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Employment Write News

Clear, pragmatic and commercial advice on all employment issues faced by our clients.

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Sick leave and holiday pay - clarity at last?

For several years, the legal position has been unclear as regards an employee's right to receive paid holiday during long term sickness absence. Under the Working Time Regulations 1998 (WTR), all workers are entitled to 5.6 weeks' basic annual leave (the equivalent of 4 weeks' leave plus bank holidays) and any extra contractual entitlement in each leave year. However, the position as to holiday entitlement becomes unclear where a worker is off sick for a long time, or where employment ends before holiday is taken.

The Stringer case

This issue was addressed in 2005 by the Court of Appeal in the long running case of *Stringer v HMRC.* Back then, the Court of Appeal held that the right to paid holiday under the WTR does not continue to accrue whilst an employee is absent on long-term sick leave. It also held that a worker who is dismissed whilst on sick leave, and who has been on sick leave since the start of the leave year, is not entitled to payment in lieu of their untaken holiday. The case was appealed to the House of Lords who referred it to the European Court of Justice (ECJ).

In this long awaited decision, delivered earlier this year, the ECJ ruled as follows:

- Entitlement to basic paid leave accrues during sick leave;
- Workers can elect to take their annual leave even when they are on sick leave;
- Workers who have been prevented from taking holiday whilst on sick leave will be entitled to carry their basic leave over into the next leave year;
- On termination of employment, workers have the right to be paid in lieu of accrued but untaken holiday, despite any sickness absence for the whole or part of that leave year; and

Any entitlement to leave beyond basic leave of 5.6 weeks was not considered but, we believe, can be treated separately.

The ECJ's decision contradicts the WTR which state that annual leave can only be taken during the leave year in respect of which it accrues. Therefore the ECJ's ruling that holiday entitlement can accrue and be carried over into the next leave year posed problems that could only be resolved by referral to the House of Lords.

Unsurprisingly, the House of Lords confirmed (in June this year) the ECJ's decision that workers do accrue holiday during sick leave and must be allowed to take it on their return to work, or to be paid in lieu of it if their employment ends. However, unfortunately, they did not deal with the issue of whether a worker who accrues holiday during sick leave can carry that entitlement forward into the next leave year (in contravention of the WTR). This therefore means that public employers will be bound by the ECJ's decision but the position is unclear for private employers. Whilst private employers could still argue that leave should not be carried over in accordance with the WTR, in doing so, they run the risk that a tribunal will subsequently interpret the WTR in accordance with the changes made by *Stringer.*

The House of Lords did make clear, however, that claims for unpaid holiday can be brought as a claim for "unlawful deduction from wages". This has more flexible time limits, allowing claims to be brought within three months of the last in a series of deductions from wages (as opposed to within three months of the initial deduction or breach under the WTR). This means that employees will now find it easier to pursue claims against their employers where they have not been allowed to take the holiday accrued whilst on sick leave or have not been paid in lieu of the same.

The Pereda case

Whilst the House of Lords in *Stringer* did not answer the question of whether holiday entitlement can be carried over into the next leave year, a more recent case of *Pereda v Madrid* in the ECJ did address this point further. The ECJ in Pereda decided that, where workers do not wish to take annual leave during a period of sickness, then the annual leave should be granted to them for a different period. This means that if an employee is on sick leave, they can choose whether to take holiday during this time, or to postpone it to a later date, possibly in a subsequent leave year. This carry over to a subsequent leave year remains incompatible with the WTR, but in line with the uncertain outcome in the *Stringer* case.

The implications of this case include that an employee who falls ill during a period of annual leave may try and claim back holiday. We suggest that employees should provide substantial medical evidence of sickness before an employer agrees to allow a reallocation of the period of holiday.

So what does this mean for employers?

It remains to be seen how Employment Tribunals will interpret the WTR in the light of *Stringer* and *Pereda.* In the meantime, employers should be aware of the risk of an employee's entitlement to carry over accrued annual leave (to the extent that it amounts to basic statutory leave) to a subsequent holiday year (and be paid in lieu of the same on termination).

