
Holiday entitlement: why 'use it or lose it' won't always apply

The New Year's approaching, and some of your workers still have annual leave to take, before it's lost in line with your annual leave policy. Should you remind them to take it, or ignore it and get a little more work out of them?

You should diligently bring it to their attention – otherwise they may be able to carry it over anyway, whatever your policy says. And if their employment ends before they take leave you may have to pay them in lieu.

This was confirmed in two recent cases that were considered together by the European Court of Justice (ECJ). The ECJ said that national law couldn't allow for the automatic loss of untaken annual leave at the end of a specified period **unless** the employer can show that it had enabled, through 'adequate information', the worker to take the leave.

'Specified period' includes the leave year or the end of the employment, and might include both: in one of these cases, the employee had accrued 51 days' annual leave over 2 years, and then the employment ended so the question was whether the employer had to pay in lieu of the holiday.

What this means for you

Have an annual leave policy giving at least 5.6 weeks' annual leave. For a full-time employee, that means at least 28 days a year (which can include bank holidays). Make sure employees know that they may lose the leave if they don't take it.

4 weeks of the 5.6 come from EU law. If a worker isn't able to take holiday, for example because of long-term sickness, you must allow them to carry over at least the EU-related portion, i.e. whatever remains of **the first** 4 weeks, unless agreed otherwise.

The 'leave-year' is normally defined by the employment agreement so that it's the same for all workers. If it's left undefined, it will start on the date that the job began if the job started after 1 October 1998, or it will start on 1 October if the job started on or before that date.

If an employment relationship is coming to an end, you might want an employee to take their outstanding holiday during the notice period so that you don't have to pay them for it when they leave. If you want a worker to take annual leave at a specific time, then in addition to any rules set out in the employment contract or policy, the notice you give of this intended holiday must be at least double the length of the holiday.

How we can help

Our **Employment agreement** sets out workers' annual leave entitlement, defines the leave-year and addresses the carry over of holiday. In our **Employee handbook**, the *Notification of sickness or other absence policy* deals with holiday-related issues.

Redundancy redeployments: offer a trial or be in court for a while...

Your business ceases doing a certain type of work. Unfortunately, that means several employees' roles are unnecessary. To one of them you're able to offer a similar role, which you consider to be a suitable alternative position.

She refuses the new role because it's a lower grade (though you'd protect her salary for a year), its location (though it was only a few miles away) and because of the other members of the team.

And then she brings a claim for unfair redundancy dismissal at an employment tribunal – she argues that your procedure was unfair because you didn't offer a trial period in the new position. Is she right?

She is right. A recent Court of Appeal ruling suggests that a redundancy dismissal will always be unfair if you offer suitable alternative employment but no trial period.

Redundancy is a potentially fair reason for dismissal, but for it to be fair you must follow a fair procedure, including various steps required by legislation. That includes offering suitable alternative positions, if there are any. And if such a position is offered, you must also offer a trial period in the new role. At the end of the trial period, they will have a second chance to accept redundancy.

This case concerned a London local authority (Council). This Council has had to make significant financial cuts to various services over recent years, and therefore closed down libraries. This employee's position was no longer needed so she was redundant, but a less senior position in another library was offered. Based on erroneous HR advice, her managers didn't offer a trial period.

With hindsight, her managers don't think there'd have been anything to gain from the trial period – she knew the job and the library in which she'd be based, and she knew her new colleagues. In addition, her salary was to be protected for a year. She said she didn't want the new position for various reasons, and the trial period didn't seem to be relevant.

However, as confirmed by the Court of Appeal, not offering the trial meant that the procedure was unfair and therefore the dismissal was unfair.

What this means for you

When making employees redundant, always consider whether you can offer suitable alternative employment, and if you can – **always** offer a trial period.

Note, however, that although in theory she's won her case, the compensation award is likely to be reduced significantly. That's because, had the trial period been offered, the employee may still have turned down the position and so been made redundant. Compensation for unfair dismissal reflects the loss that would have occurred.

The Court of Appeal doesn't decide on factual issues like that, and has therefore sent the case back to an employment tribunal to consider whether the employee would have turned down the job.

How we can help

You may wish to use the *Redundancy policy* in our **Employee handbook**.

Employee dismissals: procedures always matter

You're responsible for safety in a business that can (if mistakes are made) expose members of the public to considerable risk. You learn that an employee has developed a medical condition that could increase this risk. Someone else – the 'decision maker' – is considering whether you can

continue to employee this person, but you're adamant it's unsafe and you tell that to the decision maker, who is of a lower grade to you. He therefore holds a meeting with the employee following which he tells the employee that he can't continue in that position. Is that fair?

Probably not. In a recent case, an employment tribunal ruled a similar dismissal unfair because the person who actually made the decision didn't have a meeting with the employee.

In very simple terms, the claimant was a pilot who developed a fear of flying. For some time the pilot was on and off work whilst having therapy and other medication. The airline considered, taking into account medical evidence, the best course of action. This included the pilot having a consultation with the airline's occupational health doctor and a high-level review meeting about the subsequent report.

Inconclusive medical evidence was put to the chief operating officer (COO), who was responsible for safety. He decided that they couldn't take the risk of the pilot flying again. There was more discussion within the airline, but the COO's decision remained unchanged. He communicated that decision to the ostensible decision maker, who then had a meeting with the pilot and subsequently told him of the decision and offered an alternative ground-based role. The pilot refused the offer, and so was dismissed.

Crucially, the official decision maker didn't actually make the decision, and it was mainly for that reason that the decision was unfair.

Compensation was, however, reduced by two thirds because a fair procedure may have led to the same decision. The judge sympathised with the COO's position, as he did have legitimate safety concerns, but the airline's disciplinary procedure didn't provide for his involvement.

A key problem with the procedure was that the actual decision maker, the COO, never met the claimant. They didn't respond to representations by the claimant, nor consider all of the medical evidence.

Ignoring evidence was a problem in another recent case, in which a bus driver was dismissed for testing positive for cocaine. The bus company refused to accept medical evidence that he provided and refused to conduct further tests themselves. They also ignored other factors, such as the improbability of a 61-year-old diabetic with a 21-year unblemished record taking cocaine. Even if he had, the company's own evidence suggested he was at most an infrequent and low-quantity user: there was no suggestion that he drove whilst under the influence of the drug, meaning the company ignored the principal question.

What this means for you

However certain you are of your position, you should always follow a fair procedure when deciding on an employee's future. At the very least, that should include meeting the employee to address their concerns and considering all of the evidence.

How we can help

Our **Employee handbook** has a *Medical examinations* policy, which could assist if a worker has a medical condition that interferes with their ability to work.

On the other hand, if misconduct is the problem, you'll want to use our *Grievance and disciplinary procedures* policy. We also have a series of letters taking you through a disciplinary process.