

Can employees carry over holiday entitlement if they have been too ill to use it?

This question is the subject of much ongoing debate, particularly following recent European Court of Justice decisions ruling firstly that holiday does accrue during sickness absence and secondly that if employees are unwell during a planned holiday they can opt to take the holiday some other time. The Working Time Regulations which govern statutory holiday entitlement provide that holiday may not be carried forward from one holiday year to another.

An employment tribunal has now held that an employee on sick leave may in fact carry over holiday into the next leave year. In *Shah v First West Yorkshire Ltd*, the employee had booked four weeks' holiday commencing on 22 February 2009. However, because he had broken his ankle in January, he was on sick leave until 18 April. The employee was paid the higher rate of holiday pay for the time he had booked off rather than contractual sick pay. When he tried to reclaim his holiday entitlement, his employer claimed the days were 'lost' as he had returned to work after the start of the new holiday year on 31 March. The Tribunal decided this was a breach of the Working Time Regulations 1998 and held that an employee who falls sick during annual leave is able to take that leave at another time, if necessary in the following leave year.

It remains to be seen whether this decision will be appealed or indeed if it will be followed in future cases. It is a first instance decision so will not be binding on other tribunals but it is likely to be persuasive and shows that tribunals will

be sympathetic to employees not losing accrued holiday. Employers should bear this decision in mind in the context of requests to carry holiday forward to a new holiday year.

For further information and to discuss any of the issues raised in this article please contact our employment team on 01582 731161.

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