



# Employment law bulletin for employers

May 2010

## We're still here.....!

Welcome to this May 2010 issue of our Employment Law bulletin. If you have not needed our services over the last couple of years and rely on our bulletins for your only contact, you would be forgiven for thinking we had perhaps fallen victim to the recession – our last bulletin being, embarrassingly, Spring 2008. In a sense our bulletins, at least, did fall victim to the recession, but not because we have ceased trading. It is a sad fact that we have had a couple of very busy years helping our clients through redundancy processes and advising employees, literally in their droves, on their Compromise Agreements .

Things have – on the redundancy front - quietened down a bit and whilst the recession will doubtless be felt for some time to come, with more redundancies unfortunately on the cards, we have certainly started to sense a more positive feeling from our clients and we are now being asked to look at contracts and handbooks as part of a proactive approach to rebuilding teams and recruitment.

We have also, of course, also just had an election and whatever your party politics, the events of the last week have certainly drawn interest. It is too soon to say what changes lie ahead from an employment law point of view but with a total change of administration and talk of abolishing the retirement age already hitting the media, there are bound to be interesting times ahead.

In this bulletin, however, we catch up with some recent developments and look at some general topics of interest. By total coincidence, the contents list that we prepared for this bulletin is almost exactly the same as the one from the last bulletin 2 years ago. That just goes to show how the same old issues in employment law just continue to rumble on!



### In this edition.....

- 'Fit notes'
- The World Cup
- Payments under Compromise Agreements
- Varying contracts

### Fit notes

In April this year the 'Sick note' became a 'Fit note' - or a *statement of fitness to work* to give it its proper name.

This introduction is a cultural shift in the way in which sickness absence is dealt with. When issuing the fit note doctors have the option of signing the employee off work completely or indicating that the employee *may be fit for work taking account of the following advice*:

- *A phased return to work;*
- *Amended duties;*
- *Altered hours; and*
- *Workplace adaptations*

Employers receiving a fit note with one of the possible fit to work options completed will have to give consideration as to whether they can accommodate the recommendation in order to get the employee back to work. There is no formal process set down and an employer cannot be compelled to follow the recommendations, but we can already see how this will impact upon sickness dismissal cases with the employer's actions in response to receiving a fit note coming under close scrutiny by Tribunals. It is worth looking at your sickness absence management policy and procedures now and building in a mechanism for following up on doctors' recommendations in fit notes.

## Holiday Pay for Workers on sick leave

We have previously reported on the long running case of **Stringer v HMRC** which has gone backwards and forwards on the question of whether employees accrue holiday during long term sick leave.

At the end of the day the point was left somewhat in the air, however, following other case law, there is a general consensus that holiday does accrue during sick leave and employees are entitled to take it upon their return even in a subsequent leave year or if they do not return to be paid in lieu of untaken leave.

In the Spanish case of *Francisco Vicente Pereda -v- Madrid Movilidad S.A.*, the European Court of Justice (ECJ) held that a period of illness whilst on holiday does not count towards the minimum of 4 weeks paid annual leave under the Working Time Directive (WTD).

In the recent case of *Shah -v- First West Yorkshire Limited*, an Employment Tribunal held that the Working Time Regulations 1998 can be interpreted in accordance with the *Pereda* case, allowing annual leave ruined by sickness to be re-taken in the following leave year. In this case, Mr Shah booked 4 weeks of holiday from 22nd February to 21st March 2009 and then broke his ankle in January and was absent from work on sick leave until 18th April 2009. During his sick leave Mr Shah received holiday pay for the days that he had booked off. Mr Shah sought to reclaim his holiday entitlement, but *FWY Limited* stated that the days were 'lost', as Mr Shah returned to work after the new holiday year had commenced on 31st March.

As a result of the ECJ's decision in *Pereda*, the directive requires national law to permit an employee who falls sick during annual leave to take that annual leave at a different time, if necessary the following year. *FWY Limited's* refusal to allow Mr Shah to re-take his holiday was held to be a breach of the Working Time Regulations.



## Surviving the World Cup!

Anyone who knows this Firm's Principal will be aware that she is not a football fan and so the 2010 World Cup for her is all about taking advantage of an empty *Westfields* when everyone else is glued to the television. However, whether or not you are a fan, this major event does raise some workplace issues for employers.

