

Online Update

Essential Information for Employers



May 2010

In the News

Travel delays – employees left stranded?

The recent travel disruptions caused by ash from the Eyjafjallajökull eruption in Iceland left as many as 150,000 British workers stranded abroad, according to travel association ABTA. This raises the question of whether employers are obliged to pay staff who could not get to work.

As a general rule, employees are not entitled to be paid when they are unable to get to work because of travel disruptions, unless the employment contract provides otherwise or unless the travel was itself for business purposes. Employers could ask the employee to take the additional time as either unpaid leave or as paid holiday. Given the extreme circumstances, some employers have chosen to pay staff and allow them to make up the time elsewhere or to work remotely where possible.

Some businesses connected with the airline industry or reliant on goods to be delivered by air were unable to provide staff with work during the disruption. In these circumstances, employees would usually be entitled to be paid so long as they are ready and willing to work, unless the employer does not guarantee any minimum hours (eg casuals and workers on "zero hours" contracts). Employers wishing to stand staff down temporarily without pay can only do so if there is an express term in the employment contract allowing this, or if the employee agrees. Otherwise, withholding pay would be a fundamental breach of the employment contract allowing the employee to sue for the wages withheld or to resign and claim constructive dismissal.

Equality before the law

The new Equality Act has received Royal Assent and most of its provisions are due to come into force in October 2010. The Act consolidates and harmonises the existing rules on discrimination, but what will it mean for employers in practice?

Whilst much of the law will remain unchanged, the Equality Act introduces a few new measures relevant to employers, including:

- making it clear that an employee can complain about discrimination or harassment based on someone else's sex, race, religion or belief, sexual orientation, disability or age – eg an employee who cares for a disabled or elderly relative
- banning questions about a job applicant's health, so that if a disabled candidate is asked about their health before a job offer is made, it will be up to the employer to prove it has not discriminated on the grounds of disability
- allowing positive discrimination in recruitment and promotion to redress an imbalance in the workforce but only when choosing between two equally-qualified candidates – eg selecting a female candidate over an equally qualified male to join an all male management team
- making employers liable for the repeated harassment of employees by third parties (eg customers, clients and suppliers) where the employer knows about it and has failed to take reasonable steps to stop it
- making "gagging" clauses, which prevent employees from discussing their pay, unenforceable

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- extending the recommendations that Employment Tribunals can make to eliminate discrimination by employers
- giving the Government power to force large employers (with at least 250 employees) to publish information about the difference in what they pay male and female staff. This power will only be used if not enough employers voluntarily publish this information by April 2013.

The Act also covers discrimination and equality in the provision of goods and services, education, private members' clubs and the duties of public authorities, and makes some changes in these areas. Notably, age discrimination in the provision of goods and services will become unlawful in 2012.

Employers may consider reviewing their recruitment practices and equal opportunities training and policies ahead of the October implementation.

Case Watch

Disciplinary hearings – can employees bring a lawyer?

The employee, a teaching assistant, was accused of having an inappropriate relationship with a child. He was invited to a disciplinary hearing and advised of his statutory right to be accompanied by a trade union official or colleague. He asked if he could bring his lawyer instead, but was refused. Following the hearing, he was dismissed for gross misconduct. The school had to report his dismissal to the Secretary of State for Education, who could then include his name on a barred list preventing him from working with children. He appealed his dismissal and asked to be legally represented at the appeal hearing, but was again refused. He argued that, in refusing him legal representation at the disciplinary and appeal hearings, the school had breached his right to a fair hearing under the Human Rights Act 1998.

The Court of Appeal ruled that he should have been allowed legal representation. The Court ruled that the outcome of the disciplinary process would have a profound influence on the decision-making process relating to the barred list, as there was no separate process of oral hearings and cross-examination of witnesses. The employee's right to practise his profession would, therefore, be irretrievably prejudiced by the disciplinary proceedings. Given the seriousness of the allegations against him and the potential consequences on his future employment prospects, the school should have allowed the employee legal representation at the disciplinary and appeal hearings.

