

Employment Law Update

We hope you find our General Employment Law Update informative and beneficial. If you require any further information on the topics discussed, please do not hesitate to contact a member of the Employment Team.

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Green Light For "Sickies"

The Working Time Regulations are based upon the need to promote health and safety that are supposed to provide the employer and employee with both social and economic benefits. Under Article 7, a full time employee is entitled to 4 weeks' annual leave, which must be taken in the leave year. Holidays should not be carried over into future leave years, and should not be replaced by a payment in lieu.

Two cases, recently decided by the European Courts, are likely to place even more of a burden on employers under these Regulations. The first case, known as the Stringer Judgment, involves an employee of HM Revenue and Customs who brought a claim seeking accrued holiday pay under the Regulations. Mr Stringer brought the claim, even though he had remained on long term sick leave and had exhausted his entitlement to both contractual and statutory sick pay. His claim was lodged after his employer terminated his contract on the basis of his long term sickness absence and refused to make a payment to him in lieu of holiday entitlement during his holiday year. Not only did the Employment Tribunal find in favour of Mr Stringer, but subsequent appeals by the Revenue to Courts, both in this country and Europe, were unsuccessful. Accordingly, a worker on long term sick can accrue holiday entitlement. It is, therefore, very important that employers provide employees on long term sick with the opportunity to exercise the right to take holiday

leave. Employers should, therefore, take pro-active steps now. As an employer you may need to update your contracts of employment and, in particular, your sickness absence policy. This could help limit an employer's exposure to the payment of holiday entitlement in excess of statutory holidays.

The second significant case to come out of Europe is known as the Pereda case. Pereda was injured 14 days before planned annual leave and was unfit for work for 6 weeks. Pereda submitted a request to move his holidays, but this was refused by his employer. The European Court decided that, in such circumstances, the employee must be granted a replacement period of holidays to ensure that he was not deprived of his right to rest.

Although the case related to someone who had booked holiday leave and became unwell before it began, it was specifically stated that *"a worker who does not wish to take annual leave during a period of sick leave, [annual leave] must be granted to him for a different period of time"*.

We are of the view that this Judgment could easily open the floodgates and could be open to abuse by unscrupulous employees seeking to extend their holiday entitlement by reclassifying their holidays as sick leave.

Clearly, a commonsense approach is needed here, but we would recommend employers review their sick leave and absence policies and consider conducting "back to work interviews" and requesting medical certificates as a

potential deterrent to employees who wish to abuse

Increase to the National Minimum Wage

Increases have come into effect from 1st October 2009 as follows:

- For adults (those aged 22 and over) from £5.73 to £5.80 per hour
- For 18-21 from £4.77 to £4.83
- For 16 - 17 year olds from £3.53 to £3.57

A further announcement has been made by the government that those aged 21 will be entitled to the adult rate of minimum wage from October 2010.

Failure to ensure that your staff are paid the minimum wage cannot only land you in trouble at an Employment Tribunal but can also attract a criminal conviction. If you have any doubt about how much you should be paying your staff, get in touch and get the right advice.

A further development and amendment made to the legislation was also introduced in October of this year. Employers can no longer use tips to top up staff wages so that they meet minimum wage thresholds. Employers were previously able to count service charges and tips processed through the payroll towards the minimum wage. This is no longer acceptable and employers who continue with this practice are likely to find themselves in front of Employment Tribunals.

Fit Notes to Replace Sick Notes

More than 13 million working days were lost in Britain alone last year due to stress related absence from the workplace with the cost being felt in both financial and human terms. Reduced productivity, low morale and poor health, to name but a few issues, at a time when most businesses are doing their utmost to ride out the recession. In a report entitled "Working for a Healthier Tomorrow" a radical new approach to sickness certification was proposed. Amongst other things, the report recommended that the current paper sick notes should be replaced with an electronic certificate system linked to GP computer systems, known as a "fit note". The idea being that we steer away from the current emphasis and from what people cannot do and focus on what they can actually do. It is proposed that the new "fit notes" will have 3 categories of ability to work, namely :-

- Fit for work,
- not fit for work; and
- maybe fit for some work now.



The changes have been welcomed by employers and trade unions alike and are seen as representing a real effort on the part of the Government to tackle long-term sickness absence.

It remains to be seen how successful the "fit note" will be in practice and we will, of course, keep you up-to-date as and when it is known when the new system is due

Increase to the Maximum Weekly Limits for Redundancies

As of October 2009, the maximum weekly limit has increased from £350 to £380. Any employers contemplating a reduction of staff by means of redun-

dancy will need to ensure that they have calculated any redundancy payments using the revised increased amounts. This increase will also be relevant when calculating, among other things, a Tribunal award for unfair dismissal.

 Will you still need me, will you still feed me, when I'm 65..... 

.....well, according to the High Court ruling, YES!!! The High Court has decided that it is satisfied that the Government has proved that UK age discrimination law is valid. So the 'default' retirement age of 65 is lawful and employers who request employees to retire at the age of 65 against their wishes, are not infringing EU law. However, it would appear that the Government will shortly be reviewing the continued existence of the default retirement age. This Judgment did also send a clear message to the Government that it should review and raise the default retirement age and, accordingly, we anticipate there may be movement on the default retirement age.

New Rules Aimed at Protecting Vulnerable Children and Adults

12th October 2009 hailed the introduction of new legislation aimed at protecting vulnerable groups. It will now be a criminal offence for an individual banned under the Safeguarding of Vulnerable Groups Act 2006 to seek or undertake work with a vulnerable group or for "regulated activity providers" to knowingly employ such a person.

Under the new scheme which, when fully operational, will be one of the most stringent in the world, it is estimated that about 750,000 jobs in Wales, both in the paid and voluntary sector, will be affected.

The legislation extends well beyond the typical professions, such as those working in schools and hospitals, and will cover ancillary support workers in further education and social care together with most of the NHS staff including cleaners, catering staff and even administrative staff and receptionists. In some circumstances even the providers of transportation will be subject to the new provisions.

Under the scheme there will be two new "barred" lists. One list will be for people prevented from working with children and the other for those prevented from working with adults.

Accordingly, your employees or volunteers may need Independent Safeguarding Authority ("ISA") registration. If an employer knowingly employs a barred individual whose activities may come into contact with children or vulnerable adults, the employer could face criminal sanctions. Such sanctions include a hefty fine and, in some cases, a 6 months prison sentence. Likewise, barred individuals seeking to undertake work with any vulnerable groups could face up to a 5 year jail sentence as well as up to a £5,000 fine.

ISA registration for the vetting and barring scheme does not start for new workers or those moving jobs until July 2010; and ISA registration does not become mandatory before these workers until November 2010. All other staff will be phased into the scheme as of 2011.

Whilst the mandatory requirement is some time off, given the potential sanctions that could face an unaware employer, we strongly recommend that you take steps now to ensure that you are compliant with these rigorous regulations.

For further advice on any employment matters, please contact any member of the employment team:

Daniel Wilde, Partner
Angela Protheroe, Associate
Ben Jenkins, Trainee

Harding Evans Solicitors
Queens Chambers
2 North Street
Newport
NP20 1TE
Tel: 01633 244233
Fax: 01633 246453
www.hardingevas.com

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