



# Update

Employment Law Newsletter - Winter 2008

Support Line 08453 100 999



Welcome to the Winter edition of the Employment Law Newsletter. Inside this edition we provide details of the new ACAS Code of Practice which is due to be introduced in April 2009. We also inform you of the forthcoming changes to holiday entitlement, again due to come into effect in April 2009, as well as important updates in employment case law.

*Rod Devall, BA, MBA. Chartered MCIPD, Support Line Manager.*

## *ACAS Code of Practice*

ACAS has published its revised Code of Practice on Disciplinary and Grievance Procedures which comes into effect on 6th April 2009. The Employment Bill will enable an Employment Tribunal to increase or decrease an award by up to 25% for unreasonable failure to follow the Code.

Employers will welcome the Code as it is set to replace the Statutory Dismissal and Grievance Procedures from April 2009. The existing legislation has always been heavily criticised for making procedures unnecessarily complicated, having a draconian impact on employers. Currently, any failure to follow the statutory procedures can attract a potential increase in compensation of between 10% and 50%.

One interesting development in the Code is that, where an employee is found guilty

of misconduct or poor performance in the first instance, a written warning can be issued. The Code focuses on good practice rather than rigorous procedures.

There is also more emphasis in the new Code on informal resolution of disciplinary and grievance issues and general advice on good practice, in favour of setting out clearly the steps of the procedures and concentrating on the appropriate principles employers should follow in dealing with disciplinary matters.



# *Changes to the Statutory Flexible Working Holiday Entitlement*

The statutory minimum holiday entitlement is due to increase with effect from 1st April 2009 from 4.8 to 5.6 weeks (28 days for staff working a five day week), pro rata for part time workers. This entitlement includes bank holidays.

If a company currently offers less than this statutory minimum then the entitlement for 2009 will need to be recalculated relative to when the leave year starts.

The increase is 0.8 weeks for the total year, therefore employees will be entitled to an additional 0.067 weeks for every month of the leave year remaining after 1st April 2009 when the increase comes into force.

The further implication of this is that employers will only be able to offer payment in lieu for unused holiday entitlement in excess of the minimum 5.6 weeks to avoid being in breach of the Working Time Regulations

It will not be necessary to amend contracts but all staff should be informed in writing if they are affected by the change, either by letter or by a statement on payslips etc. Additionally notification could be made via staff notice boards, newsletters, intranet etc.

The Government has outlined proposals that could see the extension of the right to request flexible working to parents of children up to and including the age of 16 from April 2009. The right to request flexible working is currently open to parents of children under six or parents of disabled children under 18 if they have more than six months' service. This was also extended to carers of adults, subject to certain conditions in 2007.

An independent review was undertaken which proposed extending the right to request flexible working to parents of older children. These recommendations were accepted by the Government earlier this year. The Trade Union Commission's General Secretary, Brendan Barber welcomed the announcement but insisted unions would carry on campaigning for the right to be extended to all employees.

If a request for flexible working is made in writing, an employer should adhere to the procedures and rules contained within the Employment Rights Act 1996 and the Flexible Working Regulations.

However, with the current climate having an impact on businesses across the UK, there has been talk of plans to put the new family-friendly proposals on hold.

## *Points Based System for Immigration*

The Government are currently in the process of implementing a new system for migrant workers wishing to come to the UK from non-EEA member countries.

This new scheme is known as the Points Based System, and scores migrant workers wishing to come into the UK to work or study to ensure that the UK attracts only migrants that have a benefit to its economy. The system is split up into 5 tiers:

- Tier 1 - Highly skilled workers e.g. scientists or entrepreneurs;
- Tier 2 - Skilled workers with a job offer e.g. nurses, teachers, and engineers;
- Tier 3 - Low skilled workers filling specific temporary labour short ages;
- Tier 4 - Students;
- Tier 5 - Youth mobility and temporary workers e.g. working holiday makers or musicians coming to play a concert.

Employers wishing to recruit migrant workers from non-EEA member states under tiers 2 and 5 need to do so under the new Points Based System from 27th November 2008, and in order to recruit under these tiers, the employer needs a licence issued from the UK Border Agency.

As such, employers to whom the new immigration rules apply are urged to ensure that they have a licence ready if they wish to employ migrant workers under these tiers.

