

EMPLOYMENT NEWSLETTER

EMPLOYMENT LAW – WHAT'S NEXT?

As ever, a lot is happening in employment law – some of it of benefit to employers but the majority of developments aimed at increasing the protection afforded to employees.

We have just seen the introduction of new rights in respect of race discrimination and the widening of protection under the Working Time Regulations to those employed in the transport sector. From December 2003 discrimination on the grounds of sexual orientation and religious belief will be unlawful. Other forthcoming measures which require further consultation include age discrimination and new rights for workers to be consulted. This applies also to the new rules on minimum disciplinary and grievance procedures which will have a far reaching effect in cases of unfair dismissal. All of these issues are covered in this newsletter.

One area of relief for many will be the collapse of the EU Agency Workers Directive which would have required employers to afford agency workers the same rights as permanent staff. No agreement could be reached on this proposal at the Council of Ministers.

FOCUS ON HOLIDAY PAY

The right to take paid holiday under the Working Time Regulations has been in force for some time now. However, recently there have been a number of high profile cases relating to the complexities of calculating holiday pay.

The starting point is that an employee who has normal working hours gets paid for a week's holiday at the amount payable under the contract. If there are no normal working hours or pay is related to productivity, workers are paid a week's pay on the basis of the average remuneration over a previous 12 week period.

In a recent case, an employee who was contracted for 39 hours per week, but in fact regularly worked an average of 58 hours per week due to extensive overtime, applied to the Tribunal in an attempt to have his holiday pay paid at a rate which included overtime. The employee was not successful in his case. Where employees have a contractual right to overtime and overtime pay, then they will be paid in accordance with those contractual rights. However, where an employee has no guaranteed overtime, then, even if overtime is regularly worked, a week's pay will be calculated based upon their basic contractual hours only.

A further case was brought by a Sales Representative who was paid a basic salary plus a significant amount of commission. The employee attempted to argue that as his remuneration varied with the amount of work done, then his holiday pay should be calculated based on an average of his income over the previous 12 weeks. The case progressed to the Court of Appeal and it was

decided that as his level of remuneration did not vary with the amount of work he did but, instead, with his success in doing that work then he would be entitled to holiday pay based on his contractual basic salary only and not incorporating any commission payments.

Other cases relating to holiday pay include two conflicting decisions on "rolled up" holiday pay i.e. when an employer pays an additional sum each week during the year on account of holiday pay but no actual pay during weeks of holiday taken. A Scottish case earlier this year found that this was unlawful. There has since been a further case at the English EAT which found that, in certain specific circumstances, this could be permissible under the Regulations. However, this remains an uncertain area.

Finally, it has been established that employees who are absent from work on long term sick leave can continue to accrue holiday pay under the Working Time Regulations even where they have exhausted all paid sick leave. In order to succeed in such a case, employees must make a request to their employer to be treated for a specific period as being on holiday rather than sick leave. The employer must then make a payment equivalent to a normal week's pay for each week of holiday taken. There has been speculation that this entitlement may also apply to women who are absent on additional maternity leave.



u p t o t h e m i n u t e a d v i c e

IN THIS ISSUE

- EMPLOYMENT LAW – WHAT'S NEXT?
- FOCUS ON HOLIDAY PAY
- DISCIPLINARY PROCEDURES, AGE DISCRIMINATION AND WORKPLACE CONSULTATION – STILL TIME TO HAVE YOUR SAY
- TAKE CARE WHEN ISSUING FINAL WRITTEN WARNINGS
- INCREASE TO NATIONAL MINIMUM WAGE
- DIFFERENT TREATMENT OF MANAGING DIRECTORS
- WORKING TIME REGULATIONS EXTENDED TO THE TRANSPORT SECTOR
- AGENCY WORKERS AND IMPLIED CONTRACTS OF EMPLOYMENT
- EMPLOYMENT PROTECTION SCHEME
- DATA PROTECTION – NEW CODE OF PRACTICE ON MONITORING AT WORK IS PUBLISHED



DISCIPLINARY PROCEDURES, AGE DISCRIMINATION AND WORKPLACE CONSULTATION – STILL TIME TO HAVE YOUR SAY

As mentioned in the foreword to this Newsletter, the Government is currently consulting on a number of proposals before any relevant legislation is introduced.

Statutory Dispute Resolution Procedures

These procedures are contained in the Employment Act 2002 and aim to encourage employers and employees to resolve disputes internally rather than taking them to a Tribunal. As soon as the details of the Act were apparent, this has seemed to be somewhat optimistic.

Essentially employers and employees will be required to follow minimum dismissal and disciplinary procedures (DDPs) and grievance procedures (GPs) which will form part of every contract of employment. Dismissals in breach of a DDP will be automatically unfair and employees who do not follow a GP may be barred from bringing Tribunal complaints.

