

Employment Rights Update

December 2011



In this month's Bulletin we take a detailed look at one case that deals with the thorny question of holiday entitlement whilst an employee is on sick leave. We also take a look at inconsistency of treatment arguments in unfair dismissal claims.

We hope that you find the information useful and of interest.

Fraser v St George's NHS Trust, EAT

It is clear that workers continue to accrue annual leave entitlement during sickness absence and that workers can choose to take annual leave at the same time as being absent due to sickness. However, this case decides that holiday pay cannot be claimed where no notice to take the leave has been given to the employer.

Mrs Fraser was injured at work and was on sick leave from November 2005 until her dismissal in October 2008. Her entitlement to sick pay expired in August 2006 and she did not receive a payment of holiday pay for the holiday years 06/07 and 07/08. Mrs Fraser claimed a payment of 4 weeks' holiday pay in relation to those 2 holiday years.

It was accepted that Mrs Fraser had accrued the right to claim annual leave in each of the 2 years in question whilst she was on sick leave, but the Trust argued that if she wanted to exercise that right she was obliged to give notice of her intention. She had not given any notice because she did not know she could

request leave. The Tribunal dismissed her claim for holiday pay as a result.

The EAT conducted a detailed analysis of the Working Time Regulations 1998. Leave is an entitlement which a worker can choose to forego. It is triggered by the worker giving notice of his or her wish to take annual leave. The Regulations also make it clear leave may only be taken in the leave year in which it is due and may not be replaced with a payment in lieu, except where the worker's employment is terminated part way through the leave year. Leave cannot be carried over to the next holiday year – the rule is "use it or lose it".

The EAT followed the case of *Kigass Aero Components Ltd v Brown* (another EAT case) in which the Judge commented that proper notice has to be given by the worker to take annual leave and holiday pay can only be paid for leave actually taken. The EAT in Mrs Fraser's case thought that analysis to be right.

The EAT therefore found Mrs Fraser's entitlement to holiday pay depended on her having given proper notice, which she had not done. The EAT also commented that giving notice allows the employer to determine whether it is obliged to make any payment for the period of leave requested and so it is more than just a formality. A worker may choose to take annual leave when he or she would otherwise be absent sick (which might be attractive if sick pay is exhausted) but it must be their choice. As an alternative, the EAT suggested the worker may ask for

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annual leave to be deferred until a later period.

So the moral of the story is that workers must make a request to take holiday in the leave year in which it is due. Use it or lose it.

Riskier is asking for it to be deferred (which we suggest must be clearly set out in writing). The EAT here suggested deferral as a possible approach, but until another case decides the point conclusively, it may be best to simply make the request and take holiday during sickness absence.

General Mills (Berwick) Limited v Glowacki, EAT

Mr Glowacki worked as an electrician repairing production machinery and equipment. On the day in question he disabled a sensor on one of the machines he was repairing, contrary to warning notices and in breach of health and safety rules, to get inside and work on it. The employer took the view this was a serious breach of health and safety procedures and decided to dismiss the Claimant for Gross Misconduct.

The Tribunal found the dismissal was unfair, pointing to another employee who a year or so previously had committed a breach of health and safety that was 'factually indistinguishable' from Mr Glowacki's case. That employee had avoided dismissal for gross misconduct because he had been seriously injured in the machine, took a period of long-term sickness and was eventually dismissed on ill-health grounds. The Tribunal found the

employer had treated Mr Glowacki inconsistently with this employee.

The EAT overturned this decision because the employer had given unchallenged evidence that but for the injury and absence on ill-health grounds, the other employee would also have been subjected to disciplinary proceedings and dismissed for Gross Misconduct. Therefore, the EAT found the employer's approach to both cases was reasonable in the circumstances and the difference in treatment was sufficiently explained. Mr Glowacki's dismissal was not therefore unfair.

This case emphasises the difficulties employees have in trying to prove inconsistency of treatment. If a member has been treated differently to another employee, the facts of that other case must be 'truly parallel' i.e. pretty much identical!

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or suggestions for improvement to david.sorensen@morrishsolicitors.com

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