It is clear that, now more than ever, employers must carefully manage employees on long term sick leave. The decisions should prompt employers to review their contracts of employment and holiday policies to ensure that only an employee's entitlement to statutory minimum holiday accrues during sick leave. The financial burden on employers in what is already a difficult economic climate justifies a review of contracts and policies with a view to preventing employees from claiming the benefit of more generous holiday entitlements offered by employers.

Agency Workers - important changes

It is crucial for anyone employing agency workers to be aware of the proposals to change the law to provide more equality and fairness in the workplace, and the potential impact that this will have.

The current position

Agency workers (or "temps" as they are more commonly known) sign up to an agency and undertake work for that agency's clients (also known as the "end users"). The work is often for a specified time, hence the reference to "temps". Whilst agency workers have some rights under various pieces of employment legislation, they are not given the same rights and protection afforded to direct employees. This tends to mean that agency workers are treated with considerable inequality in the workplace when compared to employees.

Future changes

Due to this limited protection, the European Union (EU) felt it necessary to protect vulnerable, often low paid, agency workers from organisations who take advantage of their status to avoid certain legal obligations. The aim is to provide agency workers with the same basic working conditions and benefits as permanently employed workers, to prevent disadvantage.

This protection now looks set to be implemented through the Agency Workers Directive. The EU agreed the Directive in 2008 and the final version was published on 5 December 2008. All Member States now have until 5 December 2011 to implement the Directive and ensure that their own laws comply with it.

Once implemented, the Directive will introduce:

- The right for agency workers to enjoy equal basic employment conditions with comparable permanent employees (known as the equal treatment principle) relating to the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay. This will also include equal access to on-site facilities such as transport services and child care and improved protection for expectant mothers such as the right to reasonable time off to attend ante-natal appointments;

- The right to information for agency workers about any vacant posts in the business in which they are working to ensure agency workers are given the same opportunity as other workers to find permanent employment in that business;
- A requirement to review any restrictions or prohibitions on the use of temporary agency work in order to verify whether such restrictions are justified (and to potentially offer more opportunities for agency workers if they are not justified); and
- Penalties for any non-compliance by either the agency or the end-user with the new obligations.

The UK Government has agreed a concession with the EU so that agency workers must be working for the employer for at least 12 weeks before they are given such equal treatment with comparable permanent employees. The Association of Recruitment Consultancies has further proposed to the Government that the qualifying period should only apply to "vulnerable" workers (i.e. those who earn less than one and a half times the national minimum wage) and that a period of 12 months should be applied to non-vulnerable workers. It remains to be seen how this will be implemented but agency workers will certainly have to pass the 12 week qualifying period to gain these rights.

The consultation on the draft regulations sets out the Government's proposed approach to implementation of the Directive and this will run until 11 December 2009. The response to this consultation may mean that there are further amendments made before final implementation.

The potential impact

Whilst agency workers will undoubtedly benefit from the protections (after the 12 week qualifying period), there have been concerns that such workers will no longer be as flexible and cost effective as before. This may mean that agency workers become less attractive to potential employers, which will have a negative effect on the labour market.

Gordon Brown had previously proposed that implementation would occur in the coming months. It is unsurprising that the Government has announced a delay in the implementation of the Directive until October or December 2011 (being very close to the deadline). This delay should now give businesses time to adjust to the regulations and keep the labour market as flexible as possible, slowing the potential increase in unemployment.

Whilst it may appear that the Directive is a long way off implementation, it will happen by December 2011 at the latest. Therefore those employing agency workers should start planning now for the impact of the impending changes.

Employment law and families

There are a number of family friendly changes taking place.

Flexible working

Since 2003, employees with children under the age of six (and disabled children under the age of 18) qualified for the right to request flexible working. Then, in 2007, that right was extended to employees who have primary caring responsibilities for adults.

From 6 April 2009, the right to request flexible working was extended again to allow employees to make a flexible working request if they are new parents or have primary responsibility for children up to and including the age of 16. Therefore, the right to request flexible working has increased significantly to encompass a much larger proportion of the workforce.

Extension of paternity leave

The Government has proposed the introduction of a new scheme allowing fathers to take a proportion of a mother's entitlement to maternity leave, so that the 12 month entitlement to maternity leave can be shared between parents. It is envisaged that this scheme will allow men to take up to six months of the maternity leave period as paternity leave.

