Sickness when on holiday

Employees will now get extra holiday if they fall ill on planned holiday leave. This decision was handed down in *Pereda v Madrid Movilidad,* where the European Court of Justice held that a worker who is sick during previously planned leave is entitled to the holiday days missed. On their return to work, the employee will then have to request to take the leave missed at another time.

This judgement could be open to criticism as it allows employees to gain extra holiday if they are ill during a period of holiday. This could lead to abuse from employees. However, the reasoning for this judgement is that an employee should get at least four weeks holiday a year and if they are sick during this holiday, then they should be entitled to take the missed holiday time. The logic is that being off sick would not offer a break or relaxation, which is the whole purpose of holiday leave.

Employers have a high degree of choice when deciding redundancy pool

The Employment Tribunal's decision in *Lomond Motors Ltd v Clark* has been reversed by the Employment Appeal Tribunal. The original hearing by the employment tribunal held that the employers redundancy pool was inappropriate, and subsequently, the employee's dismissal was unfair. This was due to accountants from only two out of four garages in the employers business being considered. The Employment Appeal Tribunal reversed this and held that the employer had a choice of reasonable responses, and therefore, the two garages where the accountants were contracted were considered separate premises from the other two.

What does this mean for employers? It will now allow for employers to have more choice when deciding who to consider for redundancy. Providing employers choose only certain people for a reasonable reason, such as in this case where the business premises in which the employee worked were considered separate garages from the other two. This judgement however does not mean employers can simply pick and choose who they wish to make redundant. If employees are chosen for redundancy unfairly against others then a tribunal hearing could follow.

Unofficial strikes – dismissal

The European Appeal Tribunal has confirmed recently in *Sandhu and ors v Gate Gourmet London LTD* that dismissal during an unofficial strike is not unfair. A strike is considered unofficial if it is not planned and carried out in conjunction with a trade union. If an employee is dismissed for taking part in an unofficial strike they are subject to ordinary unfair dismissal rules. This however, would also mean that the dismissal would be subject to the ACAS code of conduct in relation to disciplinary and dismissal procedures and it would meaning that an employee would be eligible for bringing a claim for unfair dismissal in the Employment Tribunal. If you are considering dismissing an employee for any reason, correct disciplinary and dismissal procedures should be followed. Alternatively call our dedicated helpline service to obtain further guidance.

Without prejudice discussions can sometimes be admissible

In *Oceanbulk Shipping & Trading SA v TMT Asia Ltd & ors* the high court has allowed "without prejudice" discussions to be used as admissible (acceptable) evidence to the same extent as it would be if it was not a without prejudice discussion. The judge added that the reason without prejudice discussions are usually inadmissible is due to public policy and is not a absolute rule. The Judge also stated that generally without prejudice negotiations that fail to result in a settlement are inadmissible as evidence in later litigation procedures. However, if they result in a settlement they can be admissible in subsequent litigation regarding the meaning and effect of the settlement.

Minimum wage and tips

On October 1st 2009 the national minimum wage rose to £5.80 for workers aged 22 or over, to £4.88 to workers aged between 18 and 21 and to £3.57 for workers aged between 16 and 17 years old.

On this same date it was also made illegal for employers to use tips, service charges, or gratuities distributed to employees through the payroll system to top up an employees wage in order to meet the national minimum wage. Any employer found to be doing should expect to find employment tribunals not far behind!

Weekly pay limit

On October 1st 2009 the weekly pay limit used to calculate statutory redundancy money rose from £350 to £380. This increase will also apply to employment tribunals basic awards, compensation for non-compliance with flexible working procedures.

The weekly pay limit would usually be adjusted during February of each year, however, as this change has taken place so late in the year there will be no change in February 2010, and the next adjustment is set for February 2011.

Default retirement age

We have advised you in previous updates that Age concern has lost a court case commonly referred to as *The Heyday Appeal* which challenged the *Employment Equality (Age) Regulations 2006*. Age concern were challenging the ability of an employer to mandatorily retire an employee when he or she reach the default retirement age, as they argued this breached the European Equal Treatment Framework Directive. During the case various questions were referred to the European Court of Justice who ruled that the question as to whether or not the default retirement age is lawful depends on whether it can be justified as a proportionate means of achieving a legitimate aim. The case ended on the 25th of September and the High Court ruled that the default retirement age of 65 was lawful and that the requirement given by the European Court of Justice was satisfied.

