

EMPLOYMENT REVIEW

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GOVERNMENT'S EMPLOYMENT LAW REFORMS...

On the 23rd November 2011, following the consultation on resolving workplace disputes, Business Secretary Vince Cable announced the Government's proposed employment law reforms.

The most significant of these was the increase in the qualifying period for making claims for unfair dismissal from 1 to 2 years - which will come into effect in 2012. Calling it "the most radical reform to the employment law system for decades", he also revealed a number of proposals that the Government were considering including:

- 'No fault dismissals' for companies with less than 10 employees where employees could be dismissed with compensation without risk of a tribunal claim;
- The introduction of "protected conversations" which would allow employers to have frank discussions about poor performance with workers without fear that they could be used as evidence in a tribunal;
- The introduction of a requirement for all potential tribunal claims to be lodged with Acas, to give the parties a chance to resolve matters through early conciliation;
- The slimming down of existing dismissal procedures to manage staff if they are not performing in spite of warnings;
- The introduction of a discretionary power for employment tribunals to impose a financial penalty on employers that have been found to have breached employment rights;

- The creation of a "standard text" for compromise agreements, with guidance. It will consider amending the Employment Rights Act 1996 to allow compromise agreements to cover all existing and future claims without the need to list many separate causes of action;
- Introducing fees for tribunal claims.

He also launched a call for evidence into:

- Whether to cut the consultation redundancy period for 100 staff or more from 90 days, down to 60, 45 or even 30 days;
- The effectiveness of the TUPE regulations and how they might be improved.

While these proposals have been largely welcomed by employers and business organisations, it should be noted that they are still under review and may never come to pass. Consultation will begin in 2012 with any changes unlikely to come into effect before 2013.

The impact of increasing the qualifying period for unfair dismissal to 2 years may mean that some employees coming up to a year's service may be inclined to submit unfair dismissal claims over the next few months to take advantage of their current position. In addition, employers may find more discrimination claims being submitted as there is no qualifying period of service before employees can bring such claims - claims can even be submitted at the recruitment stage. It is important that employers ensure that they don't fall foul of either of these types of claims and seek advice.

If you have any questions about these reforms or the impact they may have on your organisation, please contact one of our consultants on 01942 727200.

YOUR CHRISTMAS QUESTIONS ANSWERED...

The Christmas season is upon us again bringing with it the usual concerns regarding parties, holiday arrangements etc. Below we try to answer some of the commonest questions which will hopefully help to ensure that you gain all the benefit and none of the backlash.

Q. What issues should I be aware of when organising the Company's Christmas Party?

A. As the festive season approaches, your staff will be eagerly awaiting the Christmas party – seeing it as an opportunity to let their hair down with their work colleagues. Whilst you want your staff to enjoy themselves, there needs to be some recognition of what behaviour will be acceptable and what actions will be inexcusable regardless of the circumstances.

Even though the party is probably held off site and outside normal working hours, it will still be considered to be taking place during 'the course of employment.' Whilst employees are out of the work environment they are still representing the Company and are expected to act in a manner that would not put the Company's reputation into any disrepute either at the party or afterwards. They should be made aware that the disciplinary rules will still apply at the Christmas party and should be aware of the contents relating to misconduct and harassment.

You are advised to notify all employees prior to the event that although it may be outside of work, there is certain behaviour which will not be tolerated eg fighting, threatening or abusive behaviour, lewd or offensive behaviour, harassment etc – and could lead to disciplinary action being taken. Members of management should be reminded not to put themselves in compromising positions which could lead to subsequent complaints.



You should consider the arrangements with regard to food and drink – and take care not to disadvantage anyone whose religion prevents them from eating meat or drinking alcohol by offering vegetarian and non alcoholic options.

You should consider the implications of providing a free bar – particularly in relation to individuals who may be under age. You should encourage responsible drinking and ensure there is a responsible member of Management to deal with any issues which look as if they are going to get out of hand.

You should consider the transport arrangements and if transport is not to be provided remind all employees of the dangers of drinking and driving.

