

# Online Update

## Essential Information for Employers



March 2009

### In the News

#### Pre-employment medical questionnaires – the pros and cons

According to recent reports, Cheltenham Borough Council is suing its former Managing Director for failing to mention her history of depression on her pre-employment medical questionnaire.

Such questionnaires can be helpful for employers to assess the employee's fitness for the role, but they have their disadvantages too.

Rejecting a candidate due to a medical condition revealed in the questionnaire could amount to disability discrimination. If the decision is based on mere assumption about the condition (eg that depression will inevitably result in long periods of absence) this is direct disability discrimination, which cannot be justified. In order to avoid disability discrimination, employers should investigate any medical condition, in consultation with the candidate and his or her medical advisers, in order to assess whether it affects his or her ability to do the job and if so whether any reasonable adjustments can be made. Rejecting a candidate on the basis of a past illness is unlikely to be justified, unless there is clear medical evidence showing that a recurrence is highly likely.

There is also a risk that a medical questionnaire could reveal information that is not relevant (eg a disability which has no impact on the candidate's ability to do the role). If the employer rejects the candidate, or treats them less favourably during employment, this could be seen to be due to the disability, even if it is for an unrelated reason.

Instead of wide-ranging questionnaires, the safest route for employers is to select the chosen candidate and then ask whether he or she suffers from any condition which may affect his or her ability to carry out the role. This will enable the employer to assess whether the employee is fit for the role, but avoids the risk of gathering irrelevant information in relation to unsuccessful candidates which could nevertheless form the basis of a disability discrimination claim.

#### Employees left out in the cold?

Recent heavy snowfalls meant that one fifth of employees were unable to reach their workplace (according to a survey by the Federation of Small Businesses). Do those employees have a right to be paid for the days snowed in at home?

As a general rule (and subject to any contractual provision which says otherwise – eg sick pay), employees are not entitled to be paid when they are not working. So, for example, if an employee had to return a day late from holiday because of a cancelled flight, it would be reasonable for the employer to require that extra day to be taken either as additional holiday or unpaid leave. The same approach could legitimately be used for employees who fail to attend work because of the snow and consequent travel disruption. However, since this affected so many and was for a relatively short period, from an employee relations point of view, it may be preferable to pay employees anyway (and not require them to take it as holiday). Many employers appear to be taking this approach. If more severe weather is forecast, employers may wish to consider issuing a communication about whether or not employees will be paid for future absences.

*“...the safest route ... is to select the chosen candidate and then ask whether he or she suffers from any condition which may affect his or her ability to carry out the role.”*

*“As a general rule ... employees are not entitled to be paid when they are not working.”*

The position is the same for employees who have to stay home to look after children whose schools are closed (ie no entitlement to be paid unless the contract provides otherwise). Whilst such employees may also have a right to take unexpected time off for dependants, this is usually unpaid unless the employer's policy provides for pay. These employees should, therefore, be treated the same as those who cannot make it to work due to the weather, with one exception – employers who require staff to take the time off as holiday should offer these employees the option of taking time off for dependants instead.

**Striking employees**

Do employees have a right to strike? This issue has come under the spotlight recently with a series of strikes across the UK in protest against the use of foreign labour at the Lindsey oil refinery.

Striking employees complained that an Italian contractor used Italian and Portuguese workers at the refinery to avoid paying collectively negotiated wages. Under the European Posted Workers Directive, an Italian employer can bring its own workers to perform a contract in the UK and they must be paid at least the UK national minimum wage, but they have no right to benefit from collectively agreed terms enjoyed by local workers. Whilst unions have called for the Directive to be amended, the European Commission does not see the need for change.

Under UK law, employees have no automatic right to strike and will be in breach of their employment contracts by doing so. However, dismissing striking employees will be unfair in some circumstances, depending on who participates in the strike and whether it has been authorised or endorsed by the union. The circumstances in which employers can dismiss employees who engage in industrial action – including strikes – are summarised in the table.

