



# WH Law LLP

## SOLICITORS

Specialist Workplace and Health & Safety Lawyers

April 2009

This issue of our newsletter will look at some of the changes in employment law coming in to effect this April and in particular, those being made by the much anticipated Employment Act 2008 ('the Act'). Amongst other things, the Act will repeal the current statutory dispute resolution procedures which have given rise to more litigation than dispute resolution since their introduction in 2004 and replace them with a simplified dispute resolution procedure.

There are a number of other important changes in April including:

- an increase in holiday entitlement
- changes to the National Minimum Wage
- extension of right to request flexible working

We also have a round-up of some of the more important decisions in the last few months, affecting holiday entitlement, retirement and discrimination.

Mike Rogers

Sarah Pugh

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### ACAS launches new Code of Practice on Discipline and Grievance

The current statutory dispute resolution procedures are being scrapped to be replaced with a 'fair and reasonable' approach to handling workplace disciplinary and grievance procedures. The new revised and strengthened Code of Practice will come into force with the commencement of the Employment Act 2008 this April.



The new ACAS Code and Employment Act will replace the current '3-step' dismissal, disciplinary and grievance procedures. The purpose of the new Code is to allow employees and employers to have 'greater flexibility' to deal with workplace

disputes and also to deal with disputes early in order to avoid going to a Tribunal. According to the Minister for Employment Relations, the new rules are "...a key element in the Government's plans to streamline and simplify the dispute resolution system to the benefit of employers and employees."

The new Code will be significantly shorter than the existing Code. It will provide employers and employees with the basic principles for handling disciplinary and grievance situations in the workplace. It will be accompanied by an advisory guidance

booklet which will contain practical guidance on dealing with disciplinary and grievance situations, including some guidance on suspending employees, investigating cases, and preparing for disciplinary meetings.

In general terms, the key features of the new Code are as follows:

- the importance of fairness and reasonableness;
- employers and employees should try to resolve disputes without resorting to litigation;
- employers should keep written records of the process;
- all issues should be dealt with quickly;
- employers should act consistently;
- appropriate investigations should be made;
- where matters are not performance related, meetings should be conducted by a manager who is not involved;
- employees should be informed of the basis of any allegation(s) and have the opportunity to state their case;
- employees have the right to be accompanied to meetings;
- employees should be given the opportunity to appeal;
- the code will not apply to redundancies or the termination of fixed-term contracts.

Although the Code will be non-binding, there will be consequences for employers and employees who fail to follow it. Employment Tribunals will consider this when deciding the claim. If an employer has unreasonably failed to comply with the revised Code, instead of reaching the decision that it is

automatic unfair dismissal, they will be able to increase most compensation awards by anything up to 25%. They will also be able to reduce the award by 25% where the employee has unreasonably failed to comply.

#### **Action for employers:**

- Start reviewing and amending your existing disciplinary and grievance policies and procedures in the light of the new rules
- Fully equip your HR team with the knowledge and skills they need to advise colleagues
- Train your managers and staff
- Act promptly to prevent any long-term consequences

#### **Increase in statutory paid holiday entitlement**



Currently the law states that workers working a 5 day week are entitled to a minimum of 24 days holiday which can include bank and public holidays. From 1 April 2009, this will increase to 5.6 weeks' holiday (28 days for employees who work 5 days a week). For

those employees who are already contractually entitled to over 28 days, this change will not alter their legal entitlement.

Part-time workers will also be entitled to the same level of holiday, calculated on a pro-rata basis.

The key changes to note are:

- employers can control and/or restrict when employees can take their holiday
- employees will start building up their holiday as soon as they start work
- employees must be paid as normal for their holiday
- employees will be entitled to be paid in lieu of accrued holiday on termination of their employment.
- Bank and public holidays can be included in the minimum entitlement.
- Employees continue to be entitled to holiday leave throughout their ordinary and additional maternity leave and paternity and adoption leave.
- employers can no longer replace leave with a payment in lieu, even if their staff ask for it. They can offer more paid annual leave than the statutory minimum, but it is important that they do not provide less.

From 1 April 2009, it will be against the law for employers to pay their workers in lieu of them taking any part of their basic statutory entitlement - although payment in lieu of any leave above the statutory entitlement will be allowed depending on the terms in the contract of employment.

Although there is no need to reissue new contracts, in anticipation of the increase, for flexibility, employers will need

address this matter now and consult with their staff. This could be done, for example, through a letter to staff or by a statement on pay slips.

#### **Statutory sick, maternity, paternity and adoption pay increases**

The standard rates for statutory sick pay and statutory maternity, paternity and adoption pay are set to increase from April 2009.

