
E-NEWS EMPLOYMENT

E-NEWS LATEST

The date of the general election has not yet been officially confirmed, although Thursday 6th May is the odds-on favourite by a long way. Meanwhile, it's largely business as usual in the world of employment law, with three significant reforms taking effect in April – a new right to request time off work for study or training, the long-awaited replacement for the traditional doctor's sick note and an important change in relation to whistleblowing claims. All are explained in this issue of e-news.

Religious discrimination is again in the news following last week's Court of Appeal's ruling on Christian jewellery in the workplace – click on the relevant heading below for details. The decision is helpful for employers because it means employees' purely personal versions of mainstream religious beliefs are less likely to be protected. However, an appeal to the Supreme Court looks likely, so there could yet be a further twist in the tale.

Finally, remember to pay a visit to the 'Human Zoo', which this time illustrates some novel grounds for dismissal – giving cheese away, misspelling your country's name and wearing the wrong kind of socks!

The Serious Stuff

Major employment law developments

Introduction of 'fit notes' confirmed

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New unfair dismissal compensation limit

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'No visible jewellery' policy not discriminatory

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No 'inalienable right' to take annual leave

The right to paid holiday under the Working Time Regulations depends on a worker giving

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proper notice, the Employment Appeal Tribunal (EAT) has ruled. Workers have no absolute right to take their annual leave before the end of the holiday year or carry over any untaken leave .

Tribunals to alert regulators to whistleblowing claims

From April, whistleblowing claimants will be able to say whether they want the tribunal to pass on any allegations involving protected disclosures to the relevant regulatory body.

Legislation on equal treatment for agency workers finalised

Regulations giving employment agency workers certain rights to equal treatment with permanent employees have been put before Parliament, but will not come into force until October 2011.

The new bank payroll tax

Our inbrief guide to the one-off 50% tax on bank bonuses recently announced by the Government.

The Human Zoo

True stories from the world of work

Reliably informed?

A recruitment agency boss was advised she could not advertise for 'reliable and hard-working' applicants because it might discriminate against unreliable people.

Paying the price

The general manager of the Chilean mint was sacked after thousands of coins were issued with the name of the country spelt wrongly.

The bare truth

Businessmen and women take part in telephone conference calls when naked, a study has revealed.

Call to prayer

A London church has held a service to bless office workers' mobile phones and laptops.

Brought to heel

Ambulance chiefs are threatening to dismiss paramedics if they insist on wearing novelty socks.

Chinese whispers

The government in China has set up a match-making website to help lonely civil servants find love.

Sole 2 sole

A pedicurist in Arizona who performs a 'foot-smoothing' service using live fish has had her business shut down.

Cheesed-off worker vindicated

A Netherlands court has upheld a claim by a McDonald's waitress who was sacked for giving a colleague a slice of cheese on a hamburger.

Chairway to heaven

An adrenalin junkie attached 55 helium balloons to his office chair and soared to nearly 15,000 feet.

That's wheelie unfair...

A binman in Lancashire has claimed he was removed from his round for picking up too much rubbish.

Warm personalities required

A hotel chain is employing human bed warmers.

Long time, no see, you're fired

Indian Railways has sacked one of the country's most wanted militants – 30 years after he last turned up for work.

The Serious Stuff

Major employment law developments

Introduction of 'fit notes' confirmed

The Government has confirmed that a new-style 'fit note' will replace the current sick note with effect from April 2010.

The Department for Work and Pensions has been consulting for some time about scrapping the traditional medical certificate (form MED3) doctors have used since 1948 to sign people off work. The thinking was to focus on what employees can do rather than what they cannot.

Whereas sick notes merely specify the ailment and time off required, the fit note as initially proposed was to have three categories: fit for work; not fit for work; and 'may be fit for some work now'. A GP placing a patient in the third category would have had to describe the functional effects of the condition and could suggest temporary arrangements that might assist a return to work.

