

Employment News

The newsletter of Employment Law Plus

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Review contract terms on holiday pay

Employers need to review their contract terms on holidays after the decision of *Beijing Ton Ren Tang (UK) Ltd v Wang*. The employer had agreed verbally with the employee that she would be paid in lieu of untaken holiday at the end of her employment. When her employment ended, she had a total of 131 days untaken accrued holiday and she was awarded payment in lieu of these days by the tribunal.

The issue here was that the employer had not provided that holiday would be lost if it was not taken during the holiday year, and that holiday would only be paid in lieu of holiday which had accrued in the final year of employment. It is therefore important to make this clear in the contract.

This case concerned contractual entitlement to holiday. Under the Working Time Regulations, employees are only entitled to pay in lieu of holiday untaken in the last holiday year of employment.

Employers can stop employees taking holiday under the Working Time Regulations if the dates requested by the employee are not convenient. This leaves the possibility that an employee may not actually be able to take his

holiday before the end of the holiday year and then lose the holiday.

In *Lyons v Mitie Security*, the employer stipulated that holiday requests had to be submitted wherever possible four weeks before the start of the holiday. During the final month of the holiday year, Lyons submitted a holiday request form to use up his remaining days holiday but he did not give the required four weeks' notice. The request was turned down and so he lost nine days leave. He resigned and claimed constructive dismissal.

The appeal court held that it was legitimate for employers to rely on notice requirements for taking holiday as long as the employer did not operate them in an unreasonable, arbitrary or capricious way. If employees did not comply with these notice requirements, employees could lose their holiday entitlement. They would not be able to complain if this happened.

NB This case was decided before additional leave entitlement, on top of the four week minimum leave, was introduced under the Working Time Regulations. Under the Regulations, the employer and employee can agree that this additional leave can be carried forward into the next holiday year.

Following on from the case of *Pereda* (reported in our newsletter of Sep 09), an employment tribunal has now interpreted the Working Time Regulations to allow an employee, who could use not his annual leave because he was on sick leave, to carry over his holiday to the next holiday year. This was the case of *Shah v First West Yorkshire Ltd*. The tribunal “redrafted” the Regulations to allow this to happen as the Regulations state that the four week minimum holiday entitlement cannot be carried over into the next year.

Agency workers’ rights

We now have the final Agency Workers Regulations. They do not come into force until 1 October 2011, so businesses have some time to analyse the implications. We commented on the draft Regulations in our November 2009 Newsletter. The thrust of the Regulations is to give agency workers equal treatment with comparable employees after 12 weeks. The final Regulations have explained the following:

- Profit sharing schemes will be excluded from the agency worker’s equal treatment package. Agency workers will not have the right to participate in any

bonus schemes based on company performance. Agency workers will only be entitled to bonuses based on the amount or quality of work done by the individual employee. Businesses will not be expected to integrate agency workers into their employees’ bonus schemes but can formulate an alternative scheme for them, including one operated in conjunction with the agency.

- Any vouchers which are expressed in monetary terms will not form part of the equal pay package eg luncheon or transport vouchers.
- There are stronger “anti avoidance measures” to prevent businesses from trying to avoid the Regulations by moving agency workers round different assignments so that they do not accrue the necessary 12 weeks in one role to qualify for the equal treatment package. If a tribunal decides that a business has deliberately moved an agency worker into a different role to avoid the

Regulations, the worker will in fact get the benefit of the equal treatment package after 12 weeks. Plus the tribunal will be able to award up to £5000 as extra compensation. This looks set to open up lots of new litigation!

The recent case of *Muschett v HM Prison Service* decided that, in order to be protected by anti discrimination legislation, an agency worker must have a contract with the agency which is either a contract of employment or a contract to provide work personally. The Agency Workers Regulations are drafted in the same terms. So they will only cover agency workers which have such a contract with the agency.

Religious discrimination and competing rights

The court of appeal has now heard the thorny case of *Ladele v London Borough of Islington* which concerned a marriage registrar who refused to carry out civil partnerships because of her Christian belief. The Borough received complaints from gay members of staff who said that Ladele was discriminating against the gay community, in breach of the Regulations outlawing discrimination on the grounds of sexual orientation. The Borough

disciplined Ladele for refusing to carry out civil partnership ceremonies and she claimed she had been discriminated against on the grounds of her religion.

