TRAVERS SMITH

Online Update

Essential Information for Employers

July 2009

In the News

Holidays – in sickness and in health

Can workers take holidays when they are already off on sick leave? This issue has created much uncertainty for employers, but a recent House of Lords' ruling (*HMRC v Stringer*) means that workers on sick leave:

- continue to accrue statutory holidays
- can take paid holidays whilst off sick and
- can potentially claim back-pay for several years' holiday if they have not received paid holidays.

Whilst this represents a change in the law, the ruling provides some clarity for employers.

Workers must now be allowed to take holiday at full pay even if they are already off on sick leave and their entitlement to sick pay has run out. There may be complications if employees are already receiving permanent health insurance benefits and employers should seek advice on specific cases.

"Workers must now be allowed to take holiday at full pay even if they are already off on sick leave and their entitlement to sick pay has run out."

If the worker's employment ends, they should be paid for any unused statutory holidays for that leave year, even if they were absent for all or part of the year.

Until now, holiday pay claims could only be brought for the holiday year just ended, not for previous years. Following this ruling, such claims can now be brought as unlawful deductions from wages claims potentially covering previous holiday years as well. This does not mean existing staff on sick leave are automatically entitled to back-pay for previous years' holidays and employers should seek advice on individual cases.

The decision deals only with the accrual of statutory holidays (currently 28 days for full-time staff). Employers are free to deal with any additional entitlement differently in the employment contract or relevant policy.

In the light of these changes, employers may wish to review their policies (including permanent health insurance provisions) and practices on holidays and sickness absence. If you have any queries about your leave arrangements, please speak to your usual Employment Department contact.

Reward for failure

A court has recently declared void a £175,000 severance payment promised to a former NHS trust chief executive. The court described the payment as "irrationally generous" for a leader whose trust failed to control outbreaks of the "superbug" infection at its hospitals. Although a ruling like this will usually be limited to the public sector, it perhaps highlights the current press and public intolerance towards rewarding failure in executive severance packages.

Recent events have also brought this issue into sharp focus. Earlier this year, the European Commission adopted a recommendation which establishes best practice for remunerating directors of listed companies across Europe. According to the Commission, severance payments for directors should not exceed 2 years' fixed salary and should not be paid at all in cases of failure. In the UK, a final version of the Financial Services Authority's code of practice on remuneration in the financial services industry is due later this month (see May 2009 **Online Update** for details) and the principles contained in the EC recommendation will need to be adopted into UK law in due course.

Such recommendations are likely to set the benchmark for best practice beyond directors of listed companies and the financial services industry and should be borne in mind when negotiating severance packages for executives and senior managers, whether upfront on recruitment or at the time of departure.

Where directors are involved, shareholder approval is required for termination payments in some situations. Broadly, any compensation for loss of office or employment beyond contractual entitlements (eg notice pay) or genuine compensation for claims (eg unfair dismissal or discrimination compensation) must be approved by the company's shareholders. The severance package should, therefore, be a genuine reflection of the true value of claims the director may have. Payments made without appropriate approval are unlawful and could expose directors to claims for compensation from disgruntled shareholders.

We recently hosted a seminar workshop on the current trends in executive remuneration and severance packages throughout Europe. Our preparation for the workshop included a survey of "best practice" across 20 European countries. Further details are available from your usual Employment Department contact.

"Such recommendations … should be borne in mind when negotiating severance packages for executives and senior managers…"

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 misconduct. He appealed and asked to be legally represented at the appeal hearing, but was again refused and his appeal rejected. The school had to report his dismissal to the Secretary of State for education, who could then include his name on a list preventing him from working with children. 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.

He won his case in the High Court. 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. He could not fairly be expected to represent himself nor was a trade union official or colleague sufficient.

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 is 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 dismissal could have serious implications for the employee beyond simply losing their job, eg where the matter is referred to an external body, like the Financial Services Authority, which could affect the employee's future job prospects. This will always depend on the facts of each case.

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

"Employees do not have a positive right to legal representation at disciplinary hearings … However, there will be exceptional situations where it is unfair to refuse an employee legal representation…"

When is a resignation not a resignation?

The employee, a data entry clerk, handed his employer a letter of resignation when he was under personal pressure and stress. As he appeared upset, he was given 30 minutes to reconsider his decision, after which he confirmed his wish to resign. Four days later, he emailed his manager asking to return to work. He said that he had been stressed out and unable to think straight when he resigned, and so wanted to withdraw the resignation. When this was refused, he brought an unfair dismissal claim.

