

Employment Briefing

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Qualification to the right to annual leave during sickness absence

The Employment Appeal Tribunal (EAT) has handed down an important decision affecting a worker's right to accrue annual leave while being absent due to sickness in the case of *Fraser v St George's NHS Trust*.

It is well established that workers continue to accrue annual leave entitlement during sickness absence. If the worker cannot take their annual leave because they are absent from work because they are sick, they must be allowed to take it when they return to work, even where this would mean the annual leave entitlement "rolling-over" from one year to the next.

This created a difficulty in domestic law, as the Working Time Regulations expressly rule out "roll-over" of holidays from one year to the next.

Mrs Fraser was employed as a nurse. She had been on sick leave for four years after an injury at work, and was ultimately dismissed in October 2008. For the last two years of her employment, she received no pay. On termination of her employment, she was paid in lieu of her final year's statutory holiday entitlement. However, she was not paid in lieu of



untaken statutory holiday from the previous two years, and so made a claim to the employment tribunal for these amounts.

The Employment Tribunal held that while Mrs Fraser had accrued annual leave entitlement whilst on sick leave she was not entitled to be paid in lieu of untaken statutory holidays. This was because Regulation 15 of the Working Time Regulations requires an employee to give notice to an employer when they are going to take annual leave. Mrs Fraser was entitled to take holidays whilst on long-term sick and be paid for them, but because she had not given notice to exercise her right to take the holiday entitlement under regulation 15, she lost the right to be paid for them. Mrs Fraser subsequently appealed to the EAT.

The EAT upheld the decision of the Employment Tribunal, deciding that a worker on sick leave must make a request to their employer to defer their holiday entitlement until the following year. Mrs Fraser made no such request, so her untaken statutory holiday entitlement disappeared at the end of each 'leave' year and she was only entitled to her statutory holiday entitlement of her final year of employment.

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Practical Implications

This case will be important when an employee is off sick for more than a year.

An employee on long-term sick leave has three options, giving three different results for the employer.

Miss Aalders started work with M-Choice on 1st February 2010. Her employment contract said that she was entitled to six month's notice. On 26th July 2010 M-Choice put her on garden leave. She was told that her employment would end on 1st February 2011. Miss Aalders brought a claim for unfair dismissal on 11th January 2011 on the basis that her employment was due to end on the 1st February 2011 and as such, she would have been employed for 12 months at the EDT.

Option 1 -

the employee gives notice to the employer that that they would like to take their holiday whilst absent from work.

The employer must allow this and pay the employee their holiday pay.

Option 2 -

the employee gives notice that they would like to defer their holiday and take it when they return to work.

The employer must allow this and let the employee take their holiday on returning to work. Potentially, an employee could take several years' accrued holidays on their return. If the employee leaves before returning to work, they must be paid their accrued holiday pay on termination of their employment. Again, this could potentially include several years' accrued holiday pay.

Option 3 -

the employee does not give any notice that they would like defer or take their holidays.

The employee will still accrue holiday entitlement whilst off sick, but only for the years they have given notice.

If the employee is off for less than a year they will still have full entitlement for that year when they return to work. If they are off for more than a year they will only have the holiday entitlement for the current holiday year when they return to work. They will lose the holiday entitlement for the earlier years where they failed to give notice to the employer.

If the employee's employment is terminated they will only be entitled to accrued holiday pay for the current year, and accrued holiday pay for the earlier years will be lost.

It is an important point that the requirement to give notice means an employee will lose accrued holiday pay for earlier leave years, but only for those years where they have failed to give notice. On the employee returning to work or having their employment terminated the employer should look back and check what notices have been given to see how much accrued holiday or holiday pay should be allowed.

Unfair Dismissal - Conduct And Capability - do labels matter?

A recent case at the Employment Appeal Tribunal looked into the overlap between conduct and capability in unfair dismissal cases.

Mr Screene, a financial controller for an events ticketing business, failed to spot fraudulent activity that left the company's bank account £1.7 million worse off.

A disciplinary hearing followed and Mr Screene was dismissed due to 'gross misconduct' but Mr Screene disagreed with the decision and took his employer to the Employment Tribunal.

On their ET3 form, used to respond to a claim in the ET, the employer stated that Mr Screene had been dismissed due to capability reasons. The ET found the dismissal was fair, but focused on his gross misconduct.

Mr Screene appealed, arguing that his dismissal was based on capability rather than conduct and the tribunal could not change the reason put forward by his employers.

The EAT decided that the reason for the dismissal throughout the process had remained the same, and it was only the label that had changed.

They concluded that the tribunal could look into the substance of the main allegation without overly concerning itself with labels, provided that the claimant was not prejudiced.

Practical Implications

Employers should always ensure that they have clearly identified a reason before dismissing an employee and be able to substantiate the reason in any subsequent claim.

Mitigation of Loss - the Danger of Refusing an Alternative Position

In any claim for compensation before the employment tribunal, the employee must show that they mitigated their loss. Usually this requires the tribunal to consider whether the employee did enough to find alternative employment to minimise their loss of earnings.

The employment tribunal was recently asked to consider whether an employee breached this duty to mitigate their loss by turning down an alternative job within the same organisation in *Debique v Ministry of Defence*. Ms Debique worked for the British Army and following the birth of her child struggled to combine work and home responsibilities. She gave notice to the MOD and left. In 2010 she succeeded in a claim for indirect sex discrimination.

During her notice period she was offered an alternative position that would have allowed her to address her childcare difficulties but turned it down.

In the ET Ms Debique was awarded compensation for injury to feelings but not for loss of earnings, as it was held that she had failed to mitigate her loss by turning down the alternative position.