*“Under UK law, employees have no automatic right to strike and will be in breach of their employment contracts by doing so.”*

<i>Participants in action</i>	<i>Type of action</i>	<i>Dismissal during action</i>
Includes union members	Unofficial – ie the union has not authorised or endorsed it	No successful unfair dismissal claims (even if only some of the participants are dismissed).
No union members involved	Other	No successful unfair dismissal claims provided all participants are dismissed (and none re-engaged within 3 months).
Includes union members	Official (but not protected) – ie the union has authorised or endorsed it	No successful unfair dismissal claims provided all participants are dismissed (and none re-engaged within 3 months).
Includes union members	Protected – ie it is in contemplation or furtherance of a trade dispute and the union has complied with detailed balloting and notice requirements	Automatically unfair to dismiss any employee for participating. Limited ability to dismiss fairly if strike continues beyond 12 weeks.

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Secondary action – like the sympathy strikes at other sites, in support of the Lindsey workers – cannot be protected. However, employees who are lawfully not working, former employees and trade union officials (representing members) may picket at or near the workplace, but only for peacefully obtaining or communicating information, or peacefully persuading others to work or abstain from work. Picketing outside these rules may attract civil, and possibly criminal, liability.

## Case Watch

### Religious discrimination – whose beliefs are protected?

The employee, who was of the Hindu faith, was an adviser at an advice centre. His manager, who was also Hindu, dismissed two colleagues of a different faith. They believed they had been dismissed because of their religion and, when they later came to control the advice centre's board, set about getting rid of the manager. The employee was called in to give evidence at a disciplinary hearing and was pressured to incriminate the manager. He argued that this was unlawful harassment on religious grounds, as the employer had wanted to oust the manager because of his Hindu faith.

The Employment Appeal Tribunal upheld the employee's claim. It accepted that the conduct amounted to harassment and that the reason for the treatment was the manager's religion. The EAT also confirmed that employees can bring a harassment claim not only if they are harassed because of their own religion, but also if the harassment is because of the religion or beliefs of another person.

***This case is a reminder that the rules on religious discrimination protect employees from harassment not only on the grounds of their own religion or beliefs, but also the religion or beliefs of others. The same is true of harassment on the grounds of age, sex, sexual orientation, race and disability. This is perhaps most likely to arise in practice in the context of office jokes or banter which although not targeted at any particular employee, could cause offence. Employers should ensure they have clear equal opportunities policies that are communicated to staff, consistently enforced and backed up by regular training sessions.***

*Saini v All Saints Haque Centre, Bungay and Paul*

### Redundancy – must employers consult on selection criteria?

The employee was one of 4 employees made redundant from a pool of 14, following a downturn in the employer's business. The senior HR manager had identified the selection criteria and allocated marks for service, absence, sickness and discipline from information in personnel files. The regional manager, who had worked with the employees at risk, allocated scores for the other selection criteria, including performance, commitment and attitude, skill base and team working. Employees at risk were told the selection criteria but not how the marking would be done. The employee challenged her redundancy selection as unfair and won.

The dismissal was unfair because the employer had not consulted with the unions or employees on the method of selection, the criteria to be adopted or the marking process. More importantly, key selection criteria (eg commitment, attitude and team working) were subjective and were left to the regional manager, who was unable to support his marking with any objective company documents, eg performance appraisals. He had not discussed the scoring with any other manager nor had he made any notes of his reasoning.

***This case highlights the importance of not only having fair selection criteria, but also ensuring they are applied fairly. As well as being fair and non-discriminatory, redundancy selection criteria should be capable of objective measurement and verification, eg against performance appraisals. Employers should also ensure that, where possible, more than one manager is involved in scoring and records are kept of the allocation of points against the chosen criteria.***

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*Whilst it is helpful to agree selection criteria with employees or their representatives, this is not always practical and employers are not obliged to do so. However, employers should at least explain to those at risk what the selection criteria are, how they have been applied, and give the employee the opportunity to make comments. Ideally, employers should also document their reasons for using the chosen criteria, their assessment of any potentially discriminatory impact, and their consideration of possible alternatives and reasons for rejecting them.*

*E-Zec Medical Transport Service Limited v Gregory*

### **TUPE and insolvency**

The employee was a director of a food wholesale business. When the business ran into financial difficulties, he approached insolvency practitioners and tried to sell it. A buyer was identified, but was not willing to purchase the business as a going concern due to the size of its debts. The company was put into administration and its assets sold on the same day (to avoid the buyer taking on all of its debts). The employee was then dismissed and brought an unfair dismissal claim. The question was whether his employment transferred to the buyer under TUPE.