You should consider the timing of the event with regard to individual hours and days of work to ensure the minimum disruption to the running of the business.

Q. What should I do if someone fails to turn up for work following the Christmas party?

A. You could inform employees prior to the event that disciplinary action will be taken against any member of staff who fails to turn up or turns up late the day after the Christmas party and there is reason to believe that the absence/lateness is due to the over consumption of alcohol. Otherwise the absence should be investigated in the usual way and if the reason for the absence/lateness is deemed to be unacceptable, disciplinary proceedings should be implemented.

Q. What should I do if a member of staff refuses to work on a Bank Holiday?

A. It will depend on what the employee's contract says. If the employee does not have the contractual right to time off on Bank Holidays but refuses to attend work, it should be treated as a disciplinary issue. If the contract provides for employees to take Bank Holidays as leave you should seek to get their agreement to work on the Bank Holiday in return for a day in lieu.

Q. Are employees entitled to be paid extra for working over the Christmas period?

A. Again it depends on the terms of the contract of employment. There is no automatic entitlement for employees to receive a higher rate of pay for working on bank or public holidays. If the contract does not incorporate a term entitling employees to be paid extra for working over Christmas, you are under no obligation to pay extra if they do so.

If the contract does specify that the employee will be paid extra for working over Christmas, then that agreement should be honoured - otherwise, you might be liable for claims for breach of contract, unauthorised deductions from wages and/or constructive dismissal.

Q. How can I avoid the situation where too many employees are requesting annual leave around the Christmas period in order to use up their leave entitlement before the year end?

A. It is an employee's responsibility to ensure that they take all their annual leave within the holiday year and you should not prevent employees from being able to take their full entitlement. You should make sure your process for booking and taking holiday entitlement is clear, fair and that holiday requests are properly approved – and to avoid the above situation you should monitor employees' holiday throughout the year. If your annual leave year ends on 31 December – you should remind employees around September how many outstanding days they have and ensure that the leave is booked.



Q. How can I deal with competing holiday requests over the Christmas period?

A. As the employer you are able to determine whether or not a leave request should be granted, but you should try to accommodate leave requests where possible, subject to the normal holiday entitlement and booking conditions – which as indicated above should be clear and fair.

If you have competing requests, provided that all requests comply with the notice requirements, holiday should usually be granted on a "first come, first served" basis and decided by you. Where there have been competing holiday requests, make sure you consider the reason for the request and document the reason for granting some requests over others. This needs to be accurate in order to be able to justify all refusals on non-discriminatory grounds.

INDEPENDENT ASSESSORS TO DETERMINE FITNESS FOR WORK....

In our previous Employment Review we reported on a survey which claimed that employers lacked confidence in the new 'Fit Note' system.

Now, in a recently published Government-commissioned Independent Sickness Absence Review, there is evidence that many GPs admit to signing people, who could have worked, off sick, because they lacked the time or the occupational health training to conduct an in-depth assessment.

If the Government accepts the review's recommendation that this responsibility should be passed to independent assessors, GPs will no longer sign workers off on long term sick leave.

Under the new proposals, fitness assessments would be carried out by specialist Government-funded independent assessors who would provide a 'realistic' assessment of whether someone was fit to work, fit to work with some adjustments, or unfit to work.

According to the Department for Work and Pensions it is estimated that long-term absence costs the taxpayer £60bn a year in benefits, unpaid taxes and medical bills and this review recommends some radical solutions to address this costly problem including tax breaks for organisations that employ people who have long-term conditions and a new job-brokering service to find work for people who cannot stay in their current job because of their condition.

ARE YOU PREPARED FOR AUTO-ENROLMENT...

According to the CIPD the majority of organisations are not proactively preparing for next year's auto-enrolment pension requirements.

The incoming pension reforms mean that employers will have to auto-enrol all new employees into a pension scheme. This requirement will be introduced in October 2012 for the largest firms, then gradually rolled out to small employers (those with under 50 employees) until every workplace operates auto-enrolment by 2017.

Employers who do not have their own pension scheme in which to auto-enrol employees must use the state-sponsored National Employment Savings Trust (Nest).