For those who can remember back 4 years, the matches fell at various times during working hours and, particularly as England progressed through the competition, workplaces were deserted as groups of employees mustered in local pubs and bars. This year will probably be no different - take the England v Slovenia match, for example, scheduled for 3.00pm on Wednesday 23<sup>rd</sup> June.

Now is the time to think about how you are going to deal with employees wanting time off to watch the match. You may be inundated with requests for half a day's holiday but you will not be able to grant all of these if it is going to bring your business to a halt. Employees who are not able to take holiday or whose request has been turned down, may be struck down with a mystery illness on the day in question leaving you trying to run your business single handed. Of course you may not be concerned on the basis that none of your customers will want to contact you while there is a match in progress, but remember there are those of us for whom no amount of patriotism can overcome the fundamental dislike of football.

Surviving the World Cup from an employer's point of view means starting your planning now with just under a month to go to the first match on 11<sup>th</sup> June. Take half an hour to look at the match schedule at: [www.fifa.com/worldcup/matches/index.html](http://www.fifa.com/worldcup/matches/index.html) (remembering to convert it to your own time zone) and identify which matches are going to fall in your working hours and are likely to be of interest to your particular workforce. You can then communicate the options to your employees. It may be that a bit of flexibility on start and finish times or the installation of a wide screen TV in your workplace will be all that is needed to have a smooth ride through the event and to generate goodwill between you and your workforce....unless of course you are supporting different teams but that's not one for the employment lawyers!

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## Payments under Compromise Agreements

If redundancy has been flavour of the month for the last couple of years, Compromise Agreements have come a very close second. Not all redundancies are dealt with by way of a Compromise Agreement and there would be no requirement or justification for expecting an employee to sign a Compromise Agreement if all that is being offered is statutory redundancy pay. However, with so much redundancy around, employers have wherever possible sought to help redundant employees by paying over and above statutory sums and this often includes releasing the employee from the obligation to work notice and making a payment in lieu thereof.

The question then arises as to whether the payment in lieu of notice can be paid without deductions for tax and national insurance contributions. There is a common misunderstanding that using a Compromise Agreement can somehow change the tax status of a payment which otherwise would be subject to deductions. This belief is totally misconceived. The general principle is that an employee can have up to £30,000 tax free upon termination of employment (whether or not a Compromise Agreement is signed) provided that the payment is genuinely a non contractual payment arising from the termination of employment. This includes statutory redundancy payments ex gratia payments and most enhanced redundancy payments payable under a company scheme up to the limit of £30,000. Any payment made to the employee upon termination of employment which is a contractual payment will not be tax free even if it is disguised as something else and put through a Compromise Agreement. Payment in lieu of notice falls into this category.

If your contract of employment entitles you to make a payment in lieu of notice to an employee, it will be a contractual payment and therefore tax and national insurance contributions must be deducted at source. If you do not make the deductions but try to incorporate the figure into a general compensation payment, there is a risk that HMRC will at a later stage scrutinise the payment and make a demand for the tax which should properly have been deducted. It is for this reason that we always advise putting an indemnity clause in the Compromise Agreement. However, the better practice is to make the correct deductions at source. Remember that when an employee goes to see a solicitor to take legal advice on his or her Compromise Agreement, this is one of the points which is likely to be picked up by the solicitor which could lead to unnecessary negotiations over the terms of severance which in turn will cost the company more if not in terms of the package itself, just in terms of the time spent dealing with the matter. Even if there is no clause in the contract entitling the company to make a payment in lieu of notice (a PILON clause) there is still a risk that the payment will attract tax if it is the employer's normal custom and practice to make a payment in lieu of notice rather than requiring its employees to work their notice period.

Increasingly, particularly in the current climate, employers are not enforcing notice periods so the general thinking is that it is not safe to rely on the absence of a PILON clause as absolute authority for making a tax free payment.

On balance, if you are making a payment to an employee which comprises statutory redundancy pay, payment in lieu of notice and an enhanced payment, our advice is to split the payments up and deduct the tax where appropriate. The employee is still getting more than he or she would have done if you had paid only statutory entitlements and therefore there is consideration for signing the Compromise Agreement, but the arguments and risk over tax are removed. It is always open to an employee to apply to the Revenue after signing a Compromise Agreement to see if the tax can be rebated.