The Employment Appeal Tribunal dismissed the claim, ruling that, although he was stressed at the time of resigning, he had been given a cooling off period. His decision to resign was considered and not impulsive, and he had not sought to withdraw it until 4 days later. As he had voluntarily resigned, he could not bring an unfair dismissal claim.

In some cases, what might otherwise appear to be a straightforward resignation cannot be relied on by the employer. For example, where the employee resigns in the heat of the moment or has been pressured into a decision they will usually be entitled to change their mind, so long as they do so quickly. As this case shows, if the employee waits too long, the resignation will stand. The safest approach in these circumstances is to allow the employee a cooling off period to reflect on the decision. This may not always be practical and employers who do not offer a cooling off period for whatever reason should be prepared to accept a withdrawal of the resignation if it comes in promptly, ie usually within the next few days.

Ali v Birmingham City Council

"In some cases, what might otherwise appear to be a straightforward resignation cannot be relied on by the employer."

Race discrimination and immigration

An Indian national applied online for a position as a trainee solicitor with a UK law firm. He did not have permission to work in the UK. His application was automatically rejected, on the basis of the firm's policy to reject applicants who required a work permit. The firm's reasoning was that, in order to obtain a work permit, it would have to show that it could not find a suitably qualified or experienced worker from the EU, or someone who with extra training could do the job. Because the role involved training, the firm argued that it could never satisfy this requirement. The applicant brought a race discrimination claim.

The Employment Appeal Tribunal ruled that the blanket policy of not recruiting individuals who required a work permit was discriminatory and this could not be justified. The firm had no discussions with the relevant immigration authority nor had made any attempts to obtain a permit.

Employers recruiting non-European workers may find themselves caught between a rock and a hard place. The immigration rules do not allow employers to obtain a work permit for the best candidate if there is a suitably qualified European candidate who, with extra training, could do the job. On the other hand, a blanket policy of rejecting non-European candidates who require a work permit will usually be discriminatory and is unlikely to be justified.

To avoid race discrimination claims, employers should recruit on merit and only address eligibility to work in the UK at the final stages of the recruitment process. Employers should consider on a case by case basis whether a work permit could be obtained for a candidate, which may involve general enquiries with the UK Border Agency. Ideally, notes of any discussions with the UK Border Agency should be kept. If, after having considered the position, a work permit is not a viable option, it would usually be safe to prefer a candidate who has the right to work in the UK.

Osborne Clarke Services v Purohit

"…a blanket policy of rejecting non-European candidates who require a work permit will usually be discriminatory…"

New Law

Statutory redundancy pay

For dismissals taking effect on or after 1 October 2009, the maximum limit on a week's pay for the purpose of calculating statutory redundancy pay will increase from £350 to £380 per week. This increases the maximum statutory redundancy payment from £10,500 to £11,400. The limit on a week's pay also applies when calculating certain other payments, such as the basic award for unfair dismissal. Although the limit usually increases in February each year, there will be no further increase in February 2010 due to the early increase this year.

National minimum wage rates

Also on 1 October 2009, the national minimum wage will increase to £5.80 per hour for workers aged 22 and over. The national minimum wage will rise to £4.83 per hour for workers aged 18 to 21 and to £3.57 for workers aged 16 and 17. The Government has also announced that from, October 2010, the adult rate of the national minimum wage will apply to 21-year-olds.

Tips and national minimum wage

The Government has announced that, from 1 October 2009, tips, service charges and gratuities will no longer count towards the national minimum wage. Currently, they can only count if they are paid through the employer's payroll.

Following a recent ruling, tips distributed through a "tronc" system (where the tips are pooled and distributed by an employee known as the "troncmaster") are unlikely to count towards minimum wage where they are paid through a troncmaster's bank account and not through the employer's payroll *(Commissioner for Her Majesty's Revenue and Customs v Annabels (Berkley Square) Limited)*. From 1 October 2009, they will not count at all regardless of how they are paid.

Consultations

Agency workers

The Government has launched a consultation on the implementation of the European Temporary Agency Workers Directive, which provides for equal treatment for agency workers.

