

IN FOCUS

Welcome

Welcome to the Autumn edition of **In Focus**, our quarterly update keeping you informed of the latest developments in employment, pensions and incentives law.

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If you would like to receive periodic e-mail updates on employment, pensions or incentives law, please e-mail marketing@burges-salmon.com giving your details and specifying the areas in which you are interested. In addition, to receive your own copy of **In Focus** or if you would prefer to receive **In Focus** by e-mail, please e-mail your details to marketing@burges-salmon.com.

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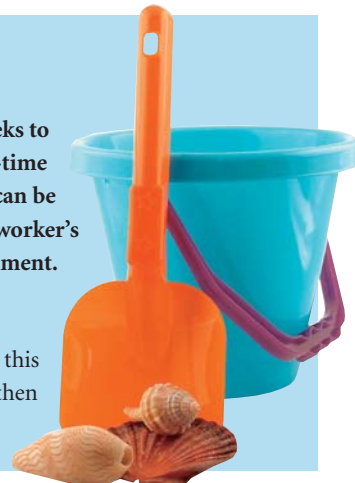
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High days and holidays

On 1 October 2007, the statutory annual leave entitlement increased from 4 weeks to 4.8 weeks. Employers will need to check that all their full-time and part-time workers are entitled to take at least 4.8 weeks paid annual leave (bank holidays can be included in this entitlement). If necessary, employers should recalculate the worker's entitlement to annual leave and inform them in writing of the increased entitlement.

The annual leave entitlement will rise to 5.6 weeks from 1 April 2009.

We have prepared a briefing note giving more details about the changes, to access this please visit www.burges-salmon.com/our_work and click on 'employment' then 'publications'.



Point of no return

In the case of *McAdie v Royal Bank of Scotland*, the Court of Appeal have upheld the EAT's approach in finding that an employer could fairly dismiss an employee for ill-health capability despite the fact that the employee's stress related illness was attributed to the conduct of the employer. In this particular case, the employee made it clear she would not consider returning to work and medical evidence supported this. In reality, therefore, there was no alternative to dismissal.

However, the Court of Appeal agreed with the EAT that where the employer is responsible for the employee's ill-health, it should normally make more effort to find alternative employment for the employee or put up with a longer period of sickness absence than would otherwise

be reasonable. This indicates that where an employee is able to return to work at some point of time in the future, the employer might be obliged to make more allowances to enable them to do this than would otherwise have been the case.

In this case, the employee was on long-term stress related sickness absence caused by bullying and mismanagement at work. If you want to know more about the legal risks associated with bullying at work, why not come to our seminar on bullying and harassment on 22 November 2007 in London or on 29 November 2007 in Bristol. For more details of our seminars and how to book, please see our website.

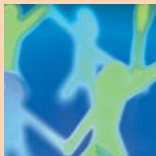
Employer's foul gives rise to penalty

The EAT has issued the first penalty notice for an employer's failure to comply with the provisions of the Information and Consultation of Employees Regulations 2004.

In the case of *Amicus v MacMillan Publishers Ltd*, Amicus made its first complaint under the Regulations relating to MacMillan's failure to provide data for the purposes of determining the number of people employed in MacMillan's undertaking in the UK. MacMillan failed to comply with the CAC's decision, leading to a further complaint, of failing to arrange a ballot to elect information and consultation representatives. The CAC

does not have the power to impose a sanction so it was necessary for Amicus to apply instead to the EAT for a penalty notice to be issued.

The EAT viewed MacMillan's failure to comply with the Regulations as "a very grave breach affecting many employees" and fixed a penalty of £55,000 (out of a maximum of £75,000). The EAT thought it was appropriate to stipulate a sum which would deter others from adopting a cavalier attitude to the Regulations. Any employer that has 100 employees or more should take note. Employers of 50 employees or more will become caught by the Regulations in April 2009.



Employment news in brief

The National Minimum Wage rates rose with effect from 1 October 2007 as follows:

- The rate for workers aged 22 and over rose from £5.35 to £5.52 per hour.
- The rate for workers aged 18 to 21 rose from £4.45 to £4.60 per hour.
- The rate for workers aged 16 and 17 rose from £3.30 to £3.40.



1 October 2007 also saw the dissolution of the Commission for Racial Equality, Disability Rights Commission and Equal Opportunities Commission and the transfer of their powers to the new Commission for Equality and Human Rights.