The final version of the 'Statement of fitness to work' has, however, been changed quite a lot and may not be as helpful for employers as was initially hoped:

- The form only confirms when the doctor assessed the case and does not confirm when (or whether) the doctor saw the employee.
- There is no option to confirm that the employee is fit (or 'need not refrain from work' as per the current MED3 form).
- The doctor can choose only to certify that the employee is **either** 'not fit for

work' or 'may be fit for work, taking into account the [doctor's] advice'.

The form then gives the doctor the opportunity to suggest changes to the employee's working arrangements which might benefit the individual (if the employer agrees to them), such as reduced hours or altered duties. The doctor also has the option to include comments but is not required to do so. (It must be doubtful whether many GPs will fill in these sections of the form.)

Finally, the form requires the doctor to confirm how long he or she thinks the certification should last and whether or not the patient needs to be reviewed again when it ends.

Practical issues

One concern is that doctors are not occupational health experts and will often only be able to give generic advice based on what the patient tells them (e.g. 'OK for work not involving stressful situations'). Moreover, whilst fit notes may promote dialogue between GPs and employers, employees could potentially feel frozen out of the process.

Further issues may arise:

- To what extent will employers be under a positive duty to contact the employee on receipt of a 'may be fit for some work now' certificate to discuss whether the employee can indeed return?
- Might employees be able to argue that an employer is in breach of the implied term of trust and confidence if it does not discuss the GP's suggested amendments to an employee's working conditions, or if it unreasonably refuses to accommodate those changes?

Will an employer's duty to make reasonable adjustments for disabled employees, in effect, be extended to cover all employees who 'may be fit for work'?

Nonetheless, depending on how the law develops, this could prove to be a beneficial reform that encourages constructive dialogues between employers and employees on returning to work.

The Government's response to its consultation is available by [clicking here](#). The new Statement of fitness to work can be found at annex B to this document.

New unfair dismissal compensation limit

The Government's annual review of employment tribunal compensation limits has, for the first time, resulted in a reduction in the maximum compensatory award for unfair dismissal.

The new limit is £65,300 (reduced from £66,200) and has applied since 1 February 2010. The downward revision reflects a decrease of 1.4 per cent in the Retail Prices Index (RPI) from September 2008 to September 2009.

The change is set out in the Employment Rights (Revision of Limits) Order 2009 – available by [clicking here](#).

The upper limit on a 'week's pay' - used to calculate statutory redundancy pay and the basic award for unfair dismissal – was increased to £380 in October 2009 and is to remain at that figure until February 2011 at the earliest – [click here for details](#).

Other new statutory rates

Meanwhile, the Secretary of State for Work and Pensions has confirmed the rates of statutory maternity pay, adoption pay and paternity pay that will apply from April 2010. Each

of these payments will rise from £123.06 to £124.88 per week. However, statutory sick pay will remain unchanged at £79.15 per week. The weekly earnings threshold for all these payments will rise from £95.00 to £97.00.

For full details, see the draft Social Security Benefits Up-rating Order 2010 – [click here](#).

‘No visible jewellery’ policy not discriminatory

The Court of Appeal has ruled that British Airways’ dress code, which prevented a Christian employee from wearing a small, visible cross with her uniform, did not amount to indirect religious discrimination.

Ms Eweida has worked for British Airways (BA) since 1999. In 2004, the company introduced a new uniform with an open neck and a uniform policy that prohibited employees from wearing any visible adornment around their neck. Ms Eweida came into work on three occasions wearing a small cross on a chain, but concealed it when asked to do so. On a fourth occasion she refused to conceal it and was sent home.

She remained at home, unpaid, between September 2006 and February 2007. BA changed its uniform policy to permit the display of a faith or charity symbol. Ms Eweida then returned to work and is still employed by BA.

Ms Eweida brought proceedings for direct and indirect religious discrimination and harassment. An employment tribunal rejected all her claims but added that, if there had been indirect discrimination, it would not have been justified. Ms Eweida appealed on the single issue of whether she had suffered indirect discrimination and BA cross-appealed against the tribunal’s finding on justification.

The EAT upheld the tribunal’s finding that there was no indirect discrimination because Christians had not been placed at a disadvantage by the policy. It was not a requirement of the Christian religion that followers visibly display the cross. Further, nobody else (out of a uniformed workforce of 30,000) had ever complained about the policy. Therefore, there was no provision, criterion or practice which put or would put ‘persons’ of the same religion or belief as the claimant at a particular disadvantage, as required by the Employment Equality (Religion or Belief) Regulations 2003.

