

UK: Employment Update

This edition of Employment Update considers a number of Court of Appeal cases that explore: a sick worker's entitlement to holiday pay, whether an employee has a right of legal representation at a disciplinary hearing and the extent of an employee's obligation to report their own misconduct. We also look at how the new fee structure will apply in the Employment Tribunal and a new guide to redundancy during pregnancy and maternity leave.

Sick worker entitled to pay in lieu of holiday

A number of European Court of Justice decisions in recent years, have clarified that annual leave entitlement accrues during a period of sick leave so a worker may take, and be paid for, holiday during sick leave. An employee cannot, however, be compelled to take holiday during sick leave and if they so wish may defer taking holiday until after the end of the sick leave even if that means that the holiday has to be carried forward to a subsequent holiday year. The employee's normal rate of pay applies to holiday taken during sick leave even if the employee has exhausted any entitlements to sick pay.

Under the Working Time Regulations 1998 a worker who wishes to take holiday must give an employer notice of their intention to do so. The Regulations also provide that on termination of employment an employee is entitled to be paid in lieu of accrued but untaken statutory holiday.

Is a worker who has not taken holiday due to absence on long term sick leave entitled to receive a payment in lieu of accrued holiday when the employment terminates in a subsequent holiday year? This was the issue before the Court of Appeal.

L was absent on ill health grounds throughout 2009 and up to the 6th April 2010 when she was dismissed on ill health incapacity grounds. During her absence on sick leave, she did not ask to take any paid annual leave.

L's employer argued that because L had not given notice of her intention to take holiday in accordance with the Working Time Regulations no entitlement to leave had crystallised which meant that there was no holiday to be carried forward to the subsequent holiday year. Accordingly on termination no payment was due in relation to the forfeit holiday.

The Court of Appeal did not agree. It held that L did have the right to carry her holiday forward to the subsequent holiday year without having to make a formal request for it to be carried over. When L's employment came to an end before she could take the carried forward holiday she was entitled to be paid on termination for the annual leave she had been prevented from taking.

Key issues

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At present the Working Time Regulations still include a "use it or lose it" provision in relation to holiday; i.e. if it is not taken in the holiday year in which it accrues it is lost. The Court of Appeal has made it clear that the Regulations should be interpreted to provide that the "use it or lose it" provision will not apply if a worker has been unable or unwilling to take the holiday because he was on sick leave and therefore did not exercise his right to annual holiday. It also ruled that the right to be paid in lieu of accrued holiday includes holiday carried forward as a consequence of a worker being unable to take it due to absence on sick leave. Employers who rely on the "use it or lose it" provision accordingly do so at their peril.

The Working Time Directive provides for a minimum holiday entitlement of 4 weeks and this is reflected in the Working Time Regulations. The Regulations also provide for an additional 1.6 weeks' paid leave. The Court of Appeal declined to rule on whether a distinction should be drawn between the basic 4 weeks' leave and the additional 1.6 weeks' leave in terms of whether a sick worker would be entitled to carry forward the additional 1.6 weeks' leave untaken due to absence on ill health grounds. Instead, it referred to a recent ECJ decision in which it was held that the Working Time Directive did not preclude national legislation which provided that a worker unable to take holiday in addition to the basic 4 week minimum should not be entitled to be paid in lieu of it on termination. It is anticipated that the Government will address this issue when it finally publishes its proposed amendments to the Working Time Regulations to address the issue of what holiday may be carried forward by sick leavers and employees absent on family leave and for how long.

When the employment of a long term sick leaver comes to an end, the employer is now required to make a payment to the individual in respect of any accrued but untaken basic statutory holiday entitlement of 4 weeks. Whether there is an entitlement to be paid in lieu of any accrued additional statutory holiday entitlement is less clear. In addition there may also be questions arising on the amount payable where the employee has been in receipt of sick pay or payments made under a permanent health insurance policy.

