

Review

Employment



TAKE IT OR LOSE IT

In a decision that will warm the hearts of HR professionals and line managers alike, the Employment Appeal Tribunal has held in *Lyons v Mitie Security Ltd* that annual leave not taken close to the end of the relevant leave year can be lost by a worker, provided that the employer does not operate its leave procedures and conditions so as to deny requests for leave unreasonably. Employers can therefore legitimately turn down year-end requests to take annual leave if the request does not suit their business requirements, though prudent employers would make sure that their employees were aware of the requirement to take their leave during the holiday year in question and the risk of losing it if they do not.

Mr Lyons, a security guard, waited until the last month of the leave year to ask to take his remaining 9 days' paid holiday entitlement. He was only paid for the hours that he worked and his employer did not guarantee a minimum number of working hours per week. His contract of employment provided that all applications for holiday leave should be submitted at least 4 weeks prior to the commencement of the holiday (although applications for holiday leave at shorter notice would be considered on their merits and subject to staffing requirements). His contract of employment further provided that pay for holiday not taken in the relevant holiday year would be forfeited, i.e. that there was no carry-over permitted.

Mr Lyons' employer turned down the request for his holiday to be paid and he then raised a grievance. In its response, Mitie told him that he could not have paid leave as he had not complied with the 4 week contractual notice obligation for annual leave requests. Furthermore, it reminded him that his leave could not be carried forward. Mr Lyons resigned and brought claims of unfair constructive dismissal (alleging that the refusal to pay the 9 days' holiday pay was the last straw) and pay in lieu of untaken holiday leave pursuant to the Working Time Regulations 1998 (WTR). The Employment Tribunal dismissed both claims and Mr Lyons appealed to the EAT.

In practical terms, the EAT was asked to consider whether the employer was legally obliged to permit an employee to take all of his paid leave within the leave year if requested by the employee towards the end of the leave year at a time when it was not practicable to fit it in with the staffing patterns of the business. It held that it was not. The EU Working Time Directive envisages that there will be conditions for entitlement to annual leave. In the UK, these are set out in Regulation 15 of the WTR. Regulation 15 also provides that the WTR conditions can to some extent be varied by contract. In its judgment, the EAT stated that the request mechanism for annual leave must operate throughout the whole of the leave year and not in an unreasonable, arbitrary or capricious way by the employer so as to effectively deny lawfully requested entitlement. In other words, the employer could not impose tougher pre-conditions on leave later in the year, change them with little or no notice, or exercise any discretion within its rules in an unreasonable manner. Here Mr Lyons had known from the start of the year what the rules were and had had ample opportunity to comply with them. By the time he made his request he could not comply with the 4 weeks' notice requirement and working patterns of others made it reasonable for Mitie to exercise its discretion against him. It would be anticipated that a different outcome would have been reached had Mr Lyons' notice failure been either technical in nature (27 days instead of 28) or not actually prejudiced Mitie's ability to accommodate his request. Subject to that, the EAT noted the application of that mechanism could then legitimately result in loss of the untaken leave, even if the effect of this was that the individual took less than his WTR minimum paid leave entitlement.

“Employers can therefore legitimately turn down year-end requests to take annual leave”.

2010 - KEY EMPLOYMENT LAW DATES

1 January	Revised Acas Code of Practice on Time Off for Trade Union Duties and Activities came into force.
1 February	Compensatory award for ordinary unfair dismissal decreases from £66,200 to £65,300. The maximum amount of a week's pay for the purposes of calculating statutory redundancy payments and the basic award for unfair dismissal claims remains unchanged at £380.
April	Statutory Maternity, Paternity, Adoption Pay and Maternity Allowance increased from £123.06 to £124.88. Statutory Sick Pay remains unchanged at £79.15.
	'Right to train' introduced for employers with more than 250 employees.
	Equality Act due to receive Royal Assent.
	Additional Paternity Leave and Scheme due to be introduced on April 6 for parents of babies due from 3 April 2011.
	New 'Fit note' scheme to be introduced.
October	Equality Act implementation starts.
	Revised National Minimum Wage rates introduced with the adult rate due to be extended to 21 year olds.
November	Mandatory checking of the Independent Safeguarding Authority status of individuals prior to employing them in a regulated activity introduced.

The above timetable may be varied if there is a change of Government this year.

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