Employees do not have a positive right to legal representation at disciplinary hearings and, in the vast majority of cases, the statutory right to be accompanied by a trade union official or colleague will be sufficient. However, there will be exceptional situations where it may well be unfair to refuse an employee legal representation, eg where there is a parallel criminal investigation and things said in the disciplinary hearing might prejudice that investigation. Employers should also consider allowing legal representation where the disciplinary process might have a profound effect on the employee's right to practise his or her profession – eg where the matter is referred to a regulatory body, like the Financial Services Authority.

R (on the application of G) v Governors of X School and Anor

When a client insists on dismissal

The employee was a school minibus driver, employed under a contract the employer had with the local Council to provide minibus services. The contract allowed the Council to veto the employment of any individual. When it heard of allegations that the employee had sexually abused two children, the Council asked the employer to remove him. The employer put the allegations to the employee who explained that they had been made several years ago, that he had done nothing wrong and that the police had decided not to prosecute. He was initially suspended while the employer tried to persuade the Council not to veto his employment and looked for alternative driving work, but none was available. He was, therefore, dismissed and brought an unfair dismissal claim.

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The unfair dismissal claim failed. The Employment Appeal Tribunal ruled that, even though the Council may have acted harshly, the employer's dismissal was still fair. The employer had done everything it reasonably could to alleviate any injustice the employee suffered, by trying to get the Council to change its mind and by looking for alternative work.

If it is shown that the employee has committed serious misconduct in the course of employment, the employer will have a valid reason for dismissal. This case also shows that it can, in some circumstances, be fair to dismiss an employee at the behest of a customer or client even if no misconduct has occurred. However, the employer should first consider what can be done to alleviate any injustice to the employee – eg by trying to get the client to change its mind and by investigating alternatives to dismissal. In some cases, it might be necessary to rearrange work so that the individual does not have contact with the customer or client concerned. Where all options have been explored and there are no alternatives, then, provided a proper process has been followed, dismissal will usually be fair. Where a particular customer or client has the right to veto an individual's employment, it may be helpful in some cases to state this in the employment contract at the outset, although this will not guarantee that any subsequent dismissal is fair.

Henderson v Connect (South Tyneside) Ltd

Changing terms and conditions

The employer wanted to move staff onto a single pay and working structure and, after extensive consultation, most employees agreed to the change. However, those who did not were moved unilaterally onto the new regime. A clause in the staff handbook stated that the company "reserved the right to review, revise, amend or replace the contents" of the handbook and "introduce new policies from time to time reflecting the changing needs of the business". The handbook also specified that the sections relating to pay and the right to change terms were contractual. About 700 employees (out of a total of 18,000) brought a claim arguing that the forced change was a breach of contract and that they had suffered unauthorised deductions from wages. However, only one was about to show that they were any worse off financially as a result of the change.

The Employment Appeal Tribunal ruled that the employer was entitled to make the changes. Although as a general rule, contractual changes require an employee's consent, the employer had clearly reserved a power in the staff handbook to vary contractual terms unilaterally.

This case is helpful to a point. It shows that an employer can reserve the power to unilaterally vary terms and conditions in the employment contract, provided this is absolutely clear. However, even where there is an express right, any changes to terms and conditions which are made arbitrarily or unreasonably would breach the mutual duty of trust and confidence. Accordingly, employers should always consult staff about any changes and give as much notice as possible, as well as considering ways to make the changes with the least impact on staff. In this case, the employer had given several months warning of the changes, had consulted extensively and was able to show most employees were not financially worse off, all of which helped its defence.

Bateman and Ors v Asda Stores Ltd

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New Law

National minimum wage

On 1 October 2010, the national minimum wage will increase to £5.93 per hour for workers aged 21 and over (the adult rate currently applies only to workers aged 22 and over, and is being extended to 21-year-olds). The national minimum wage will also rise to £4.92 for workers aged 18-20 and to £3.64 for workers aged 16 to 17. A new minimum wage of £2.50 per hour will be introduced for apprentices aged 16 to 18 and those aged 19 and over in the first year of their apprenticeship. All other apprentices already receive the national minimum wage depending on their age.