Practical Implications

The EAT agreed. The test was whether the refusal of the new employment was unreasonable. The offer would have ended the discrimination, was clear, and had been made in writing. Ms Debique had also had access to legal advice. The EAT decided that in these circumstances the decision to

This case may be more significant for larger employers, who may be able to avoid costly claims by offering suitable employment elsewhere in the organisation. On the other hand,

turn down the offer was unreasonable. Ms Debique had failed to mitigate her loss and was therefore not entitled to any award for loss of earnings.

employees may be able to argue that alternative employment elsewhere was not offered even though it was available, thereby impacting on their ability to mitigate loss.



New test in whistle-blowing cases

Employees and workers can claim compensation if they are subjected to detrimental treatment by their employer when they make a “protected disclosure”, more commonly known as “whistle-blowing”.

In *NHS Manchester v Fecitt*, the English Court of Appeal has decided the whistle-blowing must “materially influence” the employer in their treatment of the whistle-blower for this sort of claim to succeed.

Mrs Fecitt was an experienced nurse working at a medical walk-in centre. Supported by two colleagues, she told her line manager about her concerns that another nurse was making false claims about his qualifications and experience. This was a “protected disclosure”. The nurse making the false statements apologised and promised not to do so again. Management decided to leave the matter at that.

Mrs Fecitt and her colleagues were unhappy with the way the matter was dealt with and continued to pursue the issue. This caused divisions amongst the staff, as some supported Mrs Fecitt and some supported the other nurse. Some of the other members of staff directed unpleasant



treatment towards Mrs Fecitt, including a threatening phone call. The working atmosphere became increasingly difficult, and eventually Mrs Fecitt and one of her colleagues were moved elsewhere. Their other colleague left the Centre altogether.

Mrs Fecitt and her two colleagues brought a claim against the Centre. They blamed the Centre for the treatment from the other staff, and argued that it amounted to unlawful detriment that had occurred because of the protected disclosure.

The Employment Tribunal found in favour of the Centre. The EAT allowed the nurses’ appeal, deciding that the Centre had to show that the detrimental treatment was in “no sense whatsoever” due to the protected disclosure.

The Court of Appeal decided that the EAT had been incorrect, and held in favour of the Centre. The protected disclosure had to “materially influence” the employer’s treatment of the whistle-blower. The Centre could be criticised for failing to better protect Mrs Fecitt and her two colleagues, but this was not deliberate and not due to the protected disclosure. The decision to remove them from the Centre was due to the difficult working atmosphere, not the disclosure.

The Court of Appeal has decided in this case that whistle-blowing cases will be treated differently from discrimination cases, where the employer must show that their actions were in no sense whatsoever due to discrimination. It was previously thought that whistle-blowing and discrimination would be treated in the same way.

Practical Implications

The “materially influence” test means it will be easier for employers to demonstrate that their treatment of an employee was not due to the making of a protected disclosure. However, these types of cases are increasingly common, and the compensation that can be awarded is uncapped. Employers should

have a whistle-blowing policy and ensure it is followed whenever an employee discloses information that could potentially be a protected disclosure. They should also consider what steps they might take to protect an employee who is the target of negative treatment from other staff.

Important new Equal Pay decision

The Court of Session has decided that female clerical workers can compare themselves with male manual workers in an equal pay claim. This was because both groups worked for a local authority under common terms and conditions.

In order to make an equal pay claim, a worker must be able to compare themselves with a worker of the opposite sex, or “comparator”. A comparator must be in the same employment, which means that they either work at the same establishment,



or at different establishments where common terms and conditions apply.

In *City of Edinburgh Council v Wilkinson and Others* the Claimants had been employed in “Administrative, Professional, Technical and Clerical” positions, or “APT &C” for short. They were mostly Clerical Assistants, Classroom Assistants and Social Care Workers. They sought to compare themselves with male “manual” workers, mostly gravediggers, road workers, refuse collectors and gardeners.

The two groups had different unions and had gone through different collective bargaining processes, so had different terms and conditions. The APT&C collective agreement was called the “Blue Book”. The manual collective agreement was called the “Green Book”. Both the unions and the employers recognised that the different agreements had resulted in discriminatory pay practices, so in 1999 a new collective agreement called the Single Status Agreement was put in place, and a new “Red Book” covering both groups, agreed.

The Employment Tribunal held that the Claimants did not work at the same establishment as they worked at different physical locations, despite both working for the Council. They were, however, employed on common terms and conditions as they were both working under the terms in the Red Book. The EAT held that they were both working at the same establishment, as well as having common terms and conditions.

The Court of Session decided that the comparators did not work at the same establishment, as “same establishment” meant the same place of work, which in the case of the APT&C employees meant the school or care establishment. They did, however, have common terms and conditions. The same conditions would still apply to a manual worker if they moved from their present location to the same establishment as an APT&C worker, so both groups worked under common terms and conditions.

This case shows that workers will be able to claim equal pay with comparators working under the same employment regime, even when they work at different establishments.



Government to consult on “protected conversations”

The Government has announced that it plans to hold a consultation on “protected conversations”.

In a “protected conversation” an employer and an employee will be able to have a “frank discussion” on an issue without the prospect of the content of the discussion being used in a Tribunal. The Government feels that this would give employers the security to discuss matters openly with staff. This is the same as a without prejudice discussion, being on intended to result in a resolution, the terms of which cannot be relied upon in subsequent proceedings. The details of this proposal, for example what might be involved in a “protected conversation”, and the precise effect of a conversation becoming protected, have not been put forward as yet.



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