At first sight, this case appears to present a direct conflict between Christian beliefs and gay rights. It could suggest that there is no way out for an employer in this situation which will not infringe some employment right. The employment tribunal in this case concluded that the Borough had discriminated against Ladele by designating her as a civil partnership registrar and disciplining her when she failed to carry out that duty. The Borough could have excused Ladele the duty and relied on other registrars to perform civil ceremonies.

However, the appeal court disagreed. It found the reason that Ladele was disciplined was not because of her religious belief, but because she refused to conduct civil ceremonies. Therefore, there had not been any direct discrimination.

It also considered whether Ladele had suffered indirect discrimination. There can be indirect discrimination when an employer applies a requirement to all its staff but it disproportionately affects a group which is protected from discrimination. Indirect discrimination can be

justified. The court found that the Borough was justified in requiring Ladele to perform civil ceremonies because this was necessary for it to promote equal opportunities in its workforce. Further, Ladele remained free to practice her Christian religion.

Employers must be careful not to see this decision as giving them free rein to require employees to do things which conflict with their faith. The reason that Ladele lost her indirect discrimination claim was because her stance conflicted with her employer's equal opportunities policy by breaching the dignity of its gay staff. Employers should ensure they have a solid, justifiable business reason for any requirements which will adversely affect a particular religious group.

Similar principles have just been followed by the Court of Appeal in *McFarlane v Relate Avon Limited* which involved a Christian sex counsellor dismissed for refusing to counsel gay couples in contravention of his employer's equal opportunities policy. His claim for religious discrimination also failed.

And claim over wearing cross fails

The Court of Appeal has confirmed that a Christian employee did not suffer discrimination when she

was prohibited from wearing a visible cross in *Eweida v BA*. The reason that her claim for indirect religious discrimination failed was that she had failed to show that BA's policy potentially disadvantaged other Christians, not just her.

The Court also found that, even if other Christians had been disadvantaged, BA's stance would have been justified, so that there would not have been any discrimination. The Court was influenced by several factors: Mrs Eweida's objection to concealing her cross was not based on any aspect of the Christian faith. No other employee had complained about it. Mrs Eweida herself had complied with BA's uniform policy for seven years before raising it as an issue. BA tried to accommodate staff diversity and had dealt conscientiously with Mrs Eweida's complaint, including offering her a non customer facing role where she would have been free to wear her cross visibly.

Equal pay audits

The Equality and Human Rights Commission has published proposals on how employers should measure and report on gender pay. This is a voluntary regime applicable to the private sector. The EHRC has come up with 3 different measuring methods:

- The difference between the median and hourly earnings of men and women
- The difference between the average basic pay and total average earnings of men and women by grade and job type
- The difference between men's and women's starting salaries

Employers will be able to include a narrative explaining the context of any pay gap.

The EHRC expects organisations employing over 500 employees to report using two measures, and three within the next two years. It expects those employing over 250 employees to use at least one measure. The EHRC will then monitor the extent of this voluntary reporting. If there is insufficient voluntary reporting, legislation may follow to make it compulsory.

Public interest disclosure

Tribunals have been given new powers in claims brought by employees involving public interest disclosures, otherwise known as "whistleblowing". Where the claimant consents, the Employment Tribunals service may pass information about the public

interest disclosure to the relevant regulator.

Time off for training

In April, the new right to request time off for training came in for organisations with 250 employees or more. The right will be extended to all employees from April 2011.

Employees will have to show that the training would benefit the employer as well as themselves. Employers will only be able to refuse the request for a reason contained in the legislation. There is no entitlement to paid time off.

European Works Council Directive changes

The European Works Council Directive has been amended to place more burdens on affected businesses. The extent of the employer's duty to inform and consult will increase, including the obligation to consult about proposed measures. There is no obligation to change existing consultation agreements, except where there are mergers or other significant changes, unless the existing agreement has a company change clause covering it.

If employers already have agreements in place, they should check that the agreement adequately covers company changes and also addresses how EWC and national

consultations interlink. If they do not have them in place, they should consider whether now is the time to organise it before the requirements become more stringent.

The European Works Council Directive only applies to multinational employers with 1000 plus employees. Member states have until January 2011 to implement the new Directive.

Transferable paternity leave

New regulations set out the circumstances in which fathers can use up to six months of the mother's maternity leave as additional paternity leave. Some of the leave may be paid if it is taken during the mother's maternity pay period, at the standard SMP rate. The entitlement also applies to adoptive parents. The new right will apply when the child is due to be born from 3 April 2011. The father must provide his employer with a statement signed by the mother giving details such as her NI number and her return to work date.

For help with any employment law issues, call Jill Kelly on 01235 861919