## *Maternity and Paternity changes Delayed*

Changes extending the benefits to parents are expected to be delayed until April 2010. The planned changes affect the amount of maternity and paternity pay and leave employees are entitled to but are now only likely to affect parents of babies born after April 2010.

It is proposed that the period of maternity and adoption pay will increase from the current 39 weeks to 52 weeks which will cover the whole maternity leave period whereas the last 13 weeks of the Additional Maternity Leave period are currently unpaid.

The care of the child may also be more equally shared between the parents as the father will now be entitled to up to a maximum of 26 weeks paid paternity leave if the mother returns to work and has not used her full 52 weeks entitlement of paid maternity leave.

Therefore the family will receive 52 weeks paid leave in total, with the father being eligible to take up to 26 weeks of that entitlement if the mother returns to work.

## Retirement Age challenge by Heyday

The Advocate General on the case waiting to go before the European Court of Justice (ECJ) has backed UK laws which compel UK workers to retire at 65 years of age and has made a recommendation for the ECJ to dismiss challenges made in the Heyday appeal.

Whilst this opinion given is not binding, the Advocate General's view could influence the judges ruling in the case regarding Heyday, a part of Age Concern, who are challenging the current UK laws.

Heyday argues that the current legislation 'is costing good workers their jobs' in which 'denying people work because of their date of birth is grossly unfair'.

The Confederation of British Industry (CBI) has welcomed the Advocate General's opinion arguing that a normal retirement age is an essential management tool, adding that employees are afforded the right under the legislation to request to work beyond 65 years.

A decision on the Heyday challenge is expected from the ECJ before Christmas, the outcome of which, could affect the 260 cases already at Employment Tribunal which have been stayed pending the ECJ decision.

## Comparitors for Disability Discrimination

### **Clarke v Novacold**

In July this year the House of Lords gave judgment on a disability discrimination case that, whilst not directly related to employment law, could have significant impact within the employment setting.

Previously in cases where an employee was claiming disability discrimination the test applied would be to compare the treatment the disabled person received against someone who was not disabled and whose circumstances are not similar.

By way of an example if an employee is dismissed on capability grounds for being off sick for 18 months with clinical depression, their comparator would be someone who did not suffer depression and was not absent, which left the employer having to justify the reason for the treatment and dismissal.

However following *London Borough of Lewisham v Malcolm* case the correct comparator is now someone who has been treated similarly but the circumstances are not disability related.

For example the comparator would be a non disabled employee who was absent for similar periods but the reason for absence is not disability related, therefore

would have more likely been treated in the same way and would have been dismissed also.

Due to this ruling it is anticipated that it will be harder for a disabled person to successfully claim that they were subject to disability-related discrimination.

## *SSP for Agency Workers*

With effect from 27th October 2008 agency workers with contracts lasting three months or less are now entitled to receive Statutory Sick Pay (SSP). Qualifying conditions to be eligible for SSP used to state that agency workers would not qualify where they were employed on a contract for three months or less.

The Fixed Term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations 2008, which as stated above came in to force on 27th October 2008 now protects agency workers from being treated any differently than other employees when it comes to SSP entitlement, irrespective of whether they are directly or indirectly employed and regardless of the length of their contract.

It is also worth noting that what used to be known as incapacity benefit and income support has now been replaced with the new Employment Support Allowance (ESA).

## *Increase in Compensation Limits*

The annual increase in compensation limits awarded by Employment Tribunals has recently been published. The following increases will apply from 1st February 2009:-

- Maximum compensatory award for unfair dismissal increasing from £63,000 to £66,200.
- Statutory maximum for a 'week's pay' for redundancy increasing from £330 to £350.
- Statutory guaranteed pay (applicable in the event of lay off) increasing from £20.40 to £21.50.
- Maximum basic award for unfair dismissal from £9,900 to £10,500.



# Case Updates

## *Stress at Work*

### ***Dickins v O2***

O2 in this case were found to be liable for the mental injury caused to this employee following claims of stress at work.

The Court of Appeal addressed the three key elements of stress claims as follows:-

- 1) Foreseeable injuries: The employee had previously complained about the stress of her job, was coming in late and had told her line manager that she did not know how long she could keep going before she became ill.
- 2) Breach of duty: the court said that O2 ought to have sent its employee home pending an urgent review by Occupational Health, even though the employee had not been signed off by her own doctor.
- 3) Causes: The court held that there was a sufficient connection between the breach and the illness and found a series of failings by O2 to address the problems had contributed to her illness.