This judgment was made in the knowledge that in 2010 there will be a government review regarding the default retirement age increasing it, so we can all look forward to working a few more years.

Compensation for unfair dismissal

Employees are entitled to compensation for any loss suffered due to unfair dismissal. There is a problem, however, in how someone's loss of earnings should be assessed if they get another job soon after.

Norton Tool Co LTD v Tewson held that if an employee has not been given notice or pay in lieu of notice, yet they get another job before the notice period they should have received ends, then they should still be given compensation for the entirety of their notice period, their earning from their new employment notwithstanding. This case however, only deals with a claim where there is an actual dismissal from the employer, not for instance where an employee has resigned and claimed constructive dismissal. The Court of appeal held that the rule given in the *Norton Tool* did not apply in these circumstances, and therefore, a person who's claim is as a result of resignation due to poor treatment , will have their earnings during their notice period taken into account when deciding on compensation. The Court of Appeals decision differs from that of the Employment Appeals Tribunal who thought the rule given in *Norton Tool* should apply in both circumstances.

Maternity and Paternity leave

The government is planning on introducing new laws on maternity and paternity leave. This will be subject to the results of a consultation of a proposed bill in the House of Commons,

which is currently underway. Saying this however, it has been widely suggested that that the proposed new laws will come into effect by April 2010 and have effect on parents of children due on or after April 3rd 2011.

Under the proposed legislation, mothers would be able to transfer all or part of the last 26 weeks of their Additional Maternity Leave (AML) to the father of the child, providing that the leave is taken during the mother's 39 week pay period. This Additional Paternity Leave (APL) would be paid at the same rate as statutory maternity leave which is currently at £123.06 per week, or 90% of the Mother's average gross weekly earnings. Parents will be able to self certify their entitlement to this leave, however, employers could be given the right to carry out checks to stop any possible abuse.

No investigation required if misconduct admitted

In *Kelly v Manor Oak* an employee at a garage passed a car through an MOT when it should have failed. At the Employment Tribunal, the employee took responsibility for the mistake; however, the Employment Tribunal thought the dismissal was unfair as they thought the employer's belief of the employee's guilt was not based on reasonable grounds. The Employment Appeals Tribunal allowed the employer's appeal and held that once the employee made the admission the employer did not need to take their investigations further.

Although this means that once an employee has admitted to the act of which they have been accused, no investigations need not be carried out, it is still important for employers to investigate the matter so that they can make a well informed judgment on what has taken place. This is so as the employer still has the obligation to carry out a fair and objective investigation to comply with the ACAS Code of Conduct.

Grievance procedures no longer apply to claims for redundancy, holiday pay and unpaid wages

In a recent case brought before the Employment Appeal Tribunal (EAT) the residing Judge has criticised grievance procedures and stated that they no longer apply to redundancy, holiday pay and unpaid wages. He criticised grievance procedure has having been confusing and contradictory and that the initial reason for the procedure was meant to reduce the amount of cases heard in the employment tribunal. It was hoped that employers and their employees would resolve their differences with the use of Dispute Resolution, yet its implementation has given rise to more litigation proceedings often about obscure points of law that seem irrelevant and unnecessary.

In *Allen & Others v Murdoch* three members of staff at a pub tried to bring a claim to the tribunal for unfair dismissal, redundancy payments, unpaid wages, and holiday pay. Their claim for unfair dismissal was allowed by the ET as grievance rules do not apply to unfair dismissal. However, their other claims failed as the ET held they could not accept jurisdiction of the case as the proper grievance procedures had not been followed, in that they had not waited 28 days after sending their grievance letter before they tried to bring their claims forward.