[\[NHS Leeds v Larner\]](#)

Disciplinary proceedings: no right to legal representation

Is an employee entitled to be accompanied by their legal representative to a disciplinary meeting? This question has been explored by the courts in some detail in recent years with a degree of uncertainty. The Court of Appeal has now rejected previous judicial suggestions that where the outcome of the disciplinary proceedings could be to deprive the employee of his right to practice his profession then Article 6 of the European Convention on Human Rights (ECHR) applied, so the employee is entitled to legal representation.

The Court of Appeal held that in the absence of an express contractual right to be legally represented during disciplinary proceedings, an employee is not entitled to legal representation. This is the case even if the outcome of the disciplinary procedure could have significant consequences for the employee by rendering him unemployable elsewhere. In its view an employer's disciplinary process does not involve the determination of civil rights, the ECHR is therefore not applicable and no right of legal representation arises.

Employers can resist an employee's request for legal representation at a disciplinary hearing even if the potential outcome of the hearing is such that that individual may not be able to secure employment in that profession or industry sector again. Care should be taken to ensure that there is no express contractual right to legal representation before declining such a request; in addition if the employee has a "disability" for the purposes of the Equality Act 2010 consider whether any form of reasonable adjustment to the disciplinary process is necessary; in certain circumstances this could conceivably involve permitting the employee to be accompanied by a legal representative.

[\[Mattu v University Hospital of Coventry and Warwickshire NHS Trust\]](#)

No implied duty to report misconduct

All employees have a duty of fidelity to their employer, however, what obligations does this impose on the employee? The Court of Appeal's view is that the extent of the employee's duty of loyalty is dictated by the terms of the employment contract. In particular if an employer wants to ensure that an employee reports the wrongdoing of colleagues or, indeed, their own wrongdoing then an express contractual obligation is required. An employer cannot rely on the implied duty of fidelity.

In the absence of a general duty to report their own, or a fellow employee's, misconduct or breach of contract it is recommended that an express clause is included in the employment contract to impose such an obligation.

It is also recommended that employment contracts are reviewed in line with any promotions that an employee receives and/or as the employee's job evolves. In this case the employee's contract had not been amended since he was recruited from university and when the employment ended several years later the contract did not contain any post-termination restrictive covenants to protect the employer in spite of the employee being responsible for 59% of the group's total revenue.

[\[Ranson v Customer Systems Plc\]](#)

Employment Tribunal fees to be introduced in 2013

From Summer 2013 a new fee regime will be operated in the Employment Tribunal as follows:

- There will be a two-stage fee process: the first fee will be payable when a claim is issued; the second fee will be payable four to six weeks prior to the hearing.
- Claimants who cannot pay all or part of the fee will be eligible to have all or part of the fee remitted.
- The time limits for making a claim will not be affected by the requirement to pay a fee or obtain remission.
- Two levels of fee will be payable:

Fee Type	Level 1 Claims	Level 2 Claims
Issue fee	£160.00	£250.00
Hearing fee	£230.00	£950.00

- In cases with multiple claimants, higher fees will be payable.
- Additional fees will be payable in relation to applications to: review default judgements, dismiss following settlement, counterclaim, review a decision and in relation to judicial mediation as follows:

	Review default judgement	Application to dismiss following settlement	Mediation by the judiciary	Counterclaim	Application for review
Level 1	£100.00	£60.00	-	£160.00	£100.00
Level 2	£100.00	£60.00	£600.00	-	£350.00

- Fees will not be refundable even if a claim does not proceed to a hearing.
- If a Respondent is unsuccessful in defending the claim, it will be responsible for reimbursing the fee.

- Claims attracting Level 2 fees include: whistleblowing claims, discrimination claims, claims in relation to a failure to comply with collective redundancy consultation obligations, unfair dismissal and applications for interim relief.

[Charging fees in Employment Tribunals and the Employment Appeal Tribunal](#)

Guide to redundancy during pregnancy and maternity leave

How to handle the redundancy of an employee who is pregnant or on maternity leave can cause some concern for employers who may be uncertain about whether the employee should be included in the redundancy process at all, whether any of the selection criteria should be adjusted to remove any disadvantage caused by the maternity absence and what to do in relation to offering suitable alternative employment. ACAS and the Equality Human Rights Commission have produced a new Guide for employers which can be found [here](#).

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