The provisions in the Companies Act 2006 in relation to directors' duties came into force on 1 October 2007. More details of the changes are available in a separate briefing available from our website or e-mail marketing@burges-salmon.com



The new regulations amending the Sex Discrimination Act 1975 that the Government initially indicated would come into force on 1 October 2007, have been delayed for further work to be carried out. The Government was obliged to make the changes following judicial review proceedings brought by the EOC, in which the High Court ruled that the Equal Treatment Directive had not been implemented properly in order to protect women against sexual harassment and discrimination during pregnancy.



The new Employment and Pensions Seminar Programmes are out now. See www.burges-salmon.com/our_work and click on 'employment' or 'pensions', then 'publications'.

Fostering flexibility

On 1 October 2007 the Flexible Working Regulations were extended to allow private foster carers (and the spouse, partner and civil partner of a private foster carer) and those in whose favour a residence order is in force (and the spouse, partner and civil partner of such a person) to request flexible working. The definition of

adopter was also extended to cover those who are adopting a child, whether domestically or intercountry, (not just where the child has been placed through a UK adoption agency).

Employers should check, and if necessary update, their flexible working policies to take account of the changes.

Access all areas

Employers should note that as from 24 October 2007, the exemptions set out in the Data Protection Act 1998 for manual filing systems in existence before 24 October 1998 no longer apply. This means that manual filing systems will be required to comply with the Data Protection Act.

The Information Commissioner's Office (ICO) has issued a technical guidance note on what is personal data for the purposes of the Data Protection Act

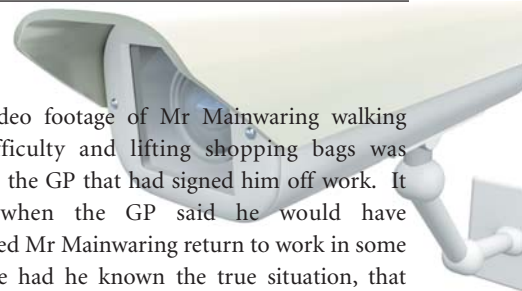
1998. The guidance is in the form of a flowchart of numbered questions which, when taken in order, aims to assist in identifying personal data, particularly in circumstances where it is not obvious whether the data falls within the definition. The guidance is available from the ICO website and is in sharp contrast to the decision of the Court of Appeal in *Durant v Financial Services Authority 2003* where the Court construed "personal data" restrictively.

The camera never lies

The EAT has indicated in the case of *Corus v Mainwaring* that there is no obligation on an employer to take a witness statement from a person who tips them off about possible malingering, if the employer then relies on medical and video evidence (rather than the original statement) to dismiss the malingeringer.

In this case, Corus received an anonymous tip off that Mr Mainwaring, who had been off work for 137 days in one year with a bad back, was actually fit and so it set up undercover surveillance to assess the validity of the

tip off. Video footage of Mr Mainwaring walking without difficulty and lifting shopping bags was presented to the GP that had signed him off work. It was only when the GP said he would have recommended Mr Mainwaring return to work in some form of role had he known the true situation, that Corus began disciplinary proceedings. The EAT said that this was sufficient and there was no need to obtain a witness statement from the person who had tipped them off as there was no evidence of bad faith.



Stirring things up

The Racial and Religious Hatred Act 2006 came into force on 1 October 2007. It amends the Public Order Act 1986 and creates a new criminal offence of stirring up hatred against a person on the grounds of their religion. It is punishable by a fine or a prison sentence of up to 7 years. The offence applies to the use of words or behaviour which are threatening and intended to stir up religious hatred, that is hatred against a group of people defined by reference to

their religious belief or lack of belief. Employers should be aware that an act of religious discrimination in the workplace could amount to an offence under the Act. Where a body corporate is guilty of the offence and "it is shown that the offence is committed with the consent or connivance of a director, manager, secretary or other similar officer" then both that individual and the body corporate are guilty of the offence.

Taxing times

New legislation means payments to contractors from managed service companies ("MSCs") are now subject to income tax and national insurance contributions. MSCs must operate PAYE on such payments.

In typical MSC arrangements, agencies procure the services of a contractor for an end client. The contractor's services are provided through an MSC, managed by a specialist MSC provider.

Until this legislation came into force, tax could be saved

by the contractor receiving a small salary, but large dividends, from the MSC.

HM Revenue & Customs will be able to impose PAYE obligations on end clients where MSCs are used. They can do so for PAYE obligations arising on or after 6 January 2008, but only if:

- the MSC fails to operate PAYE; and
- the end client directly or indirectly has encouraged or been actively involved in the MSC arrangements.