Ms Eweida argued before the Court of Appeal that no evidence of group disadvantage was necessary and ‘persons’ could mean a single individual. The use of the conditional (**would** put persons... at a particular disadvantage’) required the tribunal to aggregate the claimant with a hypothetical peer group who would all suffer the same disadvantage.

The Court of Appeal rejected this contention, finding that use of the word ‘would’ is simply to include in the disadvantaged group those to whom the condition potentially applies as well as those to whom it actually applies. In this case, there was no evidence that there were any others in society at large who shared Ms Eweida’s beliefs and would suffer a potential disadvantage were they to be BA employees.

Ms Eweida also cited the European Convention on Human Rights in support of her claim, without any joy. The Court relied on case law which showed that the Convention does not protect every act motivated by religion or belief.

Having held that there was no indirect discrimination, the Court did not need to reach a decision on the issue of justification. However, two of the three judges said they would have upheld BA’s claim that its policy was in any event a proportionate means of achieving a legitimate aim.

What next?

Ms Eweida’s appeal was backed by Liberty - formerly the National Council for Civil Liberties - which has expressed disappointment at the outcome, adding that this was “just the sort of

case that a Supreme Court is for". This strongly suggests that Liberty will support an application by Ms Eweida for leave to appeal to the UK's highest court.

Irrespective of the legal niceties explored in this case, the main message for employers is to consider their uniform policies carefully and treat employees' requests to circumvent a rule for religious reasons sensitively and respectfully. Somewhat ironically, as matters have turned out, the tribunal in this case praised BA for changing its policy, describing it as "a substantial and thoughtful piece of work, for which all those involved deserve nothing but commendation".

Eweida v British Airways plc [2010] EWCA Civ 80, 12.2.10, unreported – judgment available by [clicking here](#)

New right to request time off for training

A new right to request time off to undertake study or training will be available to employees working in businesses employing 250 or more people, with effect from 6 April 2010.

The right, will operate in a similar way to the existing right to request a flexible working arrangement, in that employers must consider requests seriously and can only refuse them on specified business grounds. The law is expected to be extended to all organisations, regardless of size, from April 2011.

Employees can only apply if they have worked for their employer for at least six months and have not made a request in the past 12 months. To apply they must submit a written request, which meets specified criteria. The employer must meet with the employee within 28 days to discuss the request.

The employer must send the employee a written, dated notice of its decision within 14 days of the meeting. Employers do not have to grant the request, but the grounds for rejecting it must fall within one or more of the ten business reasons set out in the relevant legislation (s.63F of the Employment Rights Act 1996, as amended):

- that the proposed study or training would not improve the employee's effectiveness in the business or its performance
- the additional costs burden
- detrimental effect on ability to meet customer demand
- inability to re-organise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality or performance
- insufficiency of work during the periods the employee proposes to work
- planned structural changes.

The employer's response must specify, in sufficient detail, why the relevant reason or reasons apply.

If employers grant a request, they are not legally required to fund the training or allow the employee paid time off. However, the notice confirming that the request has been granted must state:

- the subject of the study or training
- where and when it will take place
- who will provide or supervise it
- what qualification it will lead to
- whether the employee will be paid for the time spent studying or training

- whether any changes will be made to the employee's working hours to accommodate the study or training
- how the training costs will be met.

If a request is turned down, the employee has 14 days to appeal. Again, strict timetable provisions apply in respect of making and dealing with any appeal. Employees can bring an employment tribunal claim if their appeal fails, but only on limited grounds and the maximum award will be only eight week's pay (subject to the £380 weekly limit) – i.e. £3,040.

The right appears to be quite feeble because employers have broad scope to refuse requests and limited sanctions apply for breaching the rules. Whereas refusing a flexible working request can potentially lead to a sex discrimination claim with the potential for unlimited compensation and bad publicity, such considerations do not apply to a refusal of time off for study or training.

