

Issue: Carry over of unused Holiday - due to absence

The company's holiday year ran from 1st January – 31st December with the rule being that any holiday not used was unable to be carried over to the next holiday year. An employee had booked four weeks holiday in order to use his remaining holiday entitlement prior to the end of December, which was agreed by his employer. Prior to taking his holiday the worker broke his ankle and had to take three months off work, due to return 5th January.

As the employee was absent from work on sick leave, he asked his employer for the four weeks holiday to be rescheduled and to be taken at a later date, but as this would fall into the next leave year, the employer refused. The employee brought a claim to the Tribunal under the Working Time Regulations 1998 (WTR).

Employment Tribunal – Verdict

The employee's claim was accepted by the Employment Tribunal who found that the Working Time Regulations (WTR) can be interpreted in accordance with the European Court of Justice (ECJ) decision *Pereda v Madrid Movilidad SA*.

Therefore, the refusal from the employer to carry over the leave was a breach of the Working Time Regulations (WTR).

- ⌘ Employers should not adopt a 'use it or lose it' approach to holiday accrued during sick leave;
- ⌘ Employment contracts may also need to include a clause that deals with sickness during holiday;
- ⌘ Employers should be consistent in how they treat holiday during sick leave;
- ⌘ Consistency should be sought in the carrying over of holidays unused.

Learnings for employers

- ⌘ To be safe and as a matter of good practice, employers should allow employees to accrue and take holiday during sick leave;
- ⌘ For the same reason as above employers should consider allowing holiday leave to be carried forward if not able to take due to illness;
- ⌘ Employers should review sickness and holiday policies in light of this consideration;
- ⌘ Employers can still observe the strict legal position that they are not obliged to allow leave to be carried over to the next year, but this may be open to challenge especially in cases of sickness;

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Sources : CIPD: <https://www.cipd.co.uk/>