Questionable company

Company law limits the extent to which a company can protect its directors from certain liabilities. Over time the detail of the restrictions has changed, but it has not become any clearer whether they apply where a director is acting as a trustee of the pension scheme rather than as a director of the company. The cautious approach is to assume that they do.

The limitations could affect scheme rules:

- saying the trustees are not liable for errors unless their conduct was below a certain standard e.g. only if they acted in "wilful default", and
- giving them indemnities either from the sponsoring employers or out of scheme assets.

On 1 October 2007 new company law came into effect in this area as a result of the Companies Act 2006. The amended law only applies to new protections introduced from 1 October. Nevertheless it is a useful prompt to check that existing protections comply with the earlier law. If schemes cannot tackle this in the near future as an add-on when considering other rule amendments, we recommend that they look at it as a separate exercise.

If changes are necessary, a simple alteration saying that the protections only apply to the extent that they are lawful is likely to be sufficient. The other change some schemes might like to make is to add a new rule taking advantage of the slightly wider protection that is allowed from 1 October for directors of corporate trustees.



Pensions & incentives news in brief

Our recent briefing "Statutory debt to pension schemes: consultation about proposed changes" was about the buy-out debt employers can owe to an underfunded defined benefit scheme. One of the DWP's proposals was that ending accrual in a multi-employer scheme should trigger a debt. As we pointed out, this would close off a popular option for managing cost. Even before the consultation has ended the DWP has withdrawn this idea. It says its target is "scheme abandonment", not the ending of accrual, or legitimate scheme mergers or transfers.

Many schemes that had retirement ages of 65 and 60 for men and women have a "Barber window" between the date of the Barber decision and the date the scheme equalised retirement ages for future service (generally at 65). The Court of Appeal has recently confirmed that men with window service have a right to draw their pension for the window period at 60 (being the more advantageous treatment available for women). The case had to do with the priority category that men's window benefits fell into on the winding up of a scheme under an old statutory priority order.

The Regulator has analysed 1,300 recovery plans. It uses two triggers to identify plans that need a closer look, one based on the assumptions used for technical provisions and the other on the shape of the plan. A third of plans did not trip either trigger. Most of the rest needed minor clarification. 10% needed further action.

Among other changes to the tax rules, the Pre-Budget Report announced measures (for next year's Finance Bill) to prevent one company routing big contributions through another to avoid spreading; to relax the restrictions on pension increases; and to tighten the constraints on diverting tax-relieved pension into inheritance. The switch to a flat-rate State second pension begins in 2009, not 2012; this will affect contracting-out.

Flexible thinking

The Department of Work and Pensions has issued a short consultation paper on flexible retirement and age discrimination. The paper gives few clues to the DWP's thinking but shows it is keen to collect evidence of the dilemmas schemes are facing on the ground. However, there is no promise that the consultation will lead to new guidance or amended regulations; nor is there a date for a final outcome.

Flexible retirement means drawing some or all of your pension and/or lump sum while continuing to work for the same employer. There have been two main questions: first, it has been unclear whether schemes have to offer flexible retirement in order to comply with the law. Significantly, the DWP thinks not (whereas the original guidance, from the then DTI, pointed the other way). Secondly, if a scheme does offer flexible retirement, what benefit choices are lawful? For example, is it lawful to allow members to draw pension while working only on condition that they cease to accrue?

The paper does not include draft guidance or proposed amendments to the age discrimination regulations. It outlines Government objectives of having more older people working longer and of

encouraging good quality voluntary pension provision, and then it asks questions. Many are wide and invite answers based on what employers and schemes actually want to do. Some examples:

- what do you believe should constitute age discrimination in relation to flexible retirement?
- what flexible retirement practices do you believe should be exempt from the regulations?
- why might it not suit some schemes to allow flexible retirement at all?
- should it be sufficient to require employees to choose between (a) leaving work and drawing their pension, and (b) staying in their job?
- should it be objectively justifiable not to provide death benefits after a certain age?

Among the few technical questions is what to do about the legislation on early leavers that, as it stands, does not accommodate flexible retirement at all well.

The consultation lasts until 7 December. The paper is at www.dwp.gov.uk/consultations/2007.

Hazardous pursuit

The Pensions Regulator thinks it should be receiving more applications for clearance under the moral hazard provisions in the Pensions Act. This is evident from its consultation draft of revised guidance on clearance.