Employers will have to contribute a minimum of 3 per cent of earnings for every staff member who remains opted in. This 3 per cent requirement will also be phased in, with the initial requirement being 1 per cent, rising to 3 per cent by 2017. Enrolled employees must contribute 4 per cent. Auto-enrolled employees will have 90 days in which to



Although the indications are that organisations are aware of the imminent changes to workplace pension schemes, only a minority know the details and timescales of these changes and when they will apply to them. While some organisations have worked out what the financial consequences of auto-enrolment would be for them, many others have not considered the impact the changes will have.

The Government is going to publish a detailed staging profile for all employers in January – so we will keep you updated.

CASE LAW UPDATE...

Once again we highlight recent case law decisions in order to interpret key points of legislation and identify the impact these decisions have on employers.

Fraser v Southwest London St George's Mental Health Trust - Employee on sick leave must request holiday leave in order to be paid for it.

Background:

The EU Working Time Directive provides for every worker to have the right to a minimum number of days paid annual leave. There were 2 cases which considered how the right to paid leave interacted with sick leave - **Stringer and ors v Revenue and Customs Commissioners** and **Schultz-Hoff v Deutsche Rentenversicherung Bund**. In those cases the European Court of Justice (ECJ) held that workers on long-term sick leave retain their right to annual leave and have to be paid for it at their normal rate of remuneration, even if their sickness absence continues for the whole of the relevant leave year –leaving individual member states to choose whether to allow workers to take annual leave during sickness absence, or, if they decided not to, to permit workers to take such leave on their return to work.

A further case - **Pereda v Madrid Movilidad SA** - then considered the case of a worker falling ill during a period of scheduled annual leave and looking to take sick leave instead. The court decided that a worker in this position should have the right, on his or her request, to take annual leave at another time, and, if necessary, after the end of the leave year in which the leave was originally arranged.

Although providing some clarification on previously controversial issues, the decisions in these cases raised fresh doubts as to whether the Working Time Regulations 1998 (WTR) properly implemented the Directive in Great Britain – in terms of the provisions that:

- 1) expressly provide that the basic annual leave 'may only be taken in the leave year in respect of which it is due'; and
- 2) require an employee to formally request holiday leave before he or she is entitled to take it and to be paid for it.

The case reported below returns to the inconsistencies between European and domestic law, and considers whether an employee absent on long-term sick leave should have requested annual leave in accordance with the WTR in order to be entitled to receive payment in lieu of it at the end of employment.

F injured her knee in an accident at work in November 2005. She went off on long-term sick leave until November 2007 when she was certified fit for a limited return to work. Since her entitlement to Sick Pay had expired in August 2006 the Trust resumed paying her but it did not prove possible to find her work.

The Trust ceased paying her again in March 2008 and dismissed her later that year. It paid her in lieu of untaken leave accrued in the final leave year, which began in April 2008, but nothing in respect of the leave accrued in the two previous leave years. She brought a tribunal claim seeking payment in respect of four weeks' leave for each of those two years.



In light of the Stringer case, there was no dispute that she had accrued leave in those years, but the tribunal found that in order to trigger the entitlement to be paid for the holidays, she had to request them - which she had not done. It therefore held that she was in the same position as any other employee who had not exercised his or her right to paid annual leave. Furthermore, F had not shown any evidence that she was unable to take leave during her sickness. F appealed.

EAT Decision:

F submitted that it did not matter that she had not formally 'taken' her leave by serving notice. All that mattered was that she was entitled to it. She also argued in the alternative that the Trust was under an implied contractual duty to inform her of her right to request holiday leave while absent on sick leave.

The President of the EAT considered the purpose behind the WTR - which was to encourage employees to take the full annual leave to which they were entitled, in the interests of their health and welfare. If they were not entitled to be paid while taking annual leave, there would be an incentive to forgo it.

However, the obligation to pay did not apply where annual leave had not been taken. He referred to a previous case - **Kigass Aero Components Ltd v Brown** - which had ruled that employees were only entitled to payment for annual leave actually taken. Entitling employees to payment for statutory holiday regardless of whether or not they have taken that holiday would be inconsistent with the purpose of the Regulations.