The EAT ruled that the employee did not transfer to the buyer and could not bring an unfair dismissal claim. Even before the company had gone into administration, the administrator had discounted the possibility of continuing to trade the business in administration to try to rescue it as a going concern. The purpose of this administration was, therefore, to liquidate the company's assets and achieve the best result for its creditors – which involved the immediate sale to the buyer. This meant that, under TUPE, the employee did not transfer to the buyer.

***TUPE applies to the sale of a business in insolvency, but special rules apply. Broadly, employees will not transfer if administrators are appointed with a view to liquidating the company's assets where there is no intention of continuing to trade the business in administration. If, however, the purpose of the administration is to continue the business as a going concern, employees will transfer to the buyer (but there is more scope to vary their terms and some employee debts will be taken over by the Secretary of State).***

***This case suggests that in a "pre-pack" arrangement – ie where a business is sold immediately after it goes into administration as part of a pre-arranged deal – employees will not always transfer to the buyer. This is likely to make some pre-pack sales more attractive to buyers. Pre-pack sales can also help minimise negative publicity, as customers, suppliers and stakeholders are told that the business is being sold at the same time as being informed it is going into administration. This avoids the risk of the business losing further value through trading in administration for a lengthy period.***

***This case is due to be appealed. [Online Update](#) will let you know if the position changes.***

*Oakland v Wellswood (Yorkshire) Ltd*

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## *New Law*

### **Holidays**

On 1 April 2009, the statutory minimum holiday entitlement will increase from 4.8 weeks to 5.6 weeks, which equates to an increase from 24 days to 28 days for full-time employees. Of the 28 days, 8 days can be carried over to the following holiday year but none of the holiday can be paid in lieu. The increase will have little impact on employers who already allow staff to take public holidays in addition to 20 or more days annual holiday.

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### Statutory maternity, adoption and paternity pay and statutory sick pay

On 5 April 2009, the lower rate of statutory maternity pay, and the rates of statutory adoption and paternity pay, will increase from £117.18 to £123.06 per week. Statutory sick pay will increase from £75.40 to £79.15 per week on 5 April 2009.

### Flexible working

The Government has confirmed its plan to extend the right to request flexible working in April 2009 to parents of children up to the age of 16, despite requests from business organisations to delay this in the current economic climate. The right currently applies to parents with children up to the age of 6 (or 18 if disabled) and carers of dependent adults.

### Statutory dismissal and grievance procedures

The statutory procedures will be repealed on 6 April 2009, but will continue to apply to some disciplinary and grievance situations even after that date. Broadly, employers will be obliged to follow the existing statutory procedures if:

- they have taken any steps towards disciplinary action or dismissal before 6 April 2009, whether or not the employee has been invited to a meeting to discuss the issue
- an employee raises a grievance about matters that happened entirely before 6 April 2009 or
- an employee raises a grievance about matters that started before 6 April 2009 and continue after then, provided the grievance is raised by 4 July 2009 (if the time limit for bringing a claim would be 3 months) or 4 October 2009 (if the time limit for bringing a claim would be 6 months).

From 6 April 2009, employers must still act reasonably when dealing with disciplinary and grievance issues, and follow the basic principles of fairness set out in the ACAS Code of Practice on Discipline and Grievance. Whilst the Code will be non-binding, an unreasonable failure to follow it could render a dismissal unfair and/or result in an uplift in Employment Tribunal compensation by up to 25%.

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## Watch This Space

### Holidays – in sickness and in health?

The European Court has ruled (in *Stringer v HMRC*) that workers on sick leave:

- continue to accrue statutory holidays
- can take paid holiday whilst off sick
- can carry over unused holidays to the next leave year.

The impact on UK employers depends on the UK courts who now have to decide if the UK Working Time Regulations need to be amended. For now, private sector employers should hold off revising employment contracts and policies on sickness absence and holidays. Any changes made now might not fit in with the ruling of the UK courts. Until then, private sector employers can continue to apply the current rules on statutory holidays:

- workers cannot take statutory holidays while they are absent on sick leave
- workers who are absent for an entire holiday year lose their right to statutory holidays for that year and
- workers who are absent for part of the year but return to work during the leave year should be allowed their full statutory holiday entitlement for that leave year.