Additional paternity leave

On 6 April 2010, regulations came into force giving parents of babies due on or after 3 April 2011 the right to additional paternity leave of up to 6 months. The right applies not only to the baby's biological father, but also to the spouse, civil partner or partner of the mother. It also applies in relation to adoptive couples where one of the partners has taken adoption leave.

Key features of the new right are that:

- it applies only to employees with at least 26 weeks' service who, apart from the mother, expect to have the main responsibility for the child's upbringing
- the leave must be at least 2 weeks' and no more than 26 weeks' long and can only be taken if the mother has returned to work or ended her maternity leave
- the earliest the leave can start is 20 weeks after the child's birth
- the leave will be paid at the statutory rate but only if taken when the mother would otherwise be entitled to statutory maternity pay or maternity allowance, and only if the father has normal weekly earnings no less than the lower earnings limit
- both parents will be required to certify the father's eligibility to the father's employer
- the father's employer will not be required to check with the mother's employer that she has returned to work, but can ask for details of the mother's employer so that voluntary checks can be made, and can also ask for a copy of the birth certificate
- employees taking additional paternity leave will be able to take up to 10 keeping in touch (KIT) days, in addition to the mother's 10 KIT days
- employees will also have the right to return to the same role after a single period of additional paternity leave, will be protected from being singled out for dismissal for a reason related to additional paternity leave, and if made redundant during leave, will have the right of first refusal over suitable alternative employment (which mirrors the position for maternity leave).

Immigration

Changes were made to the rules on employing non-European workers on 6 April 2010. The Tier 1 highly skilled worker route has been expanded so that individuals no longer need a Master's degree to qualify, and those who earned at least £150,000 in the previous year will qualify even if they have no formal qualifications. In relation to transfers within a multinational company or group of companies under Tier 2, there are three new sub-categories:

- "established staff" which allows the employer to transfer an employee to the UK for up to 3 years (extendable to a maximum of 5 years) if they worked with the company or a related group company abroad for at least 12 months

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- "graduate trainees" which allows the employer to transfer an employee to the UK for up to 12 months for training or career development if they have worked with the company or a related group company abroad for at least 3 months
 - "skills transfers" which allows the employer to recruit someone abroad and transfer them immediately to the UK for up to 6 months either to learn or impart skills and knowledge.

Transfers within a multinational company or group of companies under Tier 2 can no longer lead to permanent settlement in the UK after 5 years. However, this change does not apply retrospectively.

Watch This Space

Parental leave

A new European Parental Leave Directive has been adopted which increases the parental leave entitlement to 4 months. In the UK, this will mean that parental leave will need to be increased from 3 to 4 months by 8 March 2012 at the latest. However, it will not require changes to any of the other key elements of parental leave, namely:

- parental leave can only be taken in blocks of one week, with a maximum of 4 weeks to be taken each year
- parental leave must be taken by the child's 5th birthday (or 18th birthday if the child is disabled)
- employers are not obliged to pay employees during parental leave.

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Did You Know?

Time off for training

On 6 April 2010, a new right to request time off for training was introduced for employees of large employers (see January 2010 **Online Update** for details). Employers do not have to agree to requests and, even if they do, are not obliged to pay for the training or time spent away from work. However, training during normal working hours which has been approved by the employer can count towards the national minimum wage, so this may need to be factored into any national minimum wage calculations. In practice, employers are unlikely to have to provide extra pay to those who earn well above the national minimum wage and who attend for short periods of training, but may well have to do so if a training request is granted to someone whose hourly pay is close to the national minimum wage or if the training is for an extended period.

Our Work

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

- presenting an employment law review to European Works Council representatives at the annual Council meeting
- advising employers in relation to employees stranded abroad following recent travel disruptions
- advising contractors to the airline industry who had no work for employees while UK airspace was closed
- advising in relation to the TUPE issues associated with the outsourcing of a business function to India and associated redundancy issues
- negotiating terms of exit for a departing board level executive
- providing an equal opportunities training programme for manager level employees within a client's business

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

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