

IN FOCUS

Welcome

Welcome to the Winter 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

The outlook

The government has announced proposals for what it describes as “the most radical reform to the employment law system for decades”.

Details of the proposals are set out in our email alert [www.burgess-salmon.com/practices/employment/news/](http://www.burgess-salmon.com/practices/employment/news/news_item.aspx?id=9588)

[news_item.aspx?id=9588](http://www.burgess-salmon.com/practices/employment/news/news_item.aspx?id=9588). Many of the proposals will be welcomed by businesses, but it remains to be seen how they will be implemented and it may be necessary to plan for some significant changes in employment law in the next year or so.

Changes in April 2012

In April 2012, the qualifying period of employment needed to bring an unfair dismissal claim is expected to increase from one year to two years. Whether it makes a significant dent in the number of tribunal claims brought annually remains to be seen; discrimination claims, for which no qualifying period of employment is necessary, may even increase and employees will still be able to bring a number of other tribunal claims based on protected circumstances, such as whistleblowing, regardless of length of service.

A number of changes to the employment tribunal process were also announced in the government’s response to the consultation on resolving workplace disputes and are expected to be introduced in April 2012, including:

- an increase in the maximum sums payable under costs orders and deposit orders
- witness statements being “taken as read” and not read out at the hearing unless the employment judge orders otherwise



- changes to the payment of witnesses expenses
- allowing employment judges to sit alone in unfair dismissal claims.

The President of the Employment Appeal Tribunal, Mr Justice Underhill, has been asked to lead a review of the employment tribunal rules and report back in April 2012, with a view to further changes being introduced in 2013.

Employment tribunal fees

The government has begun consultation on the introduction of fees in employment tribunals and the Employment Appeal Tribunal. The consultation seeks views on two options for charging fees in employment tribunals:

- **Option 1** proposes that the Claimant pays an initial fee of £150 - £250 to lodge a claim, depending on the nature of the claim, and a second fee of £250 - £1,250 to proceed to hearing. This could be introduced in 2013.
- **Option 2** proposes that the Claimant pays a fee to lodge a claim, the amount of which will depend on the value of the claim. Those seeking an award below

£30,000 would pay £200 - £600, depending on the nature of the claim, and those seeking £30,000 or more would pay £1,750. This could be introduced in 2014.

In both options, further fees are proposed for other applications once a claim has been lodged, including counterclaims and the dismissal of a claim after settlement, and the fees for multiple claims will depend on the number of people involved. The HM Courts and Tribunals fee remission scheme would be available for those who cannot afford the fees. Tribunals would also have the power to order that the unsuccessful party reimburse the successful party so that the cost is ultimately borne by the party who caused the system to be used.

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Service please!

There have been a number of cases recently relating to the service provision change rules under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). When the rules first came in it was generally thought that most outsourcing or supplier changes would be caught, but more recently tribunals seem more willing to decide there was no TUPE transfer if there are changes in the relevant services.

In *Nottinghamshire Healthcare NHS Trust v Hamshore* and others a lot of emphasis was put on the change of ethos in the

services when an NHS care home closed and the provision of care transferred to private sector care providers who provided care in the patients' own homes. It was held in this case that there was no service provision change because the services were not fundamentally or essentially the same after the change.

In *Enterprise Management Services Ltd v Connect-Up Ltd*, a reduction in scope of IT services was sufficient to mean that there was not a service provision change under TUPE.

Carry on accruing?

We have previously reported a number of cases about holiday rights under the Working Time Directive and long term sickness. These include a German case (*KHS AG v Schulte*), in which the Court of Justice of the European Union (ECJ) had 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 ECJ held that the EU Working Time Directive does not require that workers on long-term sick leave accrue the right to paid annual leave without any time limitations. This decision largely follows the Advocate General's opinion that we reported in the summer. An unlimited right to accumulate annual leave whilst on sick leave would no longer reflect the purposes of paid annual leave, which is to provide a worker with a period of rest from work and a period of relaxation and leisure.

In this case, the ECJ held that a carry-over period of 15 months was not contrary to the purpose of the right to paid annual leave, as it ensured that annual leave retained its positive effect as a rest period.



The ECJ stated that the carry-over period must ensure that the worker can have rest periods that are staggered, planned in advance and available in the longer term and also protect employers from the accumulation of very long periods of absence.

This will be welcome news for employers as it paves the way for the government to impose a limit on the carry-over of annual leave when it amends the Working Time Regulations.

News in brief

- The government plans to amend the whistleblowing legislation to close a "loophole" which allows an employee to bring a whistleblowing claim about breaches to their own employment contract.
- A call for evidence on the effectiveness of the TUPE regulations and how they may be improved has been published by the Department for Business, Innovation

and Skills (BIS). The evidence will be used to formulate policy proposals that will then be put forward for public consultation.

- BIS has also published a call for evidence regarding the rules governing statutory consultation for collective redundancies, with a view to consultation on reducing the minimum period

Seminars

Our ever popular Hot Topics seminar takes place in Bristol on Thursday, 26 January 2012 and in London on Thursday, 2 February 2012.

For details, please go to www.burges-salmon.com/seminars or email seminars@burges-salmon.com.

Recent email alerts

Our recent email alerts include details of the new compensation rates and increases in statutory payments. To access these and our other recent email alerts, please visit www.burges-salmon.com/practices/employment/news/default.aspx.

In the office

We would like to take this opportunity to wish all our readers a happy new year.

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