

# IN FOCUS

## EMPLOYMENT NEWS

### Welcome

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

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## String in the tale...

In June the House of Lords finally ruled on the long running case of *Stringer & ors -v- HM Revenue and Customs (HMRC)*. Readers will be familiar with the case which, amongst other things, considered whether an employee on long term sick leave was entitled to take holiday leave whilst off sick and, perhaps more importantly, receive holiday pay.

The European Court of Justice ruled in January that employees accrue, and can take, holiday during sickness absence. HMRC did not seek to appeal this point before the House of Lords.

What employers may find more surprising, however, is that the House of Lords held that a worker can bring a claim for non-payment of statutory holiday pay either under the Working Time Regulations (WTR) or, which is a change to accepted practice, under the Employment Rights Act 1996 as an unlawful deduction from wages claim.

At first glance that may not seem to be of great significance to employers. However, the decision can greatly benefit workers as the time limits for bringing an unlawful deduction from wages claim are less stringent than a claim under the WTR. In certain circumstances, it could allow a worker to bring a claim for non-payment of holiday pay going back a number of years.

Following the *Stringer* case employers should be aware that a worker:

- will continue to accrue statutory holiday leave whilst on sick leave. That includes workers absent on long-term sick leave and/or those in receipt of permanent



health insurance (PHI);

- is entitled to take holiday leave, and be paid for it, whilst on sick leave;
- can bring a claim for the non-payment of holiday pay under either the WTR or as an unlawful deduction from wages claim.

This means that an employer:

- cannot prevent an employee from taking holiday leave whilst signed off work sick;
- must pay the employee for any period of holiday at the "normal" rate. That means, in general, at the employee's usual rate of pay when working;
- cannot refuse to pay an employee on the termination of his employment for any accrued but untaken holiday up to the last date of employment.

The courts have left many questions in the sick pay and holiday leave/pay saga unanswered. As a consequence employers may want to decide now, as a matter of policy, how they will deal with such cases and review long-term absence and PHI policies accordingly.

## Agency Workers' Directive

In May the government published its consultation paper on the implementation of the Agency Workers Directive (AWD). The closing date for responses on the consultation paper is 31 July 2009. The government has set up a series of consultation events which interested parties can attend – see BIS (*see News in brief*) website for details if you are interested in attending one of these events.

The government's stated purpose of the AWD is to provide protection for temporary agency workers and to ensure they receive equal treatment and are not subject to any unnecessary restrictions or prohibitions. One of the main proposals (which was agreed by the

CBI and the TUC last year) is to ensure that, after a period of 12 weeks in a given job, agency workers receive equal treatment in relation to basic working and employment conditions as if they had been recruited by that employer. This is to ensure that they are treated on an equal footing to employees in the organisation in relation to pay, working time, overtime, breaks, rest periods, night work, holidays and public holidays. The agency worker's employment status would, however, remain unchanged.

It is proposed that the format will follow similar directives implemented in relation to fixed term and part-time work.

# The whole truth and nothing but...

In the case of *Cheltenham Borough Council (CBC) -v- Mrs Laird*, CBC brought a claim against Mrs Laird, a former employee, for fraudulent and negligent misrepresentation in her responses to a pre-employment medical questionnaire. CBC sought £1m in damages from Mrs Laird. However, the High Court did not uphold CBC's claim.

By way of background, Mrs Laird had been employed by CBC as its managing director from 2002 to 2005 when she left CBC's employment on an ill-health pension. The job offer was conditional upon medical clearance being obtained and Mrs Laird was asked to complete a pre-employment medical questionnaire. It was Mrs Laird's response to those questions that became the focus of the case.

Prior to her employment with CBC, Mrs Laird had suffered with bouts of stress-related depression and at the time of completing the questionnaire Mrs Laird was still taking anti-depressants. Mrs Laird did not include this information on her questionnaire. As a consequence, CBC argued that the responses given by Mrs Laird were false.

However, the court found that the answers Mrs Laird gave, in response to the specific questions asked, were not false and, therefore, not a misrepresentation. The court held that the questions on the medical questionnaire should be construed objectively and that it was for CBC to ensure that the questions asked were clear.

The questionnaire included such questions as: "Do you normally [our emphasis] enjoy good health?" and "What was the date you last [our emphasis] received medical treatment and reasons". Mrs Laird answered "yes" to the first question and cited a fall for the second.



The court held that, if there was more than one meaning in a question, then as long as the answer given correctly addressed any reasonable interpretation of the question, the answer would be considered to be true. Consequently, the court found that Mrs Laird's answers were neither false nor misleading and, therefore, no misrepresentation had taken place.

The lesson to be learned from this case is that, whenever questions are asked about an employee's health (which includes prospective employees), the questions should be detailed and carefully worded in order to ensure that past and not just current/recent medical conditions are picked up. By doing this employers will be able to explore matters of ill-health with employees and prospective employees at an early stage.

## Email alerts

Recent email alerts include:

- No opt out for the opt out – this concerned the UK's opt out from the maximum 48 hour week. Lack of agreement in Europe means the opt out will remain for now.
- Swine flu – are you prepared? Guidance for employers on what to do in the circumstances.
- Fit notes to replace sick notes – the government is currently consulting on this proposal and what the content of the fit note should be.
- Redundancy rates to rise - see *News in brief*.

## In the office

Welcome back to **Deborah Bulman** who will be returning from maternity leave this month.

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## News in brief

- With effect from 1 October 2009 the national minimum wage rates will increase as follows: the adult rate will increase to £5.80 per hour, the development rate will increase to £4.83 and the rate for 16 and 17 year olds will increase to £3.57. The government estimates that this increase will benefit over 950,000 workers, many of whom are women.
- In addition, with effect from the same date the maximum amount of a week's pay for statutory redundancy payment purposes will increase from £350 to £380. This will also impact on other areas where a week's pay is used to calculate awards/compensation to employees, such as the basic award in unfair dismissal cases and the compensation payable by an employer for failing to allow an employee to be accompanied at a discipline or grievance meeting. The government has stated that the maximum amount of a week's pay, which is normally reviewed and increased each February, will not increase in February 2010.
- In June the government announced that the Department of Business, Enterprise and Regulatory Reform (BERR) had been merged with the Department for Innovation, Universities and Skills to form a new department called the Department for Business, Innovation and Skills (BIS).
- It looks likely that Lord Mandelson will delay implementing the right for fathers to take extended paternity leave. No date for implementation has yet been set.