

# Online Update

## Essential Information for Employers



September 2009

### In the News

#### **Coping with swine flu – what should employers do?**

As the flu season approaches, experts are warning that up to 30% of the population could contract swine flu this winter. If the pandemic worsens, the Government is considering extending the time that employees with swine flu can take off work without a doctor's note from 7 to 14 days. What can employers do now to prepare if things worsen?

Some employers will be concerned about staff using swine flu as an excuse for a few extra days' holiday. Obviously, this would be a disciplinary issue but it may be very difficult in most cases to prove that the employee is not sick. Employers will probably be obliged to accept self-certification at face value for the first 7 days of absence (which could be extended to 14 days) unless there is strong evidence to the contrary. After that, employers can ask for a doctor's note.

Some employees who are healthy may wish to stay at home for fear of becoming infected. Unless there is some particular susceptibility, employers would be justified in requiring all staff to attend work and could, in theory, take disciplinary action against those who choose to stay at home (although this may seem heavy-handed from an employee-relations point of view). Where an employee is at a greater risk (eg pregnancy), the employer may need to consider moving them away from staff who are known to have been either infected or in close contact with an infected person. Employers would also usually be justified in asking those with flu symptoms to stay away from the workplace to avoid spreading infection, even if the employee thinks they are well enough to work, but the employee should be paid in these circumstances.

Employees whose children or other dependants contract swine flu, or whose schools or nurseries close during the pandemic, should be allowed reasonable time off to deal with the situation – eg to provide assistance or arrange alternative care. Such time off is normally unpaid, unless the employer's policy provides otherwise.

Other practical steps recommended by the Health Protection Agency include:

- encouraging staff to maintain good basic hygiene – eg by washing hands frequently and covering their nose and mouth when coughing or sneezing
- ensuring dirty tissues are disposed of promptly and carefully
- cleaning hard surfaces (eg door handles) more frequently, using normal cleaning products.

#### **Flexible working – a competitive edge?**

In today's climate, many employers are looking at flexible working to give them a competitive edge as the economy improves. BT is reportedly offering some employees temporary secondments with other IT services companies and accounting firm KPMG has asked staff to agree either to take a sabbatical or work part-time.

The sorts of arrangements that will work best vary widely between businesses, and some employers have found it helpful to offer a range of different options for staff to choose from. Flexible working arrangements will typically need the employee's consent, so should be introduced on a voluntary basis, where possible, after consultation with staff. Such options might include:

*“Unless there is some particular susceptibility, employers would be justified in requiring all staff to attend work ...”*

*“... many employers are looking at flexible working to give them a competitive edge as the economy improves ...”*

- Unpaid leave or sabbaticals – employers and employees are free to agree on the length of the leave or sabbatical, whether it will be unpaid or at reduced pay and what other benefits will accrue (eg holiday, pension, continuity of service etc). The employer should also be clear about what rights the employee has to return to their old job, whether they can extend or shorten the break and whether they can take up alternative employment with the employer's consent.
- Designating holiday – employers can manage holidays by requiring staff to take them during quiet periods, so long as adequate notice is given. The holidays would still be paid at the normal rate, but the employer would save the cost of having to arrange cover during peak times.
- Term-time working – this allows employees with families to spend time with children during school holidays by linking their working pattern to the school year and requiring all holiday to be taken during school holidays.
- Reducing hours – eg a 4-day week or 9-day fortnight with consequent reduction in pay.
- Phased retirement – eg gradually reducing the number of days worked per week from 5 to 4 then 3 in the years leading up to retirement, to help the employee adjust.
- Flexible benefits packages – staff could be given a fixed budget to choose a limited number of benefits from a 'menu', such as private medical insurance, gym membership, employer pension contributions etc, which might be viewed more favourably than cutting all benefits across the board.

If arrangements result in a reduction in pay, employers should be clear about how this will impact on pension arrangements and other benefits – eg some employers have agreed that in the event of subsequent redundancies, severance payments will be calculated by reference to pre-reduced pay levels. Employers should also be careful to retain the flexibility to be able to vary the arrangement if conditions change, which is best done by introducing the arrangements for a fixed or trial period and/or setting review dates.