The current proposals for the UK are that:

- temporary agency workers would be entitled to the same pay and conditions as if they had been employed by the end-user
- pay would cover basic pay, overtime, shift allowances and bonuses directly linked to individual performance (eg piece-work bonuses) but not other benefits like profit-sharing arrangements and occupational pension schemes
- the conditions covered would be those relating to working time, overtime, breaks, rest periods, night work, holidays and public holidays
- the right to equal pay and conditions would be triggered after a 12-week qualifying period
- successive assignments with the same end-user would count towards the 12-week qualifying period, unless there was a long break between them or the roles were substantively different
- temp agencies (rather than the end-user client) would be responsible for ensuring equal pay and conditions
- end-users would have a duty from day one of the agency worker's assignment to ensure they are informed of permanent vacancies in their organisation and given equal access to on-site facilities (eg canteen, childcare and transport) on the same terms as employees.

"…temporary agency workers would be entitled to the same pay and conditions as if they had been employed by the end-user…"

The Government hopes to introduce regulations this year, but is seeking views on when they should come into force. The consultation closes on 31 July 2009. A second consultation will be launched in autumn on the draft regulations.

Fit notes

The Government has launched a consultation on new "fit notes" that are set to replace sick notes in April 2010. Instead of just saying whether an employee is fit or not fit for work, doctors will be able to indicate on the new form whether an employee "may be fit for some work now", in which case they will also have to provide reasons. Doctors will also be able to suggest changes to the employee's workplace or job which could facilitate an earlier return to work, eg a phased return to work, altered hours, amended duties or workplace adaptations. Employers will not be obliged to implement the suggestions, but employees will be able to rely on them in Employment Tribunal claims. The consultation closes on 19 August 2009.

"Doctors will … be able to suggest changes to the employee's workplace or job which could facilitate an earlier return to work…"

Watch This Space

Proposed immigration reforms

Over Spring 2009, the Government's Migration Advisory Committee ran a consultation on potential immigration changes that, if made, could significantly limit the scope for recruiting foreign workers. The consultation closed on 11 June 2009.

Among the proposals being considered were:

- whether to limit Tier 2 of the points-based system to the shortage occupation list, so that employers could only recruit non-Europeans if the job had been identified as one for which there is a skills shortage in the UK
- whether to remove Tier 2 intracompany transfers, so that multinational companies could no longer transfer overseas employees to the UK
- whether changes should be made to Tier 1 of the points-based system to make it harder for individuals to qualify – currently, Tier 1 covers highly skilled individuals who have at least a master's degree and score sufficient points based on their previous earnings, age and any UK experience
- whether foreign workers should still be able to bring dependants with them to the UK.

At this stage, no decision has been made on these proposals. The first report of the Migration Advisory Committee to the Home Office is due by the end of July 2009.

Did You Know?

Recruitment subsidy

The Government has introduced a recruitment subsidy of £1,000 for employers recruiting individuals who have been unemployed and claiming jobseeker's allowance for 6 months or more. The subsidy is available through JobCentre Plus for any job averaging at least 16 hours a week and lasting for at least 26 weeks. Employers may also be eligible for up to £1,500 worth of in-work training, depending on their location.

Our Work

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

- advising on proposed trade union backed industrial action, including a detailed analysis of the legal formalities relating to balloting, picketing and the provision of information by the union to the employer
- advising on the interrelationship between the unfair dismissal regime and the criminal justice process in the context of dismissing an employee for criminal activity outside the workplace
- preparing an injunction to prevent an ex-employee from breaching non-compete restrictive covenants after termination of employment
- advising on a bullying issue
- advising on the practical implications of implementing the *Stringer* decision (see this edition of **Online Update**) in relation to long-term sick employees returning to work and helping clients change their policies and procedures on holiday and sickness absence
- advising on international secondments of employees within a multinational business.

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

Partners: Dorothy Henderson, Andrew Lilley, Siân Keall, Richard Baty, Tim Gilbert

Anna West, Russell Lamb, Ed Mills, Adam Rice, Jane Wheeler,
Alistair French, Kathryn Renahan, Simon Gorham, Jo Pengelley

If you have a colleague, or a contact in another organisation, who would like to receive **Online Update**, please send contact details to brenda.goodhew@traverssmith.com

Travers Smith LLP
10 Snow Hill
London
EC1A 2AL
T: +44 (0)20 7295 3000
F: +44 (0)20 7295 3500

www.traverssmith.com

Travers Smith LLP is a limited liability partnership registered in England and Wales under number OC 336962 and is regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Travers Smith LLP. A list of the members of Travers Smith LLP is open to inspection at our registered office and principal place of business: 10 Snow Hill, London, EC1A 2AL.