A lot of the detail of how this would work in practice was left for future Regulations and it is on these that the Government is now seeking views. The issues to be resolved include:

- The definition of "disciplinary action" – should DDPs cover oral and/or written warnings?
- The application of modified procedures – the Employment Act 2002 envisages the use of a much more truncated DDP in some circumstances. The Government suggests these could include circumstances when an employee is working illegally or gross misconduct cases where it would be fair to dismiss without any form of procedure (not a very wide category!)
- Should a separate (simplified) code of practice be developed for small employers?
- What exemptions should there be? For example, the statutory procedures could be disapplied where a party is violent or abusive, where circumstances beyond anyone's control make it impossible to follow procedures or where a matter is of a collective nature?

The new rules are expected to come into force on 1 October 2004.

Age Discrimination

Regulations will come into force outlawing discrimination on the grounds of age on 1 October 2006. The Government is allowing plenty of time for consultation on what form this new protection should take.

- It will be direct discrimination to base a decision on an individual's age or perceived age. However, a limited defence is being considered where an employer may be able to justify an age based approach which could include issues of health and safety, succession planning, encouraging or rewarding loyalty.
- There will also be unlawful indirect discrimination if a blanket policy or practice disadvantages a category of person because of his or her age.
- A more flexible approach to retirement will inevitably be required. It is proposed that any retirement age will be unlawful unless justifiable.
- The consultation paper contemplates the introduction of a statutory default retirement age of 70 after which employees could still be forced to retire.
- Currently employees over 65 have no general right to claim unfair dismissal. This bar will be removed.
- The calculation of redundancy payments will no longer be related to age. Years under the age of 18 will count and the upper age limit will be revised.
- It is suggested that any reward based on length of service may only continue where this can be justified.

Information and Consultation

The Government must implement a new European Directive requiring employers to give information to and consult with employees on a variety of workplace issues. By 23 March 2005 this will apply to undertakings with 150 or more employees and by March 2008 all workplaces with 50 or more employees will be caught.

The Government has proposed that a number of alternative approaches should be open to employers to satisfy the requirements of the Directive allowing many pre-existing workforce or union agreements to continue. In particular:

- It is envisaged that there will be a period during which the employer and employees can negotiate and agree appropriate arrangements.
- If agreement is not reached an Information and Consultation Committee must be established by the election of employee representatives through a ballot. It is proposed that there should be at least one representative for every 50 employees up to a maximum of 25.
- Information provision and consultation would cover the development of the business, the employer's economic situation, employment structures and future employment prospects, and decisions likely to lead to substantial changes in work organisation or in terms and conditions.
- A range of sanctions are proposed including the possibility of fines being levied on employers up to a maximum of £75,000.

One area of difficulty is how the new obligations will fit with existing responsibilities, e.g. to consult in the case of redundancies and business transfers, and what will happen if a collective agreement governing such issues is already in place.

TAKE CARE WHEN ISSUING FINAL WRITTEN WARNINGS

Care should be taken when issuing a final written warning to an employee whose misconduct may not necessarily warrant such a severe reprimand. In a recent case, an employee was involved in a heated discussion with a colleague after which she felt she had to leave the office as she was feeling ill and upset. The employee was absent from work for an hour and a half, 30 minutes of which was her lunch break. When the employee returned to work she spoke to her line manager. As she was clearly still upset her line manager told her to go home. The employee was subsequently issued with a final written warning for leaving the office without permission. The

employee resigned and claimed that the imposition of a final written warning was unjustifiable and that it amounted to a breach of her contract of employment by the employer. The Employment Tribunal agreed with the employee and this decision was upheld by the EAT.

This is the first case where an unjustifiably harsh final written warning has been found to be a fundamental breach of contract. Care should therefore be taken to ensure that disciplinary sanctions are imposed at the correct level.

INCREASE TO NATIONAL MINIMUM WAGE

From October 2003 the National Minimum Wage will rise to £4.50 (from £4.20) and the young workers rate to £3.80 (from £3.60). The Low Pay Commission has also had a recommendation provisionally accepted to increase the rates from October 2004 to £4.85 and £4.40 respectively. Consideration is to be given to whether 16 and 17 year olds should still remain outside the protection of a National Minimum Wage.



DIFFERENT TREATMENT OF MANAGING DIRECTORS

Two recent cases have highlighted differences in the Court's approach to the way in which Managing Directors carry out their duties. In **Bartholomew -v- LK Group Limited**, the High Court decided that a Managing Director who worked erratic hours and spent much of his working time in London clubs, cafes, walking in the park and visiting saunas and jacuzzi parlours was not guilty of misconduct. A key factor in the case was that Mr Bartholomew had worked in this way for a number of years and his employers were found to have agreed to his work style. The Court held that even if there was a breach of contract, the employers had waived their right to rely on this breach to terminate his employment.

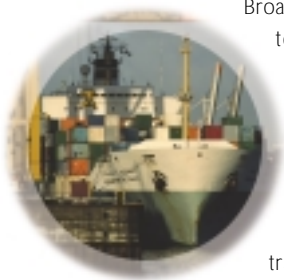
In a separate case, around one month later, the Court of Appeal took a much less sympathetic view of a Managing Director. The case was brought after a hostile take-over of the Company and the Managing Director had led a competing (unsuccessful) bid for control of the Company. The Director was subsequently dismissed by the new owners and the Court of Appeal found that the dismissal was fair in the circumstances.

