employment law update

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Holiday Pay for Long-Term Sick Workers

In a recent decision by the ECJ, it was held that a worker who is on sick-leave for the whole of an annual leave year, is entitled to a period of four weeks' paid annual leave. This right is not extinguished at the end of a leave year 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 terminated

Flexible working

Parents with children under 17 can now request flexible working (it was previously children under 6). Employers can still refuse the request so long as they have a justifiable business reason for doing so.

SMP / SSP

SMP increases to £123.06 (from £117.18), and SSP increases to £79.15 (from £75.40).

National Minimum Wage increase

On October 1st 2009 the National Minimum Wage will rise again to £5.80 for adults aged 22 or above, to £4.83 for workers aged 18 to 21 and to £3.57 for under 18s .

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Stress At Work – Worrying Decision For Employers

In October 2008 the Court of Appeal handed down its decision in the case of *Dickens v O2 plc*. They found that O2 were responsible for the stress induced personal injury suffered by their employee, Dickens.

Employers should take heed of this decision as the Court of Appeal lowered some of the hurdles that employees have to clear in order to bring a successful personal injury claim:

1. They held that if there is sufficient warning or there is a risk of harm to an employee's health and that any breakdown had not "come out of the blue", then the employer should have reasonably foreseen that there was a risk to the employee.

2. If you are informed that and employee that is suffering from work-related stress, just advising them that they should seek counselling is not enough to discharge your liability. However, offering confidential advice and a counselling service may be enough; in other words you must been seen to be taking an active role in trying to aid the recovery of your employee.

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Paid holiday

The minimum annual paid holiday entitlement for most full time workers increases to 28 days from April 2009. This is 8 days more than the absolute minimum required by the EC Working Time Directive so the 8 extra days are not subject to EC requirements. It follows that it will be possible, if employer and worker agree, for the 8 additional days to be carried forward from one year to the next. There is no requirement to round up part days' holiday entitlement

It should be noted that bank and public holidays count towards the 28 days. Therefore, assuming 8 bank holidays in a year, the new rules make no difference to the minimum amount of holiday which can be taken in cases where the employer already allows 20 days annual holiday plus, paid bank holidays.

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The New ACAS Code of Practice

On Friday, 7th November 2008 the new ACAS Code of Practice was published . It brings wide ranging changes to the area of dispute resolution. The Employment Act 2008, which gained Royal Assent on 13th November 2008, provides for the repeal of the Employment Act 2002 (Dispute Resolution) Regulations 2004 and the related provisions of the Employment Act 2002.

The main effect of the new Act is that it is no longer mandatory for employees to raise a grievance in order to bring a claim in the Employment Tribunal. Under the new Code an employer is no longer obliged to hear the grievances of ex-employees, which means that the complex differentials between the Statutory Grievance Procedures and the Modified Grievance Procedures no longer exist. Unlike the 2004 Act, which made compliance with ACAS Code of Practice mandatory, the 2008 Act allows for a semi-voluntary compliance with the Code. A failure to comply with the Code will not in itself make the employer liable, but tribunals will take the code into consideration when examining individual cases. If the tribunal considers it just and equitable to do, they may increase or reduce any compensation awarded in the event that either party unreasonably fails to comply with the Code. It does advise that disciplinary and grievance procedures should be set down in writing, and that a formal grievance should be raised in writing with a manager who is not the subject of the grievance. It remains to be seen to what extent the tribunals will take these aspects into consideration and, until this is known, it would probably be best to adhere to the Code as closely as possible. The new law only applies to matters where the event giving rise to the claim occurred after 6 April 2009. For earlier events, there are complex transitional provisions that largely apply the law as it was prior to the change

The Code is aimed at promoting the early resolution of disciplinary and grievance issues in the workplace and ensuring that issues are dealt with in accordance with the basic requirements of fairness. The fairness of any procedure will be heavily dependant on whether an employer has followed the principles enshrined in the Code when dismissing an employee. A failure by an employer to comply with the Code will not, on its own, render an employer liable for a claim but it will be taken into account by the tribunal when considering whether or not the employer acted fairly. However, simply following the Code will not necessarily make a dismissal fair.

A summary of the main provisions.

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

The Code does not apply to dismissals due to redundancy or to the non-renewal of fixed term contracts on their expiry.

IMPORTANT NOTICE

These notes are for guidance purposes only. We believe the contents to be correct but it should not be taken as accurate or full or to apply to specific situations, without first referring to us. Please feel free to call the office and speak to one of our employment team who will be willing to assist with any queries you may have.

Rest Breaks

In the case of *The Corps of Commissionaires Management Ltd v Hughes,* the Employment Appeal Tribunal has held that an employee is entitled to ***just one*** rest break of 20 minutes once he or she has worked for more than six hours. Prior to this an employee was entitled to a rest break after every six hours worked.

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Redundancy Marking Criteria Age Discriminatory... but Justified

The High Court in *Rolls Royce v Unite* has held that two collective agreements giving points for length of service in the redundancy selection process (i.e. the marking criteria used to select employees for redundancy) were lawful under the Age Discrimination Legislation. The Employment Equality (Age) Regulations 2006 prohibit the application of a "provision, criterion or practice" that is disadvantageous to a particular group because a considerably smaller proportion of that group is able to comply with it, unless it can be shown that the provision, criterion or practice is a proportionate means of achieving a legitimate aim. The High Court ruled the points system was age discriminatory but was a "proportionate means of achieving a legitimate aim." It judged Rolls Royce was not operating a "last in, first out" principle and it seems likely that any redundancy scheme which operates solely on the basis of "last in, first out" will not be justifiable.

The ruling effectively establishes that protecting older workers in redundancy agreements is legitimate, observing that older workers typically had more difficulty finding new employment after being made redundant. The inclusion of a length of service criterion in the collective agreements was not therefore unlawful. It was relevant in this case that the redundancy scheme was agreed with a trade union and length of service was only used as part of a wider measure of performance.

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Heyday - The ECJ Ruling

UK charity, Heyday, which is part of Age Concern, is currently challenging parts of the Employment Equality (Age) Regulations 2006 that allow employers to enforce retirment and to refuse to employ people over the age of 65.

The High Court referred the case to the European Court of Justice (ECJ) to provide an interpretation of the European Union's Equal Treatment Employment Directive, which Heyday claim has been breached by the UK government by imposing a mandatory retirement age of 65.

The ECJ has finally handed down its decision. Heyday contended that 'forced retirement' at age 65, permissible under the *Employment Equality (Age Discrimination) Regulations 2006*, is inconsistent with the EU Equal Treatment Framework Directive.

In summary, the ECJ follows the earlier Advocate-General's opinion, deciding:-

- a retirement age of 65 is, in theory, capable of being justified as being a proportionate means of achieving a legitimate aim. It is for the UK courts to decide whether that test is met
- UK legislation does not breach the Equal Treatment Framework Directive by failing to set out, expressly, a list of permissible 'legitimate aims'.

So, the case will go back to the High Court to decide whether the ability lawfully to dismiss on grounds of retirement at age 65 is a proportionate means of achieving a legitimate aim.

Watch this space...

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