The main pitfall for employers is likely to be falling foul of the strict timetabling provisions. Employers who receive a request should ensure they familiarise themselves with the procedure and deal with the request promptly and correctly.

The new right is explained in a leaflet published by the Department for Business, Innovation & Skills, available by [clicking here](#).

No 'inalienable right' to take annual leave

The right to paid holiday under the Working Time Regulations depends on a worker giving proper notice, the Employment Appeal Tribunal (EAT) has ruled. Workers have no absolute right to take their annual leave before the end of the holiday year or carry over any untaken leave.

The claimant, Mr Lyons, was contractually required to give four weeks' notice of intention to take holiday. Three weeks before the end of the holiday year, he asked to take his outstanding leave for that year. His request was rejected because he had not complied with the four-week notice requirement. As his contract provided that holiday could not be carried over, the employer regarded his untaken holiday for that year as forfeited.

An employment tribunal rejected Mr Lyons' complaints of unfair constructive dismissal and pay in lieu of untaken holiday under the Working Time Regulations 1998 (WTR) and he appealed to the EAT.

One of the main issues before the EAT was whether an employer must ensure that its employees actually take their statutory holiday entitlement under the WTR within the relevant year or permit carry over to the following year. Dismissing the appeal, the EAT ruled that the statutory right to annual leave is not an 'inalienable' right - it requires compliance with the notice provisions set out in regulation 15 of the WTR, as varied by the worker's contract.

Regulation 15 says that a worker who wishes to take leave can give notice to the employer twice as many days in advance of the number of days to which it relates, and the employer can put in a notice which has the effect of refusing leave either in whole or in part. These provisions can be varied or excluded by a 'relevant agreement'.

The EAT accepted that an employer must not operate the notice rules in an unreasonable, arbitrary or capricious way so as to deny any entitlement lawfully requested. But if operated correctly, those provisions could properly result in the loss of leave not taken at the end of the holiday year. The employer is not legally obliged to permit employees to take all of their paid leave within the holiday year where this is requested towards the end of the year and might not fit in with the staffing patterns of the business.

Sickness cases different

The EAT heard this appeal in September 2009, before the judgment of the European Court of Justice (ECJ) in *Pereda v Madrid Movilidad SA* – [click here for details](#). However, this case is quite different from *Pereda* in that it had nothing to do with sickness. The ECJ in

Pereda established that workers who are off sick can elect either to take accrued annual leave during their sickness absence or defer this until such time as they have returned to work. In the latter situation, it may be necessary to allow leave to be carried forward into a subsequent holiday year.

Outside the context of sickness, the Lyons ruling means that employers are entitled effectively to operate a system of 'use it or lose it' by means of the WTR notice provisions (as contractually varied). But clearly it would be dangerous to do so in a way that might be characterised as capricious or unreasonable.

Lyons v Mitie Security Ltd, EAT 81/09, 18.1.10, unreported – [click here for the judgment](#)

Tribunals to alert regulators to whistleblowing claims

From April, whistleblowing claimants will be able to say whether they want the tribunal to pass on any allegations involving protected disclosures to the relevant regulatory body.

This change is set out in draft Regulations published by the Department for Business Innovation & Skills (BIS) in its response to a consultation on employment tribunal claims and the Public Interest Disclosure Act 1998 (PIDA) - available by [clicking here](#). The Regulations will shortly be laid before Parliament.

The Government wanted to explore whether there was a practical way of allowing the substance of allegations giving rise to PIDA claims to be forwarded to the relevant regulator. That would mean the allegations of the underlying issues could be investigated by the regulator and appropriate action, if any, taken in accordance with its own practices and procedures.

Under the proposed amendments to the 2004 Employment Tribunal Rules of Procedure, claimants will be able to tick a box on the ET1 indicating whether their claim involves allegations of a protected disclosure and, if so, whether they wish the tribunal to pass on such allegations to the relevant authorities. The change would affect claims (or amended claims) arising on or after 6 April 2010.

