

Online Update

Essential Information for Employers



November 2009

In the News

Reclaiming lost holidays

Can employees who fall sick during their annual leave reclaim the lost holiday? A new ruling from the European Court suggests they can and should be allowed to take the holiday at a later date (*Pereda v Madrid Movilidad SA*). Whilst the full impact of the ruling in the UK is not clear, it could be used by employees to claim extra "replacement" annual leave if they fall ill during their holiday.

So, what should employers do if faced with such requests? Where employees are entitled to statutory sick pay only, they should be reminded that they will drop to the statutory rate if they choose to convert annual leave into sickness absence. This may discourage some employees, as the first 3 days would be unpaid and it may mean paying back some holiday pay. Employees should also be asked for a sick note (but are entitled to self-certify for the first 7 days of statutory sick pay).

Where the employer offers enhanced sick pay, the policy should ideally require medical evidence to support the full period of any sickness absence, or at least the full period of any sickness during annual leave. If the sick pay scheme is discretionary, the employer could choose not to pay out for periods of sickness during holiday (although, in extreme cases, a failure to do so for a disability-related illness could be discriminatory). If the sick pay scheme is contractual, the position is more complex and the employer should seek advice on possible changes to the scheme, such as dropping contractual sick pay back to SSP for sickness during holidays.

In the policy, employers should also remind all staff that any dishonesty in relation to sickness absence is a serious disciplinary issue that could result in dismissal.

The European ruling only deals with the statutory minimum holiday entitlement and employers are free to apply different rules to any additional contractual entitlement.

If you have any queries about the ruling and its impact on your business, please speak to your usual Employment Department contact.

Retirement lawful – but just a matter of time?

The High Court has ruled that the UK's default retirement age is lawful and has dismissed the challenge brought by age charity, Heyday. This is good news for employers as it means they can continue to retire employees at or above 65 (or at or above the employer's normal retirement age if this is later) and, provided the statutory retirement procedure is followed, the employee will not have an age discrimination or unfair dismissal claim.

However, there is every indication the position could well change in the future. The Judge in the *Heyday* case said there was a strong argument for a default retirement age higher than 65 and his decision would have been different if the Government had not promised to review the default retirement age in early 2010. It is, therefore, likely that the default retirement age could change or be removed altogether after it is reviewed next year.

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Pay audits – should employers reveal their figures?

The Equality and Human Rights Commission is urging employers in the financial sector to publish annual pay audits, after its inquiry found a gender pay gap in the industry of 55% compared to the UK average of 28%. The Government is also encouraging all employers to report voluntarily on their gender pay gap and, if not enough progress is made by 2013, could use powers in the Equality Bill to force employers to do so. This raises the question: what should employers be doing on gender pay reporting?

At the moment, employers are not required by law to conduct gender pay audits or publish statistics. However, pay audits are recognised as good practice in the EHRC's Code of Practice on Equal Pay, which is not binding but can be used by Employment Tribunals to draw an inference of sex discrimination if not followed. There is no set way to do a pay audit, but the EHRC has developed a "toolkit" which recommends that employers:

- include all staff in a pay audit so as to give a full picture of the workforce
- involve managers with authority to make any necessary changes
- determine if men and women in different roles are doing equal work eg by comparing job profiles
- collect data on pay, including both total earnings and the various elements of the pay package (eg bonuses, pension and other benefits)
- identify any reasons for any differences in pay between male and female groups to decide if they are justified and
- develop an action plan to address any pay discrepancies with clear timescales.

Employers should only conduct a pay audit if they are prepared to take any necessary action. Identifying a problem and failing to do anything about it would leave the employer highly exposed to a sex discrimination or equal pay claim, and the results of any review would have to be disclosed in any Employment Tribunal proceedings. In some cases, legal privilege could be claimed over a pay audit if internal or external lawyers were involved with preparing it and specific advice should be sought about this.

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Case Watch

Disability discrimination – got the look?

An employee, who had a prosthetic forearm, worked on the shop floor of a large clothing retailer. The retailer had a strict "look" policy that required anyone working on the shop floor to wear a branded uniform including a short-sleeve polo shirt. The employee was worried about the impression she would make on customers if they saw her arm and asked if she could cover it up. A senior manager agreed to let her wear a cardigan and informed most other managers at a team meeting, but not all were present. On several occasions, the employee was asked by different managers to remove her cardigan to comply with the company's look policy. When she told them she had permission to wear it, they backed down. On one occasion, however, a manager told her (without any preliminary discussion) to go and work in the storeroom as she could not wear the cardigan on the shop floor. The employee resigned claiming constructive dismissal, direct disability discrimination, failure to make reasonable adjustments and harassment.