Moral hazard allows TPR to sanction group companies that participate in steps to avoid a s.75 debt, and to make other group companies liable to fund a defined benefit scheme where the sponsor is financially weak. Clearance gives companies the comfort of knowing that TPR will not use either weapon.

The main proposals for change are:

- as an overarching idea, broad principles replace narrow rules for identifying events that warrant clearance;
- only type A events (clearance appropriate) are retained from the current guidance; types B (clearance not necessary) and C (not available) are dropped. In a significant change, some current B and C events become As e.g. surprisingly, asset sales. Apportioning a s.75 debt is also included;
- a distinction between, on the one hand, employer-related events that are type A only if the scheme is in deficit and, on the other, scheme-related events

that are type A whatever the funding level;

- the bases for assessing a deficit include a scheme's basis for technical provisions and the basis the PPF uses for the levy;
- more detail about how to assess the materiality of corporate events (comparing the strength of the employer's covenant before and after); and
- emphasis on the mitigation trustees should look for.

Examples: extra contributions; higher priority e.g. through a charge; escrow accounts; letters of credit and insurance (i.e. obligations from third parties); and intra-group guarantees.

The proposed changes could make it harder to judge when to go for clearance. That said, clearance would remain entirely voluntary.

The consultation closes on 2 November 2007.

Risky ideas

The PPF has been consulting about changes it proposes to the risk-based levy. In general, the changes would apply from levy year 2008/09 onwards. The broad objectives are (a) greater certainty for levy payers, (b) better distribution, (c) better managed cross subsidy from strong schemes to weak, and (d) reviewing the take-up of incentives like contingent assets. The consultation closed on 3 October. Briefly, these are the proposals.

General development

- A stable levy estimate for 3 years at a time (subject to indexation and changes in long-term risk exposure).
- Collect an amount closer to the levy estimate than in the past.
- Reduce cross subsidy from better funded schemes to less well funded.

When risk is assessed

- The deadline for data should come forward 12 months so schemes know next year's bill once the estimate is published in November. But this

would delay the mitigating effect of action to de-risk a scheme, so the PPF might be urged to rethink.

Insolvency risk

- Weight the effect of county court judgments (making them irrelevant except for very small employers).
- Finer grading for the lowest risks (probabilities of 0.01- 0.05% for D&B failure scores 100 – 98).

Underfunding risk and contingent assets

- All schemes must submit their first s.179 valuation by March 2008. TPR is discussing sanctions for non-compliance with the PPF.
- The PPF is monitoring developments but has no current plans to increase the range of acceptable contingent assets.
- As funding levels change the PPF is reviewing whether its five categories of underfunding distribute the total levy fairly. This could change the funding level a scheme wants to target with contingent assets.

HMRC says “No”

In the last edition of In Focus we drew attention to a European Court of Justice decision that opened the way for pension schemes to make the argument that they should be exempt from VAT on investment management fees, writes *Catherine Sear in our Tax Department*. The case was about collective saving vehicles known as investment trust companies.

Having received claims for overpaid VAT from a number of schemes, HM Revenue & Customs has now

made clear that it will fight pension schemes on this. It considers the ECJ case to be confined to investment trust companies and says it will reject protective claims for refunds from pension schemes.

We understand that the National Association of Pensions Funds is talking to some large schemes about the possibility of challenging HMRC's position. Even if this happens, it could be a long struggle; schemes should not expect quick answers.

Acting up

The Finance Act 2007 makes these changes of practical significance: ill-health pension can be reduced on partial recovery (originally it could only be stopped); a commutation lump sum must be paid in an 18 month window starting 6 months before the pension becomes payable (rather than within 3 months afterwards); and a lump sum death benefit

must be paid within 2 years of the trustees becoming aware of a death (rather than within 2 years of the date of death).

On a detail, HMRC has confirmed that, despite unclear legislation, an ill health pension that began before A Day can be reduced or stopped in the same way as one that started after A Day.

In the office

Congratulations to **Richard Stovell** and his wife Annie on the birth of their second child, Mollie.

Romance is obviously in the air because there have been no fewer than four engagements in the employment and pensions teams. Congratulations to **Luke Bowery, Ben Loxton, Kate Granville-Smith and Emily Daniels** on their engagements (not to each other!)

We welcome **Paula Hargaden** to our incentives team.

Lucy Fiddick takes our best wishes with her as she begins maternity leave.

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