



A recent case that went through the Employment Appeal Tribunal (EAT) answered a couple of common queries that I get asked regularly. It involved the scenario where employees don't take their full entitlement to statutory annual leave through personal choice. In this situation, what happens to those annual leave days? Must the untaken days be carried over or are they lost forever?

The case that came before the EAT was *Shannon v Rampersad & Rampersad T/A Clifton House Residential Home 2015*.

Although Shannon (S) had a day job, he was on-call in a care home owned by an acquaintance between 10.00pm and 7.00am. He was allowed to sleep during those hours but had to respond to any request for assistance by the night care worker on duty. In return, S received free accommodation at a flat in the care home and was paid the national minimum wage (NMW) on the rare occasions he was called on to help. So the queries were;

1. Could S carry over his untaken statutory annual holiday?
2. At what rate of pay should S be paid when he was asleep and waiting to be called to assist

As you will be aware The Working Time Regulations 1998 (WTR) grant all employees the right to statutory paid annual leave. Employees who work five days per week are entitled to 5.6 weeks' annual leave; (part time workers who work fewer days will have their entitlement calculated on a pro rata basis). You

will be aware from previous HR Broadcasts that it has long been the case that the employer must allow an employee to carry over certain unused annual leave entitlement from one holiday year to the next if they've not been able to take it due to:

1. Long-term sickness absence; or
2. Maternity, additional paternity, adoption leave or shared parental leave.

The question in this case was what happens where an employee doesn't use some or all of their statutory annual leave entitlement through personal choice? Do they lose it or must the employer automatically carry it over into the next holiday year?

Whilst in this role S never took any statutory annual leave **by choice**, even though he was entitled to it under the WTR. When he was dismissed S claimed that Rampersad should have carried his statutory annual leave entitlement forward automatically and, as it had failed to do so, he was entitled to a payment in lieu totalling £15,000. The Employment Tribunal (ET) decided that as S could have requested annual leave but chose not to do so, he could not carry forward his entitlement to it or any right to pay in lieu. The case then went to the EAT.

The EAT upheld the decision of the ET. The EAT stated that S was neither *unable or unwilling to take annual leave due to reasons beyond his control*.

Therefore, where an employee doesn't take their statutory annual leave through personal



choice, the rule is quite simple: use it or lose it. However, where an employee is prevented from taking their entitlement due to business reasons, e.g. they have too much work; then it is helpful to have a holiday policy that spells out what is to happen. Our advice in these circumstances is to always consider allowing them to carry some or all of it over.

In addition S also claimed that he should have received the NMW between 10.00pm and 7.00am, not just when he was called upon but also when he was resting / sleeping. The EAT disagreed and held that he was available for work during those hours but not always working so not entitled to the NMW for the entire duration.

However, please remember that decisions of this nature are always fact sensitive; there is no single rule for all situations.