If the tribunal accepts the claim and considers it appropriate to do so, it may send a copy of the claim, or part of it, to one or more regulators set out in a prescribed list. The tribunal would then write to the claimant and respondent to confirm that a copy of the ET1, or extracts from it, has been disclosed. Only those claims accepted by employment tribunals where PIDA is identified as a jurisdiction (by the claimant ticking the relevant box and the tribunal identifying the protected disclosure) would be subject to this process.

Implications

Employers will not welcome the prospect of dealing with a regulatory investigation alongside an employment tribunal claim and many will be worried that employees will use this as a bargaining tool by employees.

The Government has dismissed these concerns on the basis that a claimant is already free to send information directly to a regulator. But the new process will make it very easy for employees to do so and employers operating in highly regulated sectors may feel increased pressure to settle complaints before the claim form is served. This could result in serious PIDA allegations never reaching the regulator at all, which would seem to defeat the purpose of the reform.

What is a disclosure of 'information'?

Whistleblowing has also been the subject of a significant recent ruling by the Employment Appeal Tribunal (EAT), in a case in which a protected disclosure was alleged to have been made in a solicitor's letter. The EAT drew a distinction between giving 'information' and merely making an 'allegation'. The former would fall within the statutory definition of a 'protected disclosure', whereas the latter would not.

This approach by the EAT may cast doubt the long-standing position established in *Parkins v Sodexho Ltd* [2002] IRLR 109. In that case, it was held that an employee's complaint of breach of contract against his or her employer was sufficient to qualify for protection under PIDA.

Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 - [click here for the judgment](#)

Legislation on equal treatment for agency workers finalised

Regulations giving employment agency workers certain rights to equal treatment with permanent employees have been put before Parliament, but will not come into force until October 2011.

The Agency Workers Regulations 2010 – available by [clicking here](#) - are designed to implement the EU Temporary Agency Workers Directive (2008/104/EC). They provide all employment agency workers with a right to equal treatment in basic working and employment conditions with their directly employed counterparts after 12 weeks in a given job.

The agency sector forms a large and important part of the UK labour market (approximately 1.3m workers or 5% of the workforce). Employers would be well advised to use the time between now and October 2011 to assess the impact of the Regulations on their own practices and take any necessary action.

The key aspects of the Regulations are as follows:

Scope: The definition of 'agency worker' includes both those taking up temporary work through an employment agency and those employed via umbrella companies or other intermediaries. It excludes those who are genuinely in business on their own account (i.e. self-employed or working through a corporate vehicle).

Equal Treatment: The right is to the same basic working and employment conditions as if the agency worker had been recruited directly by the hirer. This includes entitlement in respect of working hours, night work, rest periods and breaks, overtime and annual leave.

Pay: The principle is 'equal pay for work done' - i.e. basic pay plus other contractual entitlements that are directly linked to the work undertaken by the agency worker (for example, overtime, shift allowances, unsocial hours premiums). It excludes aspects of remuneration provided in recognition of the long-term relationship between employer and permanent employee (for example, profit-sharing schemes, occupational pension contributions, occupational sick pay, maternity pay and redundancy pay).

Qualifying period: The qualifying period for the right to equal treatment will be 12 calendar weeks in a particular job. A new qualifying period will only begin if the new assignment with the same hirer is 'substantively different' or if there is a break of more than six weeks between assignments in the same role. The Regulations include anti-avoidance provisions.

The comparison: In most cases this will be to a 'comparable employee' doing the same or similar work. However, as the agency worker is entitled to be treated as if they had been recruited directly, a 'flesh and blood' employee comparison may not always be necessary. Draft guidance on this issue can be found in the Government's response to the consultation on the draft Regulations, published last January – available by [clicking here](#).

Liability: Primary liability will rest with the agency. However, where it is reliant on information provided by the hirer, and has taken 'reasonable steps' to obtain information and acted 'reasonably' in determining basic working and employment conditions, the hirer may be liable.

Dispute resolution: Claims may be brought in an employment tribunal subject to a three-month time limit. There is a minimum award of two weeks' pay, no upper limit on

compensation and an additional award of up to £5,000 for breach of the anti-avoidance provisions.

The Government has stated that guidance to accompany the Regulations will be published at least 12 weeks before they come into force.