### **Alternative to redundancy scheme**

The CBI has proposed an "Alternative to Redundancy" scheme that would allow employers to stop providing work to an employee for up to 6 months instead of making them redundant. The employee would receive double the jobseekers allowance (about £130 per week) paid jointly by the employer and the Government. At the end of the 6 months, the employee would return to work, or if no work was available, could be made redundant. The 6 months in the scheme would count towards the employee's service for the purpose of calculating their statutory redundancy entitlement. The TUC has said that it agrees with the underlying aim of the scheme, but has criticised the proposal as not going far enough to protect employees.

## *Case Watch*

### **Pre-employment medicals – asking the right questions**

The employee was offered a job with the Council, conditional on medical clearance, and was asked to complete a pre-employment medical questionnaire. She confirmed that, at the time of completing the questionnaire, she normally enjoyed good health and had no physical or mental impairment, despite having a history of depression. She was given the job, but due to a difficult working relationship with a new Council leader, went off sick with depression and later retired on ill-health grounds. When the Council discovered her history of depression, it sued her for damages, claiming that she had made false and misleading representations in her pre-employment questionnaire.

*“If arrangements result in a reduction in pay, employers should be clear about how this will impact on pension arrangements and other benefits ...”*

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The Council lost the claim. The Court ruled that, because of the way the questions had been drafted, the answers the employee had given were truthful and she reasonably believed them to be true. She had suffered episodes of depression in the past, but was in good health at the time of completing the questionnaire. The Court said that job applicants cannot be expected to be medical experts and it is, therefore, the employer's duty to make sure questions are clear and unambiguous. There is no general duty on applicants to disclose their medical history beyond what is specifically asked.

***Pre-employment medical questionnaires can be helpful, but should be used with caution. There is a risk that such questionnaires could request information which, even if not taken into account by the employer, could give rise to a disability discrimination claim from an unsuccessful candidate. Instead of wide-ranging questionnaires, the safest route for employers is to select the chosen candidate and then, at that stage, ask whether he or she suffers from any condition which may affect his or her ability to carry out the role. This would enable the employer to assess whether the employee is fit for the role, but avoids the risk of gathering irrelevant information on unsuccessful candidates.***

***If questionnaires are to be used, the questions should be clearly drafted and relate to the objective requirements of the job – eg instead of asking whether the applicant has a history of depression, they could be asked if they have ever suffered from any condition that might affect their ability to do particular aspects of the job – eg working to tight deadlines or dealing with a demanding workload.***

*Cheltenham Borough Council v Laird*

#### **Redundancy selection – is 'LIFO' lawful?**

The employer negotiated a collective redundancy agreement with the trade union, which set out how staff would be selected for redundancy. Under the agreement, employees scored points under five categories – achievement of objectives, self-motivation, expertise/knowledge, versatility/application of knowledge and wider personal contributions to the team – as well as one point for each year of service. The employer was worried that awarding points for length of service would constitute age discrimination, and asked the Court to declare this part of the agreement unlawful. However, the union argued that it was lawful and should stay in the agreement.

The Court of Appeal agreed with the union, ruling that using length of service as one of the redundancy selection criteria was lawful. The Court accepted that this was indirectly discriminatory against younger workers, but said it was objectively justified in this case. It was legitimate for the parties to want to reward loyalty and bring about redundancies peacefully. There was no evidence that any of the younger employees objected to rewarding service. More importantly, length of service was only one of a number of criteria used and was not determinative, which meant it was a proportionate means of achieving those aims.

***Using length of service as a selection criterion (eg "last in, first out" or "LIFO") is potentially lawful but has two significant disadvantages. It may result in the loss of good employees, as it takes no account of skills (and, for this reason, it is unlikely to be used as the sole criterion). Also, it is likely to amount to indirect age discrimination and would, therefore, need to be justified. Justification requires employers to show that:***

- ***the selection criterion achieves a legitimate aim, eg to reward loyalty or retain business specific experience, and***
- ***there is no less discriminatory way of achieving that aim, eg whether business specific experience could be assessed on an individual basis instead of relying solely on length of service.***

***Using length of service on its own would be difficult to justify, and it is more likely to be justified when used as one of a number of criteria, or even as a "tiebreaker".***

*Rolls Royce plc v Unite the Union*

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### Philosophical beliefs – are they protected?