Following this judgment, it is now absolutely clear that speed is of the essence and employers must act as soon as they are aware of problems to ensure compliance with their duty of care.

## *Rest Breaks*

### ***Commissionaires Management v Hughes***

In a recent Employment Appeal Tribunal case clarification was provided in relation to rest breaks and compensatory rest for employees.

It was ruled that, whilst an employee is entitled to 20 minutes uninterrupted rest break after 6 hours, there is no entitlement to an additional period of rest if working 12 hours.

In certain circumstances should workers, such as security staff, care workers etc, be unable to take their statutory rest breaks, equivalent compensatory rest should be given as soon as possible during a period which would otherwise be classed as working time. Employers should however not use time between shifts as compensatory rest.

## *Religious Discrimination*

### ***Saini v All Saints Haque Centre***

In this case Mr Saini, a Hindu, was put under pressure to give evidence against his manager, also a Hindu, by members of the board of the All Saints Haque Centre, who were of the Ravidass faith.

However, they did not carry out a fair investigation, but instead set about indirectly gathering evidence against and generally targeting one of his colleagues, Mr Chandel, who was a Hindu. Mr Saini resigned when he realised that he was, effectively, being pressured into providing 'ammunition' to be used against his colleague.

The Employment Appeal Tribunal concluded that Regulation 5(1) of the Employment Equality (Religion or Belief) Regulations 2003 will be breached not only where an employee is harassed on grounds that he holds certain religious beliefs but also where he is harassed because someone else holds certain religious beliefs.

## *Time off for Dependants*

### ***RBS v Harrison***

Time off for dependants is considered to be 'a right allowing employees to take a reasonable amount of time off work to deal with certain unexpected or sudden emergencies and to make any necessary longer term arrangements.'

In this case Harrison's childminder had given her two weeks notice of unavailability to provide the usual childcare arrangements. Harrison tried without success to make alternative arrangements and subsequently asked for

the day off which RBS refused, however, Harrison took the day off despite this. RBS subsequently disciplined Harrison for taking unauthorised absence. Both the Employment Tribunal and Employment Appeal Tribunal found that Harrison had suffered a detriment when, under s57A(1)(d) of the Employment Rights Act 1996, she was entitled to take that time off.

In this case it was found that Harrison had exercised her right to take time off in order 'to deal with an unexpected disruption of care arrangements for a dependant' and that there was no requirement to review the passage of time between the employee finding out about the unavailability and it taking effect.

They stated that it was more a question of whether the time off was 'necessary.' They also found that the word 'unexpected' did not need to be supplemented with the words 'sudden' or 'in emergency' on this occasion.

## *Agreements on Holiday Dates*

### ***Industry and Commerce Maintenance v Briffa***

The Employment Appeal Tribunal considered regulation 15 of the Working Time Regulations 1998 which requires that an employer must give double the amount of notice in relation to the time to be taken

when it comes to enforcing dates for an employee to take their holidays.

The employer gave Mr Briffa one week's notice of termination of his employment and told him to take 4 days holiday during his notice to use up his outstanding entitlement.

The Employment Tribunal found that the employer was in breach of regulation 15 since Mr Briffa was not given 8 days' notice of his holiday and he was awarded 4 days' pay in lieu in respect of the 4 days' holiday.

The Employment Appeal Tribunal allowed the employer's appeal ruling that the original tribunal had failed to consider that the requirement of regulation 15 can be varied or excluded by a "relevant agreement".

In this case there was a relevant and enforceable contractual term that covered the position and allowed the employer to require an employee to take any accrued holiday during the notice period.

## *Rainbow v Milton Keynes Council*

Ms Rainbow is a 61 year old teacher with 32 years experience, employed at a school in Milton Keynes. She applied for a full time position at the same school, which was advertised as being suitable for "candidates in the first five years of their

career". Rainbow's application was rejected without interview and she subsequently brought an Employment Tribunal case alleging direct and indirect age discrimination.

The tribunal found that the school had indirectly discriminated against her in that the advert disadvantaged Rainbow's age group.

The tribunal rejected the school's case that the justification was based on cost. They rejected this on the basis that the approach, as taken in an earlier case, that "economic grounds can properly be a factor justifying discrimination if combined with other reasons" had not been proven in this case.

