mediation between employer and employee.
- A requirement that all claims must be lodged with ACAS for conciliation before being lodged with Employment Tribunal.
- The possibility of an employer having an off-the-record “protected conversation” with an employee about performance or a proposed exit package/Compromise Agreement, without the employee being able to use that as part of a claim against the employer.

- We continue to work hand in hand with **bto's** clinical defence team in representing doctors accused of misconduct or other employment related issues.
- David and team have provided advice to the further education sector regarding a number of issues including discrimination claims, trade union issues, Sheriff Court claims etc.
- The team has handled a wide range of discrimination cases including a religious discrimination case relating to alleged pornographic/sectarian e-mails, a claim in respect of pension rights by a transgender employee, age discrimination claims arising out of forced retirement at age 65, and a number of sex and disability discrimination claims.
- Caroline successfully defended a GP Practice in an unfair dismissal claim and over and above winning the case obtained an award of expenses against the unsuccessful Claimant.
- We continue to provide employment support to many charities and registered social landlords.

- Fees for employees to lodge Employment Tribunal claims (possibly also a requirement that the employer pays fees at some stage of the process). Consultation closes on 6 March.
- Tribunals having the power not just to award compensation to employees, but to fine employers for breaches of employment law.
- Changes to TUPE (perhaps abolishing service provision changes entirely). A “call for evidence” from the government expired on 31 January.
- Changes to the Working Time Regulations to address the sickness absence/holiday pay issue discussed on page 1.
- Reducing the required duration of collective redundancy consultation.
- Review of ACAS disciplinary and grievance Code.



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Update

Increase in Compensation Limits

From 1 February 2012:

- The limit on the amount of a week's pay for the purposes of calculating statutory redundancy pay and a basic award of compensation for unfair dismissal will increase from £400 to £430.
- The maximum compensatory award for unfair dismissal goes up from £68,400 to £72,300.

Please contact us if you require advice in relation to any of the issues touched on in this newsletter, or you may be interested in our free employment law seminar programme. To view **bto's** forthcoming seminars, visit the Seminars section of our website at:

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