

# IN FOCUS

## Welcome

Welcome to the summer edition of **In Focus**, our quarterly update keeping you informed of developments in employment law.

For further information on employment issues, please email [chris.seaton@burgess-salmon.com](mailto:chris.seaton@burgess-salmon.com)

## Holiday and sick leave

In the recent case of *NHS Leeds v Larner*, the EAT has confirmed that where a worker is absent on sick leave for the whole of a leave year, the right to paid holiday carries over to the following leave year without the worker having to make a formal request for that leave.

Also, in a German case about holiday rights under the Working Time Directive and long term sickness (*KHS AG v Schulte C-214/10*), the national court asked the European Court of Justice (ECJ) to decide whether accrued holiday rights can expire where a worker is on long term sick leave, or whether this is incompatible with the EU Working Time Directive.

The Advocate General has delivered her opinion on the case, concluding that:

- EU law does not require that workers on long-term sick leave accrue the right to paid annual leave without any time limitations. She said that allowing a worker to take accrued leave several years after the leave year to which it related would not achieve the Directive's purpose of enabling the worker to recuperate from the effort and stresses of that year, which is most effectively met when workers take leave in the year it arises.
- A national law under which annual leave entitlement expires 18 months after the end of the relevant leave



year (effectively giving workers up to two and a half years to use a year's leave entitlement) would be sufficient for the effective exercise of the right to annual leave in cases of long term sick leave. She commented that this was a guideline only, but also expressly mentioned that a period of six months would be insufficient.

The ECJ is not obliged to follow the Advocate General's opinion but it will be considered by the ECJ before it gives its opinion at a later date. However, the opinion of the Advocate General will be a welcome sentiment to many employers who will be hoping the ECJ will follow suit.

## National minimum wage increases

The national minimum wage will increase with effect from 1 October 2011 as follows:

- the rate for workers age 21 and over will increase to £6.08 per hour (from £5.93)
- the rate for workers age between 18 and 20 will rise to £4.98 per hour (from £4.92)
- the rate for workers 16 to 17 will rise to £3.68 per hour (from £3.64)

- the rate for apprentices will rise to £2.60 per hour (from £2.50).

The accommodation offset will rise to £4.73 per day (from £4.61). The government also proposes to put in place regulations with effect from 1 October 2011 which will disapply the accommodation offset rule to institutions where the worker is undertaking a higher education or full-time further education course.

## The Agency Workers Regulations

The Agency Workers Regulations 2010 will come into force on 1 October 2011. The Regulations give protection to agency workers in two main ways:

- rights that apply from day 1 of an assignment (Day 1 rights)
- rights that apply after the agency worker has worked on the assignment for 12 weeks (Week 12 rights).

### Day 1 rights

From day 1 the agency worker will be entitled to:

- be informed of any relevant permanent employment vacancies in the hirer's organisation
- equal access to on-site facilities (such as canteens, crèches and parking).

*Continued overleaf*

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## Week 12 rights

- After twelve weeks in the same role, the agency worker will be entitled to the same basic working employment conditions as if they had been recruited by the hirer to do the same role. This covers terms and conditions relating to pay, duration of

work, night work, rest periods, rest breaks and annual leave.

For more information on the Agency Workers Regulations, please see our briefing at [http://www.burges-salmon.com/Practices/employment/Publications/The\\_Agency\\_Workers\\_Regulations\\_2010.pdf](http://www.burges-salmon.com/Practices/employment/Publications/The_Agency_Workers_Regulations_2010.pdf)

## Modern workplaces

The Government has published a consultation on modern workplaces setting out its plan for “a culture of flexible, family friendly employment practices”. Key proposals include:

### Flexible parental leave

- Unpaid leave for fathers to attend antenatal appointments
- 18 week period of maternity leave, followed by a new 34 week period of shared parental leave.

For more details of the changes on flexible parental leave, please see our e-mail alert at [www.burges-salmon.com/practices/employment/news/news\\_item.aspx?id=9194](http://www.burges-salmon.com/practices/employment/news/news_item.aspx?id=9194)

### Flexible working

- The extension of the right to request flexible working to all employees with 26 weeks' continuous employment
- A new requirement for employers to consider requests “reasonably”.

### Annual leave

- Amendments to the Working Time Regulations to allow annual leave to be carried over into the next leave year for workers who are unable to take the annual leave in the year in which it is accrued due to sickness or absence on maternity, adoption, parental and paternity leave
- Increasing employer flexibility by allowing employers to “buy-out” the additional 1.6 weeks' annual leave entitlement that was introduced under Regulation 13(a) of the Working Time Regulations and requiring employees to carry over all or part of the additional 1.6 weeks' leave in cases of genuine overriding business need.

### Compulsory pay audits

- Introducing a new power for employment tribunals to order employers to conduct and publish a pay audit if it is found in breach of the Equality Act 2010 either by discriminating because of sex in relation to non-contractual pay, or by breaching the equality clause in relation to contractual pay (an equal pay claim).

## Double or quits

A recent decision from the EAT is a reminder for employers to take care when preparing termination letters. In the case of *Publicis Consultants UK Ltd v O'Farrell*, the EAT held that a termination payment that was described as “ex gratia” could not extinguish an employee's entitlement to notice pay and so the employer was liable for breach of contract. The

term “ex gratia” should only be used when the payment is intended as a gift and as the employer had not protected themselves with a compromise agreement, they were obliged to pay three months' salary as pay in lieu of notice on top of the three months' salary they had already paid as an “ex gratia” payment.

## The end of the brown envelope

The Bribery Act 2010 came into force on 1 July 2011. For more information please see our briefing at [www.burges-salmon.com/Practices/disputes\\_and\\_litigation/Publications/The\\_end\\_of\\_the\\_brown\\_envelope.pdf](http://www.burges-salmon.com/Practices/disputes_and_litigation/Publications/The_end_of_the_brown_envelope.pdf)

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## Living without the DRA

It is no longer possible to issue a notice of retirement under the statutory retirement procedures and employers are no longer able to dismiss by reason of retirement unless it can be objectively justified. For more information please

see our briefing at [www.burges-salmon.com/Practices/employment/Publications/Living\\_without\\_a\\_default\\_retirement\\_age\\_Employment\\_aspects.pdf](http://www.burges-salmon.com/Practices/employment/Publications/Living_without_a_default_retirement_age_Employment_aspects.pdf)

## Recent email alerts

To access our recent email alerts, please visit:

[www.burges-salmon.com/Practices/employment/News/default.aspx](http://www.burges-salmon.com/Practices/employment/News/default.aspx)

## In the office

We welcome Akshay Choudhry to the team, who joins us from Wragge & Co in Birmingham.

We are delighted that Natalie Jefferies and Ian Taylor are joining the team following their qualification as solicitors in September.

Congratulations to Sarah Embleton and Iain, on the birth of their a son and Amy Whiting and Mark, who have also had a son.

Our best wishes go to Faith Salih who leaves us at the end of August to join her husband who has moved to Sheffield with his work.

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