The rate of statutory sick pay will rise from £75.40 to £79.15 per week. The standard rate of statutory maternity, paternity and adoption pay will rise from £117.18 to £123.06 per week

Further information on the new rates can be viewed on the HM Revenue and Customs website:

<http://www.hmrc.gov.uk/employers/stat-pymnt-rates09-10.htm>

#### **Right to request flexible working time is extended for parents and carers**

Flexible working is currently available to parents with children aged six or under, and registered carers. From 6 April 2009, the right to request flexible working time will be extended to parents to care for a child up to the age of 16.

##### **- General eligibility requirements**

Anyone can ask their employer for flexible working arrangements, but to have the statutory right to make such a request an employee must meet certain qualifying criteria. To be eligible the person must:

1. be an employee (but not an agency worker or in the armed forces);
2. have worked for the employer for 26 weeks continuously before applying; and
3. not have made another statutory request during the past 12 months

The employee can only make an application to care for:

- a child under 6 years old. From 6 April 2009, the right to request flexible working will be extended to cover employees with parental responsibility of a child aged 16 and under;
- a disabled child who is under 18, and who is in receipt of disability living allowance; or
- an adult who requires care.

#### **Parents who can make flexible working requests**

A parent can request flexible working if they are either:

- the mother, father, adopter, guardian, special guardian, foster parent or private foster carer of the child or a person who has been granted a residence order in respect of a child
- married to, or the partner or civil partner of, the child's mother, father, adopter, guardian, special guardian, foster parent or private foster carer or of a

person who has been granted a residence order in respect of a child

### Carers who can make flexible working requests

A carer can request flexible working if they care, or expect to be caring, for either:

- a spouse, partner, civil partner or relative,
- someone who lives at the carer's address.

A relative is a mother, father, adopter, adoptee, guardian, special guardian, parent-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law, uncle, aunt or grandparent. Step-relatives, adoptive relationships and half-blood relatives are also included.



Employees can make one application every 12 months - even a second request in this period was for a different caring responsibility. Employees must note that there is no right to a flexible working arrangement. However, an employer must seriously consider any application made, and can only reject it on good business grounds otherwise they could leave themselves open to potential sex discrimination claims.

### The types of flexible working requests employees can apply for are:

- change the hours they work
- change the times when they are required to work
- job sharing
- working from another location of the business or from home (whether for all or part of the week)
- term-time working
- flexible working hours scheme
- enhanced flexible working hours scheme
- banked hours
- reduced working hours
- extra leave and extended leave

By extending the rights to parents of children up to the age of 16, it is anticipated that an extra 4.5 million working parents will benefit.

## Stop Press!

### Advice following some recent cases...

#### European Court rules that sick workers are entitled to full annual holiday pay

On 20<sup>th</sup> January 2009, the European Court of Justice ('the ECJ') handed down its ground-breaking judgment in the long running case of **Stringer v HMRC** (previously known as **Ainsworth v HMRC**) that workers on long-term sick are entitled to paid holidays.

The case was brought by a group of HM Revenue and Customs employees who were refused holiday pay after returning from sick leave. One of the employees had sought to take annual leave during a period of sick leave but was prevented from doing so and the others had been absent on sick leave and were then dismissed. Upon termination, those that were dismissed (who had not taken any holiday whilst on sick leave) sought payment in lieu for outstanding holiday. HM Revenue and Customs refused on the basis that they had been on sick leave.

The employees all brought claims under the Working Time Regulations 1998 ('WTR'), which implements the EC Working Time Directive ('the Directive'). Although they were successful in both the Employment Tribunal and Employment Appeals Tribunal, the employees lost in the Court of Appeal who held in favour of HM Revenue and Customs.

The Court stated that firstly, the holiday could not be taken whilst an employee is on sick leave and secondly, if it could not be taken whilst on sick leave then employees were not entitled to payment for such leave upon dismissal. On appeal to the House of Lords, the matter was referred to the European Court of Justice (ECJ) in December 2006 to interpret the Directive and to consider two questions:

1. Whether the Directive entitles a worker on sick leave to accrue annual leave while absent and/or to take that annual leave while absent?; and
2. Whether an absent worker is entitled to a payment in lieu of untaken annual leave upon termination of employment?

Overruling the current position in the UK, the ECJ responded by saying that a "... worker does not lose his right to paid annual leave which he has been unable to exercise because of sickness. He must be compensated for [the] annual leave not taken."

In response to the questions, the ECJ responded:

1. A worker who is returning from one year's sick leave is still entitled to a period of four weeks' minimum paid annual holiday leave, despite the fact that they are not actually at work. The national courts can decide whether the accrued paid leave can be taken during that year, or whether it should be carried over to another year (in addition to any holidays they are entitled to for the year ahead) or to be paid in lieu of it if their employment terminates.
2. If the worker was on sick leave for the whole of that year, or if he was absent on sick leave for part of the year and was still on sick leave when his employment terminates his right to be paid annual leave is not extinguished at the end of a leave year.