The employee was dismissed from his role as head of sustainability. The employer claimed it was a genuine redundancy but the employee alleged the real reason for his dismissal was his strongly-held belief in climate change. He believed that carbon emissions must be cut urgently to avoid the catastrophic effects of climate change. He said that this was more than a mere opinion – it was a belief that affected most aspects of his life, including how he lived, how he travelled, what he bought and where he ate. He, therefore, brought a claim alleging discrimination on the grounds of his philosophical belief.

As a preliminary point, the Employment Tribunal had to decide whether his belief in climate change was a "philosophical belief" that could be protected under the discrimination regulations. They said that for a belief to qualify for protection as a philosophical belief, it must have sufficient cogency, seriousness, cohesion and importance, in addition to being worthy of respect in a democratic society. The Tribunal ruled that this employee's particular belief in climate change was sufficiently serious to amount to a philosophical belief – it went beyond mere opinion and affected how he lived his life. The case will now go to a full hearing to decide whether the real reason for dismissal was redundancy or the employee's beliefs.

***This case is perhaps more helpful than it first seems. On one level, it is a reminder that a broad range of beliefs can be protected from discrimination under the religion and belief regulations. On the other hand, it also shows that not every belief will be a philosophical belief that is capable of protection. As the Tribunal pointed out, the belief has to have a serious impact on how the individual lives their life. Employers can distinguish between mere opinions, which are not protected, and philosophical beliefs, which are. For example, a mere opinion that being a vegetarian is healthier would not be a philosophical belief, but a serious belief in animal rights that affects how an individual lives, including what they eat, could be a philosophical belief capable of protection.***

*Nicholson v Grainger plc*

### When is dismissal by post effective?

The employee attended a disciplinary hearing on a Tuesday and was told to expect a letter concerning the outcome on Thursday. The letter arrived by recorded delivery at the employee's home on Thursday but, as she was away, it was signed for by someone else. She did not read it until the following Monday after she had returned home. While she was away, the employee had phoned home but did not ask about the letter. She brought an unfair dismissal claim and the question arose as to when her dismissal was effective. She argued it was when she read the letter. However, the employer argued it was when the letter was sent or delivered, in which case the employee's claim would have been outside the 3-month time limit for bringing a claim.

The Court of Appeal ruled that the dismissal was not effective until the employee had read the letter. A dismissal cannot be effective until the employee knows about it. Because the employee in this case was away, she did not have a reasonable opportunity to read the letter until she returned home. She had no duty to ask about the content of the letter over the phone.

***A dismissal is not effective until it is communicated to the employee. If the dismissal is communicated by letter or email, it will not be effective until the employee reads it. However, an employee cannot deliberately go away to avoid receiving the letter or simply refuse to open it. Employers should, where possible, notify the employee of the dismissal in person or over the phone and then confirm this in writing. Alternatively, the employer should make every effort to make sure the employee has a reasonable opportunity to read the dismissal letter and ideally send copies by whatever means possible, including email (requesting a read receipt), fax and/or post.***

*Gisda Cyf v Barratt*

*“... a broad range of beliefs can be protected from discrimination under the religion and belief regulations.”*

*“If the dismissal is communicated by letter or email, it will not be effective until the employee reads it.”*

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### LLP members – are they employees?

The Employment Appeal Tribunal had to decide in this case whether a member of a limited liability partnership was also an employee and could claim employment rights. The member had been recruited as the chief investment officer of an LLP providing investment advice to high net-worth individuals. He signed a membership agreement giving him a share of any profits and a share of the proceeds of sale of the partnership. After he was retired from the partnership following performance issues, he brought an unfair dismissal claim alleging he was an employee.

The EAT ruled that, although there were some features of an employment relationship, the member was not an employee of the partnership. He was not paid salary but instead received a share in the profits of the partnership, which was paid in gross without any deduction for tax or national insurance contributions. He was also entitled to a share in the proceeds of sale of the partnership. Although he was entitled to holiday and sick pay, and worked under the direction and control of the LLP, he had considerable autonomy and signed documents on behalf of the partnership. He was, therefore, not an employee and could not bring an unfair dismissal claim.