The Employment Tribunal upheld her claims of constructive dismissal, failure to make adjustments and harassment (but not direct disability discrimination). It said that asking her to work in the storeroom away from customers constituted harassment as it had the effect of violating her dignity and creating a humiliating environment for her. The company had not done enough to prevent this sort of incident, even though it had a diversity policy and managers received online training. According to the Tribunal, managers had not been trained in any meaningful way and were too reliant on HR in terms of their disability duties. The Tribunal also ruled that the employer had failed in its duty to make reasonable adjustments. Although allowing the employee to wear a cardigan was a reasonable adjustment, this was withdrawn by one manager who refused to let her wear it on the shop floor. The employee was awarded an amount for loss of earnings and £6,000 for injury to feelings.

The case is a reminder that a single act can be enough to constitute harassment if it violates an employee's dignity or creates an offensive environment. Employers can only guard against this sort of behaviour if they have a clear equal opportunities policy that is effectively communicated to staff, and managers are trained in a meaningful way about their responsibilities. The case also highlights that, where an employer decides to make adjustments to accommodate a disability, this must be applied consistently and communicated to all managers so that there is a consistent approach.

Dean v Abercrombie & Fitch

Business transfers – can employers move staff?

The employee was employed by a primary care trust and transferred under TUPE to another NHS trust. A mobility clause in her original employment contract provided that she could be asked to work at any location "within the Trust". Following the transfer, the new employer moved the employee's team to a new workplace, arguing that the mobility clause had transferred under TUPE. The employee resigned claiming constructive dismissal and a redundancy payment, arguing that the change resulted in a material detriment to her. The move added an extra 2.5 miles to her journey but her workplace could be reached in a similar amount of time if she took a different route.

The Employment Appeal Tribunal ruled that the employee had been constructively dismissed as the change in location was a fundamental breach of contract. The new employer could not rely on the mobility clause in her contract, as it was limited to the original employer's location. The clause could not be reinterpreted to widen its scope to cover the new employer's location after the transfer. The EAT also ruled that the change in workplace was a substantial change in working conditions to the employee's detriment, when viewed from her point of view, as it involved a potential disruption to her childcare arrangements.

On a TUPE transfer, employees transfer on their existing terms and conditions. However, it is not always clear how 'employer-specific' terms like restrictive covenants or mobility clauses should be interpreted and the new employer will not always get the full benefit of these. Employers may, therefore, wish to renegotiate such terms after the transfer. Whilst changes to terms and conditions connected to a TUPE transfer are generally void, there are some practical ways to achieve such changes. Employers should seek advice on different strategies, eg dismissing employees and re-engaging them. Even if changes to working conditions are allowed under the contract, employers should be aware that, following a TUPE transfer, an employee can resign and claim constructive dismissal if the change is to the employee's detriment, when viewed from the employee's perspective.

Tapere v South London and Maudsley NHS Trust

“...where an employer decides to make adjustments ... this must be applied consistently and communicated to all managers so that there is a consistent approach.”

Collective redundancy consultation – when is the duty triggered?

The employer operated a factory in Finland and was part of a large group of companies with locations across the world. Its parent company supported a proposal to get rid of the factory, and the subsidiary employer began consultations with employee representatives. At the end of the consultation, the employer decided to close the factory and began making employees redundant. The employees claimed that the decision to close the factory had been made by the parent before the consultation began, in breach of the Finnish collective consultation duty. The Finnish courts referred the case to Europe for guidance on when the consultation duty arises in a group company situation like this.

The European Court confirmed that the collective consultation duty is triggered where there is a strategic decision or change of activity which compels the employer to plan for redundancies. There must be an intention to make redundancies and not a mere possibility. The obligation falls on the employer making redundancies, even if the strategic decision is made by a parent company and even if the subsidiary employer does not have all the information necessary for the consultation.

This case is helpful as it confirms that the duty to consult trade union or employee representatives is not triggered by a mere possibility of potential redundancies. There must be a strategic or commercial decision that is sufficiently specific to enable meaningful consultation. However, UK case law suggests that, where a proposal would inevitably lead to redundancies (eg a site closure), the employer must consult about the business proposal before the decision is made as part of its duty to consult about possible alternatives. In a group structure, complications can arise when a proposal is developed by a parent company that affects a subsidiary. The duty to consult will fall on the subsidiary even if it does not have all the information necessary for consultation. In this situation, the employer should begin the consultation and provide information during the process as soon as it is available.