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If a private sector employee challenges this approach, any claims are likely to be put on hold, giving employers time to deal with them once the definitive ruling of the UK courts is known.

By contrast, employers in the public sector will be bound by the European ruling immediately and should seek advice on their position.

The European Court ruling deals only with the four-week minimum holiday entitlement under European law and it will be for the UK courts to decide if it applies to the extra 0.8 weeks provided under the UK Working Time Regulations (increasing to 1.6 weeks from 1 April 2009). Any additional contractual holiday entitlement can be governed by rules in the employment contract.

**Equal treatment for agency workers**

Last year, the European Parliament adopted the Temporary Agency Workers Directive which gives agency workers the right to equal treatment in terms of basic employment conditions. The UK Government has said that it hopes to introduce regulations to implement the directive in the UK during the current parliamentary session, which ends in November 2009. However, the UK has until December 2011 to implement the directive and employer groups are urging the Government to delay implementation until then. The Government will publish a public consultation this year on how the directive should be implemented and when the regulations should come into force.

*“...the Temporary Agency Workers Directive ... gives agency workers the right to equal treatment in terms of basic employment conditions.”*

**Cases to watch**

<i>Case</i>	<i>Subject Matter</i>	<i>Court and Date</i>
<i>R v Secretary of State for Trade and Industry</i>	Whether the default retirement age of 65 breaches the European Directive on age discrimination.	European Court, 5 March 2009
<i>Stringer v H M Revenue and Customs</i>	Whether employees can take paid holiday while on sick leave and/or carry forward unused leave to the following holiday year.	House of Lords, late 2009
<i>Rolls Royce plc v Unite The Union</i>	Whether using length of service as a criterion for redundancy selection can be justified under age discrimination law.	Court of Appeal, early 2009
<i>Coleman v EBR Attridge LLP</i>	Whether discrimination on the grounds of association with a disabled person is unlawful.	Employment Appeal Tribunal, late 2009
<i>Ladele v London Borough of Islington</i>	Whether the Claimant was discriminated against on the grounds of religion when she was dismissed for refusing to conduct civil partnership ceremonies.	Court of Appeal, late 2009

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## *Did You Know?*

### **Welfare counselling tax exemption**

Some types of welfare counselling or employee assistance programmes provided by employers are exempt from tax and national insurance contributions. The exemption covers counselling for issues such as stress, problems at work, debt problems, career concerns, equal opportunities, harassment and bullying, but does not cover certain specified forms of counselling including medical treatment of any kind and legal advice. If you would like further information about the exemption, please speak to your usual Employment Department contact.

## *Stop Press*

### **Immigration changes for highly skilled workers**

The Government has announced key changes that will make it much harder for highly skilled migrants to come to the UK under Tier 1 of the points-based system. From 1 April 2009, highly skilled migrants seeking entry will need to have at least a master's degree and minimum earnings over the previous 12 months of £20,000 (in addition to satisfying the other Tier 1 points-based criteria). This will significantly reduce the number of non-EEA nationals who will qualify under Tier 1, as those with a bachelor's degree will no longer qualify. Employers considering hiring individuals who do not meet the new criteria should encourage them to apply before 1 April. It is not clear whether the changes will also apply to those already working in the UK who wish to extend their stay under Tier 1, so these individuals should also consider applying for an extension before 1 April 2009.

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## *Our Work*

Since the last edition of **Online Update**, our work has included:

- attending an All Party Parliamentary Group meeting, led by Harriet Harman, to speak on key legal issues arising from the forthcoming Equality Bill
- acting for the purchaser of a business in a "pre pack" administration sale and advising on the application of TUPE
- advice on preparing for trade union collective consultation on a site relocation and proposed employment contract changes
- assessing an employer's rights and obligations on reducing the scope of an outsourcing contract
- preparing documentation for dual UK and overseas employment contracts in relation to a secondment abroad
- advising an insolvent business on the implications of the "adoption" of the employment contracts of its employees
- advising on the immigration requirements for non-UK academics and business visitors making lecture tours and business trips to UK institutions
- advising on the extension of a UK ancestry visa under the immigration rules.

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If you have any queries on this edition of **Online Update**,  
please contact any member of the Employment Department

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