Remember too that tax arises not only on payments in lieu of notice but on **any** contractual payment and this will include the payments, bonuses and commissions. Sometimes these can all be rolled up into the ex gratia payment where you are not directly making a payment in lieu of the lost benefits but paying compensation for general loss of benefits, but if there is any documentation which directly breaks down and identifies the payment as including contractual amounts, the risk of tax is still there.



## Money matters.....

Since 1<sup>st</sup> February 2010 the maximum compensatory award for unfair dismissal has reduced from £66,200 to £65,300

**National minimum wage rates:** (figures in brackets are the new rates effective October 2010)

£5.80 (£5.93) an hour for workers aged 21 and over  
£4.83 (£4.92) an hour for workers aged 18 to 20  
£3.57 (£3.64) an hour for workers aged 16 to 17

**SMP** rate is currently the lower of £124.88 a week or 90% of pay

**SSP** is currently £79.15 a week

## Risk Assessments for Pregnant Workers



We have previously advised on the importance of carrying out risk assessments as soon as you become aware of an employee's pregnancy.

In a recent case in which a pregnant school teacher brought a claim of sex discrimination for the school's failure to carry out a risk assessment pursuant to Regulation 16 of the Management of Health and Safety at Work Regulations 1999, the EAT held that for an employer to fall under a **duty** to conduct a risk assessment of a pregnant worker, the following pre-conditions **must** be met:

- The employee notifies the employer in writing that she is pregnant.
- The work is of a kind which could involve a risk of harm or danger to the health and safety of the expectant mother or her baby.
- The risk arises from either processes, working conditions or physical, chemical or biological agents in the work place.

The EAT also confirmed that where a risk assessment is required, the employer must provide comprehensive information on any risks to the employee, but does not need to meet with the employee to do this.

This is a helpful guideline for employers and should avoid them falling into the trap of being accused of failing to comply with their duty when the employee's pregnancy is no more than a verbal office rumour. However, don't forget that when there is a requirement to carry out a risk assessment and the employer fails to do so, automatic unfair sex discrimination will result and the pregnant worker does not need to prove a detriment.

## Varying Contracts of Employment

It has long been thought that an Employer who varies the terms and conditions of his employees without their express consent does so at his peril. However, a recent decision by the Employment Appeal Tribunal suggests otherwise. In the case of *Bateman & Others -v- Asda Stores Limited*, the EAT held that employers may reserve the right to vary employment contracts unilaterally, which may include rates of pay and hours of work, without the need for the express consent of employees, provided that the changes are properly implemented and the employer acts in line with the implied duty to maintain trust and confidence.

In this case, the EAT found that Asda was permitted to amend their handbook and introduce new policies without employee consent, as the wording in the handbook was clear and unambiguous. However, it is important to note that the decision in this case was based on specific facts and we would therefore always advise that you obtain legal advice when considering varying the employment contracts of your employees.

### Bonuses

Most bonuses are discretionary i.e. non contractual but this does not mean that employees have no entitlement. Failure to pay bonus to an employee on maternity leave could amount to sex discrimination.

Whether employees on maternity leave should be paid their full bonus or only a pro rata entitlement based on the amount of the year worked depends on the type of bonus being paid. If the bonus is in any way work related i.e. determined by the employee's own performance then it can be paid on a pro rata basis to reflect the employee's contribution over the year. However, if the bonus is being paid to all staff or individual groups of staff in which the employee on maternity leave belongs then the employee is entitled to receive her full bonus entitlement as if she had been at work for the whole year.

Similar principles should be applied to employees on long term sick leave who could have a Disability Discrimination Act claim if they miss out on a general bonus payment.

Of course, the above principles could be superseded by any more favourable contractual terms in your employment documentation.

Whatever your Employment Law requirements, we have an arrangement to suit – from full consultancy to ad hoc advice. With offices in Eastcote and Amersham, a cost effective specialist Employment Law Service has never been more accessible.

Call us on 0208 866 0044 or email: [emplaw@bulfin.co.uk](mailto:emplaw@bulfin.co.uk)