

FORFEITING ANNUAL LEAVE



Introduction

Last week, the Employment Appeal Tribunal (EAT) in the case of Lyons –v- Mitie Security Limited confirmed that workers can lose accrued untaken annual leave entitlement at the end of a leave year where they fail to follow an employer's rules relating to how much notice they are required to provide when submitting a request to take annual leave. The decision is important for employers given that it clears up the confusion surrounding whether workers are entitled to holiday pay when they have failed to comply with their employer's rules relating to annual leave requests.

The Law

The Working Time Regulations 1998 (The Regulations) state that a worker is entitled to take 5.6 weeks' annual leave each year. In order to exercise this right, a worker must provide the employer with twice as many days' notice as the amount of time he wishes to take (Regulation 15). The Regulations however provide an employer with the ability to vary this rule through a "relevant agreement" (for example, a contract of employment as in this case).

The Facts

Mr Lyons was employed by Mitie as a security guard. On 6th March 2008, Mr Lyons submitted a request to take 9 days annual leave before the end of Mitie's leave year

on 31st March 2008. His contract stipulated that any request for annual leave:- *"wherever possible should be submitted at least four weeks prior to the commencement of the holiday"* and that applications made at shorter notice would be considered *"on their merits and subject to staffing requirements"*.

Mr Lyons' request was refused and in his employer's response, he was informed in a letter:-

"As you are aware, it states in your contract you must give a minimum of 4 weeks' notice for an annual leave request and annual leave cannot be carried over to the following year".

As a result of Mitie's response, Mr Lyons argued that the requirement to provide 4 weeks' notice in his contract prevented him from taking his full entitlement before the end of the holiday year. He therefore resigned and pursued a claim of unfair constructive dismissal and a claim for a payment in lieu of accrued untaken annual leave under the Regulations.

EAT's Decision

The EAT stated that *"a worker's right to statutory leave is not inalienable"* and held that where a worker fails to follow the rules relating to the provision of notice set out in a document such as an employment contract, or where a request is refused on grounds which are not *"unreasonable, arbitrary or capricious"* (and the mechanism

for applying for annual leave is operated during the whole of the holiday year) which then results in a worker having insufficient time to take their outstanding leave entitlement before the end of the holiday year, they will forfeit this entitlement. It also confirmed that where the employer does not have its own rules, the worker must provide notice in accordance with Regulation 15 in order to qualify for paid leave.

Conclusion

The decision is helpful in that it makes clear the point that employers can operate rules which workers must adhere to when submitting annual leave requests even if this results in them losing annual leave at the end of the leave year.

Please note however that this principle of “use it or lose it” does not affect the right of workers to carry over unused annual leave where they have been unable to take it due to ill health as the European Court of Justice has held in the cases of *Pereda –v- Madrid Movilidad SA* and *Stringer & Others –v- H M Revenue & Customs* in 2009.



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