The employees appealed to the EAT and were successful. The presiding Judge held that the grievance procedures did not apply to any of their claims, and therefore, the employees won their appeal. The judge cited the Employment act 2002 (Dispute Resolution) Regulations 2004 and the Employment Tribunals Extension of Jurisdiction Order 1944 when giving the reasoning for his decision and held that:

- In regards to redundancy payments the grievance procedures did not apply as redundancy payments are only relevant where there has been a dismissal and considering that grievance procedures do not apply to unfair dismissals then they should not apply to redundancy payments;
- In regards to holiday pay similar reasoning was given to that of redundancy payments as disputes for holiday pay can only come from a dismissal so if the procedures do

not apply to unfair dismissals then they therefore should not be applicable to holiday pay;

- In regards to unpaid wages the judge held that these were claimed as a breach of contract and breach of contract claims do not have to follow grievance procedures.

Saying this however, it is best for employees to raise a grievance, and for employers to deal with them as quickly and as thoroughly as possible to avoid having to attend the employment tribunal and getting bogged down in the lengthy employment litigation.

Changes to first aid training regime

New changes to the first aid training regime have been implemented. These changes do not include changes regarding an employers legal responsibilities to give training but merely apply to the guidance of first aid training.. They are meant to try to make first aid training more flexible for employers.

The changes are effective as of the 1st of October 2009 and they include:

- The replacement of the mandatory four day 'first aid at work' course to that of a mandatory three day 'first aid at work' course;
- A new option of a one day 'emergency first aid at work' course for smaller businesses;
- It will be strongly recommended that all employees trained in first aid go on an annual refresher course in order to review the basic skills and keep up to date with changes, yet this is not a mandatory requirement.
- The requirement of all employees trained in first aid to attend a two day course every three years in order to renew their certificate will be maintained.

Employers should note that any employee with a 'first aid at work' certificate would only have to take the new course when their current three year certificate expires. Also any training organisation currently approved by the HSE will be automatically approved for the new course changes.

Bullying in the workplace

In the case of *Veakins v Kier Islington Ltd*, a trainee electrician was constantly picked on by her supervisor. She was a usually robust woman, however, due to being victimised and demoralised by her supervisor she became clinically depressed and eventually left her job. She brought a claim in the County Court against her employer. The claim was brought under the *Protection from Harassment Act 1979*. The claim failed on the basis that the conduct was not so bad that a criminal prosecution could have been brought.

She decided to take the matter higher still and appealed to the Court of Appeal. They held that the County Court was wrong in their judgment, and that the correct test was not whether the conduct was criminal, but whether it was "oppressive and unacceptable". The level of victimisation in this case was over a relatively short period and easily satisfied the test. The Court of Appeal said, however, that it did not expect that many workplace cases will give rise to liability under the Harassment Act and that the Employment Tribunal will more fittingly provide the remedy for the great majority of cases of high-handed and discriminatory conduct.

Dress codes

In the case of *Dansie v The Commissioner of Police for the Metropolis*, the Employment Appeal Tribunal has confirmed that employers may adopt a dress code requiring conventional appearance with differing needs for men and women. However, this is only acceptable if it requires compliance with differing requirements in the same way for both male and female employees.

Dansie brought a claim for sex discrimination on the basis that he had been asked t cut his long hair when he started training. He had previously been advised that it was acceptable for him to wear bun in compliances with the forces code, which stated hair was to be above the collar or, if long, fastened close to the head.

The EAT held in favour of the Respondent, having come to the conclusion the Respondent had looked at as a whole, and were balanced in the way it treated the sexes. There had been no less favourable treatment, because a woman would also have been required to comply with the code.

Paternity Leave ….

The British Chambers of Commerce has now reported that six month paternity leave for fathers will be one of eight extra costs for businesses already planned for next year. From April 2011, fathers will be able to take six months maternity leave after the mother has used the first six months of her permitted nine months maternity leave. The father will be able to take the last three months as paternity leave and will be eligible to statutory paternity pay of £123 per week.

The goal is to give families more choice about their caring arrangements during a child's first year. The current entitlement for fathers is two weeks paid paternity leave and the right to request flexible working hours. It has been decided that the new right will extend to all fathers who are eligible for statutory paternity leave and will be introduced for babies due on or after 3 April 2011.

Pre-employment questionnaires

A new clause to be inserted into the Equality Bill has been introduced by the House of Lords preventing employers asking candidates about their health if unrelated to the role. This will result in medical conditions such as mental health issues not being disclosed unless it affects the candidates ability to perform the role.