WORKING TIME REGULATIONS EXTENDED TO THE TRANSPORT SECTOR

From 1 August 2003 the Working Time Regulations have been extended to apply to the previously excluded transport sector.

The amendments do not mean that the Regulations simply apply to all workers in this sector. Instead, distinctions are made between mobile and non-mobile workers and between different transport sectors.

Broadly speaking the Regulations now apply in full to all non-mobile workers (e.g. clerical, administrative and other office based workers) in the air, road, sea, inland waterways and sea fishing sectors. Most mobile workers are now separately covered by other EC Directives which deal with working time within each individual transport sector.



Matters are more complex in the road transport sector where mobile workers may be covered by the Road Transport Directive which from March 2005 will regulate driving hours and rest periods for HGV drivers. All other mobile road workers (e.g. couriers, white van drivers, taxi drivers) are entitled to an average 48 hour limit on a working week, four weeks paid annual leave and (if night working is involved) free health assessments. These workers are also entitled to "adequate rest", but are not covered by the detailed provisions relating to daily and weekly rest requirements, rest breaks and limits on the length of night work.

Subject to certain exceptions regarding rest breaks and length of night work, the Working Time Regulations will apply in full to rail workers.



AGENCY WORKERS AND IMPLIED CONTRACTS OF EMPLOYMENT

The use of agency workers continues to grow as a means of providing a flexible and adaptable workforce. Despite this trend the law has yet to catch up when deciding whether these workers are employees of the agency, of the contracting company or not at all.

Previous case law had established that an essential ingredient of a contract of employment was "mutuality of obligation". Therefore, the employer must be under a duty to provide work for the employee and the employee must be under a reciprocal duty to perform it. On this basis, it is necessary to look at where the obligations lie between agency workers, the agency and the contracting company. Tribunals are able to look at any documents which exist between the parties but also any surrounding circumstances and the way in which the parties have behaved.

The Court of Appeal recently reviewed this area in the case of **Franks -v- Reuters Ltd**. Mr Franks worked for Reuters through an employment agency for a number of years. There was no written contract between Reuters and Mr Franks, but there was a contract between Mr Franks and the agency. This set out his hourly rate and also stated that he was not obliged to accept any work offered by the agency, neither was the agency obliged to offer him any such work. The agency was responsible for paying his wages and holiday pay and these were paid under the PAYE system. However, if Mr Franks wanted to take holiday, he had to get Reuters permission to do so. A contract

existed between Reuters and the agency on the agency's standard terms of business.

When Mr Franks was told that his services were no longer required at Reuters he brought a complaint, citing Reuters as his employer. Reuters claimed that Mr Franks was an employee of the agency, which paid his wages. The agency denied that Mr Franks was an employee of theirs.

Initially the Tribunal decided that Mr Franks was not an employee of Reuters and therefore rejected his claim. The Tribunal focused in particular on the fact that there was no written contract between Mr Franks and Reuters. When Mr Franks eventually appealed to the Court of Appeal, it was decided that the Tribunal had not properly considered whether a contract of employment could be implied between Mr Franks and Reuters.

Whilst the existence of a written agreement between the agency worker and the contracting company may be useful, it is certainly not conclusive in deciding whether an employment relationship exists. This could have important implications for companies who use agency workers who may find that they have additional obligations toward these workers due to their employee status. This will include an individual's right to claim unfair dismissal. Particular care is needed if contract workers work on a long term basis and are treated largely in the same way as the contracting company's existing members of staff.

DATA PROTECTION - NEW CODE OF PRACTICE ON MONITORING AT WORK IS PUBLISHED

A new Code of Practice has been issued to help employers comply with the monitoring at work principles of the Data Protection Act 1998. The Code is detailed and establishes that it will usually be intrusive to monitor workers who will have legitimate expectations to a degree of privacy. Where monitoring takes place, workers should normally be made aware of it and employers should be clear about its purpose.

The Code recommends that employers set clear guidelines on the use of telephone systems, e-mail and internet and the extent to which these facilities may be used for private purposes.

INFORMATION

**If you have any queries on any aspect of employment law please contact:
Neil Maidment at Hull on (01482) 323239
or at York on (01904) 625790**

This newsletter is for the use of clients and will be supplied to others on request.

It is for general guidance only. It provides useful information in a concise form.

Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits,

Wilberforce Court, High Street, Hull, HU1 1YJ.

**The law is stated as at 1 October 2003
Wilberforce Court, High Street, Hull HU1 1YJ
Rowntree Wharf, Navigation Road
York YO1 9WE
www.rollits.com**

EMPLOYMENT PROTECTION SCHEME

We are now able to provide insurance backed cover under our own scheme. This can cover Tribunal awards or both awards and the cost of defending any claims. The scheme is very flexible and can be tailored to the needs of any employer, large or small. Please let us know if you would like any details or to obtain a quote.