#### What does this mean?

The ECJ's judgment does not tie in with the current key provisions of the WTR: use it or lose. However, it is obviously a difficult decision for employers. It poses "potential serious financial and practical ramifications for employers" and many may now need to review and change their policies on sickness, holiday and maternity leave.

The case will now return to the House of Lords for a final judgment. There is a general opinion that the Law Lords are likely to overturn the Court of Appeal's earlier ruling. *The final decision is expected in a few months.*

### **Landmark court ruling for victims of homophobic banter**

In *English v Sanderson Blinds Ltd* the Court of Appeal considered the question of whether a person can claim discrimination for sexuality without being (or without revealing that s/he is) actually gay.

Stephen English suffered years of homophobic "banter". This included abusive name-calling and having cruel jokes made at his expense. The teasing and "tormenting" began when a work colleague discovered that he had been to boarding school and now lived in Brighton, which has a large gay population. Mr. English was in fact a heterosexual and happily married with three daughters, a fact which his colleagues were aware of. His colleagues were aware that he was not gay and Mr. English accepted that they knew that he was not gay. However, after his employers, Thomas Sanderson Blinds Ltd, failed to take action, he brought a claim against them for harassment on grounds of sexual orientation under Regulation 5 of the Employment Equality (Sexual Orientation) Regulation 2003.

An employment tribunal subsequently dismissed his case on the grounds that Mr. English was not covered by Regulation 5, which only applies to harassment based on actual or perceived sexuality.

The Court of Appeal held that the Sexual Orientation Regulations 2003 do protect heterosexuals as long as the harassment has sexuality as its focus. So therefore, it is irrelevant whether someone: a) is gay or not, b) is not perceived or assumed by his/her tormentors that s/he is gay, and c) accepts that his/her tormentors do not believe him to be gay. The Court stated that it did not matter whether Mr. English was gay or not, the "calculated insult to his dignity" and the consequently intolerable working environment was sufficient to bring his case within the Regulations.

### **Can employees be lawfully made to retire at 65? A legal challenge to the mandatory retirement age...**

The European Court of Justice ('the ECJ') has given its judgment in *The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* (also known as the 'Heyday Challenge').

The case challenged the legality of the provisions of the Employment Equality (Age) Regulations 2006 ('the Regulations'), which allow employers to dismiss employees age 65 or over by reason of retirement. Heyday questioned whether the Regulations had been properly implemented stating that parts of the Regulations were not compliant with the UK's obligation under the EU Equal Treatment Framework Directive ('the Directive'). They argued the Regulations allowed for forced retirement contrary to the Directive.

The case went all the way to the House of Lords who referred certain questions to the ECJ.

On 5 March 2009, the ECJ clarified the interpretation of the EU Directive and concluded that that it is for the national Courts to decide whether the legislation based on the EU Directive has a "legitimate aim" in terms of employment policy and labour market objectives.

Ultimately this means:

1. The UK Regulations fall within the scope of the EU Directive
2. The High Court must ascertain whether the UK legislation is a 'proportionate means of achieving a legitimate aim'.

\*\*\* WATCH THIS SPACE FOR FURTHER DEVELOPMENTS... \*\*\*

### **Employment Agency Provisions**

All employment agencies in England, Scotland and Wales must comply with the Employment Agencies Act 1973 and Regulations. The changes to the Employment Agencies Act 1973 are relatively small but include the following:

- the Employment Agency Standards Inspectorate will be given additional inspection powers;
- offences under the Employment Agencies Act may now be dealt with by the Crown Court (with power to impose unlimited fines). Previously such offences were dealt with by the Magistrates' Court; and
- SCOTLAND ONLY: where the offence has been committed by a partnership, individual partners will be liable for offences under the Employment Agencies Act 1973

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## **OUR SERVICES**

WH Law LLP have specialists able to assist and advise both employers and employees in all aspects of Employment Law.

We take a client focused approach to advice and consider the practical as well as the legal implications of decisions made within your business.

We provide a holistic service to businesses, focusing primarily on the assessment and management of the risks involved in employing people within a business, with particular focus on diversity issues and post-termination issues such as employee competition and breach of fiduciary duties. We prepare and review documents (contracts, policies and procedures) and conduct litigation on your behalf.

Our services also include bespoke training for managers and personnel officers and running seminars.

We can offer these services through a programme tailored to your needs with a monthly retainer, negotiated with you, or on an ad hoc basis according to your needs.

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