The clause is receiving a mixed response. Some HR personnel are welcoming the proposal and believe it will assist in equality, whilst others are more reserved and concerned that employer's may not understand a persons limitations thereby placing them in a role they are unable to perform.

"Like baby bear's porridge…

It was just right", held the EAT when it handed down its decision in *Cable Realisations v GMB*. In this case the respondent had not fully consulted on a TUPE transfer, which took place over a two week period during which the company was closed and as many of 85% of the employees being out of the country on holiday. The EAT held that:-

- in a TUPE transfer, the obligation to inform affected employees is a discrete duty which arises even if no measures are contemplated in relation to the transfer;
- It did not fall into the Susie Radin band of a complete failure to consult and the maximum award of 13 weeks' pay would have been excessive;
- on the facts, an award of three weeks pay per affected union member/employee was deemed to be "Like baby bear's porridge, it was just right."

What does this mean for you I hear you ask?

- In the absence of any specific guidance being given by the EAT it appears as if employers should allow sufficient time between the provision of information pursuant to Regulation 13 and the date of the transfer for meaningful consultation to take place, even if the consultation is not compulsory under Regulation 13.

- Longer time should be allowed especially if, for any period during that time, the undertaking will be closed or significant numbers of affected employees will be absent from the workplace.
- Meaningful consultation requires sufficient time for responses to be given and considered.

payments during pregnancy

The Advocate General has given his opinion in the case of Parviainen v Finnair Oyj recommending that the European Court of Justice hold that the EU Pregnant Workers Directive (No.92/85) does not require an employer to pay a pregnant worker, who is temporarily transferred to a different job to prevent her being exposed to health risks, the average salary that she earned prior to the transfer. Under Article 11, the employer is required to provide her with an adequate allowance, which must be no less than a male or female comparartor undertaking the equicilent job.

Religious Belief versus Sexual Orientation

The Court of Appeal handed down its judgment in Ladele v London Borough of Islington (the Christian registrar case).

It is authority for the proposition that there is nothing in the Religion or Belief Regulations 2003 that entitled Ms Ladele, as a civil partnership registrar, to insist on her right not to have civil partnership duties assigned to her because due to her religious beliefs.

The Court of Appeal made it clear in their ruling that employees are free to hold religious beliefs but employers are entitled to require them to comply with their explicit equality and diversity policy, where this is a proportionate means of achieving a legitimate aim. The aim in the case of Ladele was very clear in that her employer provided a public service on a non-discriminatory basis. This does not mean you should be inflexible, but that should an employee request some form of flexibility in practice, you must carefully considered the request of face the consequences. It may be possible to accommodate some requests while upholding the policy.

IVF Treatment and Sex Discrimination

More and more women are undergoing IVF treatment, and in turn, are requiring time off work. Under the Sex Discrimination Act (“SDA”) women are protected from the time they conceive to the end of their maternity leave; this is referred to as the “protected period”. The question now being asked is whether or not a women undergoing IVF treatment, but who has not yet conceived, is covered by the SDA? The EAT has recently considered this question and handed down its decision in Sahota v Home Office.

The EAT upheld the tribunal's original decision that although Mrs Sahota had every right to be disgruntled with the way the matters had been handled, the employer had not discriminated against her on grounds of her sex by considering the time off she had for IVF treatment, when considering her absence record.

The EAT confirmed that once an employee becomes pregnant following IVF treatment, the employee is entitled to the same protection as an employee that has become pregnant naturally. In addition they set out the following guidelines: -

- For employees who have become pregnant following IVF treatment, the “protected period” starts when fertilised ova are implanted (when she is regarded as being pregnant).
- When an implantation fails, and the pregnancy ends, the protected period ends after a further two weeks have elapsed in accordance with section 3A(3) of the SDA.

- A woman undergoing IVF treatment will also be protected for an additional, albeit limited, period of time before implantation. This is the time it takes for ova to be collected, fertilised and the "immediate" implantation of the fertilised ova.
- An employee is not protected during the long period between the freezing of fertilised ova with a view to implanting at a later date.