He went on to say that the tribunal had correctly concluded that F's entitlement to holiday pay depended on her having given proper notice of her intention to take annual leave and that she had failed to do so. Using the rule of 'use it or lose it', this meant that her failure in asserting her right to leave by putting in a request for it, meant that the right expired at the end of each leave year.

He also said that his conclusion was consistent with the European authorities, particularly Pereda where he thought that it was clear that an employee on sick leave may choose to take annual leave during that absence or ask for it to be deferred until a later period.

He gave brief consideration to F's alternative argument but concluded that there is no duty on an employer to advise his employees of their rights that arise as a matter of general law.

F's appeal was accordingly dismissed.

Comment:

Although this decision provides a commonsense approach to the treatment of annual leave during sick leave, it is unlikely to be the end of the matter, as another EAT recently came to the opposite conclusion where it held that a worker on long-term sick leave who does not request holiday, is entitled to be paid for leave accrued on termination.

Annual leave and long term sickness continues to be a thorny issue which leaves employers confused as to what the appropriate action they should take. Employees returning from long term sick absence over a period of successive holiday years could be eligible for paid leave far exceeding the maximum amount of annual leave prescribed under the WTR.

If you need any assistance with the management and control of your long term sick employees, please contact one of our consultants on 01942 727200.



HEALTH AND SAFETY...

Incident reporting changes now effective

Changes in the way employers have to report certain incidents to the Health & Safety Executive (HSE) became effective from 12th September 2011.

From that date, only fatal and major injuries/incidents can be reported by telephone.

All other work related injuries/incidents, which are included under RIDDOR (The Reporting of Injury, Disease and Dangerous Occurrence) Regulations, have to be reported on-line using the HSE's website: www.hse.gov.uk

Seven forms are available on-line to report the following:

- Injuries
- Dangerous Occurrences
- Cases of Disease
- Injuries Offshore
- Dangerous Occurrences Offshore
- Flammable Gas Incidents
- Dangerous Gas Fittings

Waste firm in court over worker's fall

A waste collection firm has appeared in court after poor safety measures led to a worker falling from the top of a truck. The Company was prosecuted by the HSE after the worker fell four metres to the ground while trying to remove waste that had become stuck on the roof of his collection vehicle.

He had been helping to empty a skip when the incident happened. He had climbed up some metal bars on the truck to reach the stuck waste and fell when the access fixings gave way. He suffered a broken right elbow and damage to his left foot.

The HSE investigation found that the Company had allowed workers to use the metal bars to reach the top of the vehicle, despite the bars not being designed for this purpose. The Company handled more than 270 tonnes of waste every year and although waste often became stuck while the contents of overfilled skips were being emptied, they did not have an acceptable health and safety procedure in place for removing the stuck waste.

The Company admitted breaching Section 2(1) of the Health and Safety at Work etc Act 1974 by failing to ensure the safety of employees. They were fined £15,000 and ordered to pay £11,661 in prosecution costs.

Speaking after the hearing, an HSE Inspector said: "The employee was lucky he wasn't more seriously injured in the fall. He could easily have suffered life-changing injuries as a result. Unfortunately, the Company wrongly assumed the metal bars on the front of the vehicle could be used as a ladder to climb up to the roof. They were not designed to be used in this way and the Company should not have allowed this practice to continue. It should have provided an alternative way for stuck waste to be safely removed."

If you need any information or guidance on Health & Safety related issues please call one of our Health and Safety consultants on 01942 727200.



RIGHT TO REPLY...

If you have any comments or feedback regarding this newsletter or wish to highlight a specific topic you would like to see covered in our next issue, please e-mail the details to us. If there are other individuals in your organisation who you feel would benefit from receiving future newsletters, please forward the details to the e-mail address below.

EML's consultants are on hand to assist you and provide a tailor made service to support your organisation in effectively managing human resource or health and safety issues. Please contact any of our consultants on the contact number below if you would like to discuss any specific problem or issue.

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