

In a helpful decision for employers, the EAT in *Sood Enterprises Ltd v Healy* has ruled that a worker on long-term sick leave could only carry over the basic four weeks' statutory holiday entitlement from one leave year to the next, and not the additional 1.6 weeks' leave.

Mr Healy went off sick in July 2010 and remained so until he resigned in June 2011. He then brought a claim in the Employment Tribunal for the holiday pay which he said had accrued during the two leave years he had been off. He argued that he was entitled to carry over the full 5.6 weeks' leave entitlement from 2010 under Regulations 13 and 13A of the Working Time Regulations 1998, reduced to reflect the holiday he had taken in 2010 prior to going off sick. The Tribunal found in his favour, accepting that the right of workers on long-term sick leave to carry over holiday applies to **all** the statutory holiday entitlement set out in the WTR, and not just to the minimum four weeks required by the Directive. SE Ltd appealed to the EAT, arguing that if there were to be any carry over at all it should be limited to the 20 days set out in Regulation 13, and not the additional eight, on the basis that the WTR expressly state that this additional holiday can only be carried over if there is a "relevant agreement" (essentially a contractual permission to do so) in place. As there was no such agreement, Mr Healy was not entitled to the additional holiday pay.

The EAT accepted SE Ltd's arguments and ruled that Mr Healy was only entitled to be paid in respect of the four weeks' statutory minimum holiday entitlement conferred by Regulation 13. It accepted that Regulation 13A only allows the additional 1.6 weeks' leave to be carried over if there is a relevant agreement in place between the parties. This was not the case here. In reaching this conclusion the EAT considered the recent European case law in this area, in particular the ECJ's judgment in *Neidel* which suggested that the Working Time Directive's rules on carry-over do not apply to any annual leave granted by Member States in excess of the four weeks' leave provided for by the Directive.

Clearly this decision is useful for employers, especially for those seeking to mitigate claims for unpaid holiday pay stretching back several years. It also reflects the approach set out by the UK Government in its Consultation on Modern Workplaces, in which it said that it would amend the WTR to limit the ability of workers on long-term sick leave to carry over annual leave from one holiday year

to the next to the four weeks' leave required under the Directive, i.e. excluding the additional 1.6 weeks' leave required by the WTR and any additional contractual leave. As we are still waiting for the Government's response to this Consultation, we do not know when these changes are likely to take place.

One question we have been asked is whether this decision affects the amount of holiday that women on maternity leave can carry over from one leave year to the next. The answer is no. This case only dealt with the position of workers on long-term sick leave and it would be dangerous to draw any analogies with that of women on maternity leave. Such women remain entitled to all their contractual terms (except those relating to remuneration) during their maternity leave period including their full contractual holiday entitlement. Whilst the WTR do not allow a worker to carry over the basic four-week leave entitlement, in light of European case law (in particular the ECJ's decision in *Merino Gómez*) it is likely to amount to discrimination to prohibit a woman from carrying over her full contractual holiday entitlement, assuming she has been unable to take it during the leave year in which it accrued. In most cases this situation should be largely avoidable by encouraging pregnant women to use up their current year's holiday entitlement before they go off on maternity leave. In any event, the Government also indicated in its Consultation on Modern Workplaces that it proposes to allow carry-over of leave which is untaken due to absence on maternity, adoption, parental and paternity leave, but unlike long-term sick leave this will **not** be limited to the basic four-week entitlement under Regulation 13, "as to do so would appear inconsistent with the relevant CJEU judgments".

### Contact

#### Caroline Noblet

Partner

T +44 20 7655 1473

E caroline.noblet@squiresanders.com