***This case is a reminder that a member of a limited liability partnership can, in some circumstances, also be an employee of the partnership and obtain employment rights. Tribunals will look at the substance of the relationship, rather than the labels given by the parties, to determine the true employment status. Provided both the partnership documentation and what happens in practice are consistent with a partnership relationship, it will be rare for a genuine LLP member to be considered an employee. LLP members may, however, have some rights as "workers" – eg working time rights (holidays, rest breaks and maximum working time) and protection from discrimination.***

*Kovats v TFO Management LLP & anor*

*“... a member of a limited liability partnership can, in some circumstances, also be an employee of the partnership and obtain employment rights.”*

## New Law

### National minimum wage

On 1 October 2009, the National Minimum Wage will increase from £5.73 to £5.80 per hour for workers aged 22 and over, from £4.77 to £4.83 per hour for workers aged 18 to 21 and from £3.53 to £3.57 per hour for workers aged 16 to 17.

### Statutory redundancy payments

On 1 October 2009, the maximum amount of a week's pay, used when calculating statutory redundancy payments and the unfair dismissal basic award, will increase from £350 to £380. The increase will apply where the dismissal takes effect on or after 1 October 2009. The maximum amount of a week's pay usually increases in February each year, but there will be no increase in February 2010.

### Dual discrimination

Among the changes being introduced by the Equality Bill is a new concept of "dual discrimination". This would protect individuals who experience discrimination on combined grounds – eg a black woman who is treated less favourably than a black man or a white woman. Under current law, such a claimant would have to establish either race or sex discrimination, or both, but under the proposed changes would have a single claim of combined race/sex discrimination. Claims of dual discrimination would be limited to direct discrimination only (not indirect discrimination, harassment or victimisation) and could only be based on a combination of two protected characteristics, including age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

Whilst most of the changes in the Equality Bill are planned to come into force in October 2010, the Government plans to introduce protection from dual discrimination in or after April 2011. For more details of the Equality Bill, see the May 2009 edition of [Online Update](#).

## *Watch This Space*

### **Parental leave**

Proposals are being considered in Europe to increase parental leave from 3 months (13 weeks) to 4 months by amending the European Parental Leave Directive. If these proposals are adopted, the UK will have 2 years within which to increase parental leave. The Directive will not require the UK to change any of the other key elements of parental leave, namely that:

- 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.

### **Retirement**

The Government has announced that its review of the default retirement age, initially scheduled for 2011, will be brought forward to 2010 to reflect the "change in economic circumstances" since it was introduced. One thing being considered is whether to do away with the default retirement age and a public consultation will run until 12 October 2009 to help gather evidence for the review. If a decision is made to do away with the default retirement age, no changes would be made until at least 2011.

In the meantime, the *Heyday* case on the challenge to the UK's mandatory retirement provisions (see May 2009 [Online Update](#) for details) was heard in the High Court on 16 and 17 July. A decision is expected by the end of the year.

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## *Did You Know?*

### **Supreme Court**

A new Supreme Court has replaced the House of Lords as the highest appeal court in the UK. It is scheduled to open for business in October 2009. The aim is to separate the judicial function carried out by the Law Lords from the rest of the parliamentary process.

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## *Our Work*

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

- working closely with our corporate private equity team to advise on the departure of a senior executive who is also claiming that he is being unfairly prejudiced as a minority shareholder
- successfully obtaining an order dismissing a harassment claim, with costs, brought under the Protection from Harassment Act 1997 by an employee against a director
- establishing a set of pan-European employment contracts, meeting minimum legal standards in each country, for a multi-national employer
- advising an employer on enforcing non-compete and confidentiality obligations against a departing executive
- successfully resisting trade union calls for industrial action arising from proposals to alter employment contracts
- advising on the employment implications for a conglomerate of putting two subsidiaries into administration
- advising on the termination of employment of an employee on long term sick leave and the associated settlement of liabilities under the employer's permanent health insurance policy
- advising on the immigration issues associated with being a "business visitor".

## *Our News*

It is with great pleasure that we confirm Tim Gilbert's promotion as a new partner in our Employment Department. Tim joined Travers Smith as a trainee in 1999 and has specialised in employment law for the past 8 years.

This edition of **Online Update** also gives us the opportunity to express our enormous thanks to Dorothy Henderson who retires from the firm on 31 October 2009 after 22 years with the firm. We look forward to maintaining our links with Dorothy in her role as an Employment Tribunal judge which she will continue into her retirement.

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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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