

## Employment - Statutory Notice: Holiday Requirements

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The Employment Appeal Tribunal has held that the notice requirements a worker has to observe to exercise his holiday entitlement are not superseded by an inalienable right to take the full holiday entitlement granted by regulation 13 of the Working Time Regulations 1998 during the applicable holiday year.

### Summary

The Employment Appeal Tribunal (EAT) has held that the notice requirements a worker has to observe to exercise his holiday entitlement are not superseded by an inalienable right to take the full holiday entitlement granted by regulation 13 of the Working Time Regulations 1998 (WTR) (regulation 13) during the applicable holiday year.

### Background

Every worker is entitled to at least four weeks' paid annual leave (Article 7(1), Working Time Directive (2003/88/EC)) (Article 7(1)). In the UK, workers are currently entitled to 5.6 weeks' holiday in each holiday year (regulation 13). A worker may have a contractual right to holiday in excess of the statutory entitlement.

A worker who wishes to take holiday must give notice to his employer twice as many days in advance of the number of days to which the notice relates. An employer can respond with a counter-notice refusing the holiday request, either in whole or in part. These provisions can be varied or excluded by a contract or other relevant agreement

(regulation 15, WTR) (regulation 15).

Where, during any period, a worker is entitled to a rest period, rest break or annual leave both under a provision of the WTR and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable (regulation 17, WTR) (regulation 17).

### Facts

L's contract with M confirmed his entitlement to the statutory minimum holiday and provided that:

- Holiday requests had to be submitted on M's standard form at least four weeks before the holiday start date wherever possible. Applications for holiday on shorter notice would be considered on their merits and subject to staffing requirements.
- All holiday had to be taken during the relevant holiday year and could not be carried forward to the following year.
- Pay for holiday entitlement not taken in the relevant holiday year would be forfeited.

At the beginning of March 2008, L had nine days' holiday outstanding which needed to be taken by 31 March (the end of the holiday year). On 6 March 2008, L sent a fax to M requesting



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payment for those nine days before the end of the holiday year. He did not make a request for specific days as holiday and did not use M's standard form.

At the beginning of April, after discovering he had not been paid for the nine days, L brought a grievance. When this was rejected, he resigned and presented a claim for unfair constructive dismissal and pay in lieu of untaken holiday. The tribunal dismissed both claims. L appealed.

### Decision

The EAT upheld the appeal, holding that:

- The tribunal had failed to deal properly with the key question in relation to the constructive dismissal claim: whether M had breached the contractual provisions governing L's exercise of his right to holiday.
- It should reject L's argument that, applying regulation 17, the more favourable statutory right to take holiday during the holiday year overrode a contractual provision which could deprive him of that right. The WTR did not support the proposition that statutory holiday was an inalienable right that effectively obliged employers to ensure that workers took the holiday to which they were entitled. The annual leave position was distinguished from the rest period position considered by the European Court of Justice (ECJ) in *Commission v UK*, which held that employers were not obliged to ensure that workers took all of the rest to which they were entitled.
- A worker's right to statutory holiday was subject to the notice provisions set out in regulation 15 (as varied by contract, if applicable). Notice provisions had to be operated by an employer in a manner that was not unreasonable, arbitrary or

capricious so as to deny any lawfully requested entitlement. If operated correctly they could, as envisaged by the ECJ in *Stringer and others v Revenue & Customs Commissioners*, result in the loss of the right to leave that had not been taken at the end of the leave year.

- The tribunal had failed to consider the manner and timing of L's holiday request, the merits of a request on shorter notice or M's staffing requirements for that period. The EAT therefore remitted the case to a fresh tribunal for these matters to be decided.

**Case:** *Lyons v Mitie Security Ltd UKEAT/0081/09.*

### Contacts

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