The proposals suggest allowing a father to take up to 26 weeks' paternity leave following a woman's return to work and that this cannot be taken any sooner than 20 weeks after the baby is born.

Potentially, employers will be faced with a difficult administrative burden when managing these rights, especially as, in the vast majority of cases, mothers and fathers will work for different employers. The Government is intending to adopt a "light touch" approach to the question of how entitlement to leave and pay will be verified by the employer. The proposals outline a system which largely relies on self-certification by employees to prove their eligibility to take such leave.

The Government intends that HMRC will provide detailed guidance, help lines and forms to assist employers and will also conduct compliance checks to minimise the risk of fraud. In addition, potential financial penalties for employees who abuse the system are also being proposed.

It is intended that the scheme will be effective for parents of children born on or after 3 April 2011. Although the Government seems keen to adopt these proposals, the impending general election and the perceived heavy burden already placed on employers during the current recession, may mean that these proposals are either postponed or watered down before they are implemented.

Childcare vouchers

Many employers provide employees with childcare vouchers as a benefit of their employment, usually by way of a "salary sacrifice" arrangement, which has certain tax and NIC advantages to both the employer and the employee.

At the Labour Party Conference on 29 September 2009, Gordon Brown announced that the Government now plans to remove tax relief on employer supported childcare by April 2015. It has since been confirmed that the tax relief will not be available for employees who join a childcare voucher scheme after April 2011, while existing members of a scheme will continue to enjoy the same relief until April 2015.

These childcare schemes provide a significant benefit for employees with children in professional childcare, as well as some tax savings for employers, and the proposals to scrap the incentives have received widespread criticism from opposition political parties and labour back bench MPs.

Other news in brief

Retirement

- The High Court in *R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills* (known as the Heyday case), has held that the UK's default retirement age (DRA) of 65 is lawful. The Heyday case challenged the DRA, which is set out under regulation 30 of the Employment Equality (Age) Regulations 2006, on the basis that it was contrary to the Equal Treatment Framework Directive and therefore constituted age discrimination. The High Court held that the DRA is both legitimate and proportionate and, therefore, compulsory retirement at 65 does not amount to age discrimination. The Government had always planned to review the DRA in 2011. Following the pressure of the Heyday case, this review has now been brought forward to 2010 and a survey of employers' policies, practices and preferences in relation to the DRA and retirement provisions generally has already been commissioned. It is likely that the DRA will be raised or removed in the not too distant future.

Philosophical Belief

- In a case called *Grainger v Nicholson,* the Employment Appeal Tribunal (EAT) has held that a belief in the need to cut carbon emissions in order to avoid catastrophic climate change is capable of being a 'philosophical belief' for the purposes of the Employment Equality (Religion or Belief) Regulations 2003. Mr Nicholson was dismissed from his position as Head of Sustainability at Grainger Plc and claimed his beliefs about climate change contributed to his dismissal. Mr Nicholson claimed his views were not just opinion as they affected his whole lifestyle, including choice of home and how he travels. The EAT held that Mr Nicholson was entitled to pursue his claim. It remains to be seen whether he will succeed in his claim and whether the decision will create an increase in the number of claims brought on such grounds.

Equality Bill

- The Queen's speech, which took place this month, has confirmed that the Equality Bill is still on the cards, despite having gone quiet as it slowly moves through Parliament. The Bill will have a massive impact on current discrimination law by bringing together the various strands of discrimination in an attempt to simplify and put each of the 'protected characteristics' onto an equal footing. However, if there is a change in government and the Bill is not passed in time, it is unlikely that the Bill will proceed any further.

Discrimination compensation increases

- There has been a recent change to the "Vento guidelines" which are used to assess compensation for injury to feelings in discrimination cases. The EAT in the case of *Da'Bell v National Society for the Prevention of Cruelty to Children* has held that the guidelines should be increased to take account of inflation. Accordingly the position is now as follows:
  - Lower band: up to £6,000 (formerly £5,000)
  - Middle band: £6,000 to 18,000 (formerly £15,000)
  - Higher band: £18,000 to £30,000 (formerly £25,000)

The Employment Department - Key Contacts

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