Akavan Erityisalojen Keskusliitto AEK ry and ors v Fujitsu Siemens Computers Oy

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New Law

Compensation for discrimination

Discrimination claims have become more expensive, as the Employment Appeal Tribunal has increased the amount that Tribunals should award for injury to feelings. There is no limit on the amount that can be awarded, but Tribunals generally follow a set of guidelines known as the "Vento bands". The EAT has ruled that these bands should now be increased, to reflect inflation, as follows:

- up to £6,000 if the discrimination involves an isolated, one-off incident (increased from £5,000)
- up to £18,000 for something more serious (increased from £15,000)
- up to £30,000 for the most serious cases – eg a lengthy campaign of harassment (increased from £25,000).

Compensation for discrimination claims is usually made up of the employee's loss of earnings as well as injury to feelings. These guidelines only apply to the injury to feelings part.

Consultation

Additional paternity leave and pay

Mothers with babies due on or after 3 April 2011 should be able to transfer part of their maternity leave and pay to the father. The Department for Business Innovation and Skills has launched a consultation on draft regulations that would give fathers the right to take up to 26 weeks' leave where the mother ends her maternity or adoption leave early. Key features of the new right are that:

- fathers must have 6 months' service to be eligible and, for statutory pay, must also have average earnings of at least the lower earnings limit
- the father's leave will only be paid if he takes it when the mother would otherwise be entitled to statutory maternity pay
- the earliest the father's leave could start is 20 weeks after the child's birth (or placement for adoption) and the mother must have ended her maternity or adoption leave before the father can take the additional leave
- both parents will be required to certify the father's eligibility
- the father's employer will not be required to check with the mother's employer that she has ended her maternity leave and pay but can ask the employee to provide information about the mother's employer so that checks could be made
- fathers will be required to produce a copy of the child's birth certificate if requested by the employer
- fathers will have the right to return to the same role after a single period of additional paternity leave of 26 weeks or less
- fathers taking additional paternity leave will be protected from being singled out for redundancy and, if made redundant during leave, will have a right of first refusal over suitable alternative employment (this mirrors the position for mothers on maternity leave) and
- fathers will be able to take up to 10 keeping in touch (KIT) days during their leave.

The consultation on the new regulations closes on 20 November 2009.

Agency workers

The Government has announced that regulations giving agency workers the right to equal pay and conditions will not come into force in the UK until October 2011. A consultation on the draft regulations has been launched and will run until 11 December 2009. The key proposals 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, bonuses based on company performance, occupational pension schemes and occupational sick pay
- 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 break of at least 6 weeks 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

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- end-users would have a duty from the beginning of any agency worker's assignment to ensure they are informed of permanent vacancies in the end-user's organisation and
- agency workers will also have to be given equal access to on-site facilities (eg canteen, childcare and transport) from the beginning of their assignment on the same terms as employees.

Watch This Space

Employing foreign workers

From 2010, new rules will make it tougher for employers to recruit skilled workers from overseas. Employers who are registered immigration sponsors will need to advertise all roles with JobCentre Plus for 4 weeks – extended from 2 weeks – before they can look for staff outside Europe under Tier 2. In addition, multinational employers wishing to transfer staff from an office abroad will only be able to do so where the employee has worked for them abroad for at least a year prior to the move – currently only 6 months' service is required. The minimum salary that will need to be paid to allow an employee to qualify as a skilled worker under Tier 2 will rise from £17,000 to £20,000.

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Did You Know?

Tribunal statistics

The latest statistics from the Employment Tribunals for the year ending 31 March 2009 show a slight decrease in the overall number of claims submitted. However, there was a large increase in the number of "recession-related" claims including unfair dismissal (up 29% on last year), breach of contract (up 31%), claims for redundancy pay (up 48%) and failure to inform and consult trade union or employee representatives when making multiple redundancies (up 150% on last year).

The number of discrimination claims remained fairly constant. Sex discrimination claims were down on last year by 31% but age discrimination claims rose by 29%, although claims relating to retirement will be dismissed following the *Heyday* ruling (see In the News above).

Our Work

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

- advising on the enforceability of post-termination non-poaching restrictive covenants, including an analysis of the potential injunction and damages risks
- presenting a series of diversity training workshops for HR professionals and line managers
- advising on a group reorganisation triggering TUPE obligations
- providing training on the Equality Bill
- assisting an employer to obtain immigration sponsor status within 3 weeks from our initial instructions
- advising a client on TUPE issues arising from bringing an outsourced function back "in-house"
- preparing and negotiating fresh, board-level service agreements for executive directors of a client to reflect latest corporate "best practice" guidance
- advising a client on the issues related to a trade union's application for compulsory recognition through the Central Arbitration Committee (CAC).

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

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