

Welcome to the latest issue of the Steptoe & Johnson Employment Law Update. The Employment Law Updates are aimed at providing information on recent developments in UK employment law. It is our desire to provide you with not only an update of the law in the UK, but also a practical insight in managing workplace issues on a pro active basis.

To achieve our objective and to continuously improve the Updates, it is important that we receive feedback from you. With a view to this, please email any comments or suggestions which you may have relating to the Updates to employmentgroup@steptoe.com.

We look forward to hearing from you.

1. Forthcoming Legislation

6 April 2005 - Implementation of the Employment Relations Act 2004

Includes amendments to statutory procedure by which Trade Unions can obtain recognition for collective bargaining purposes and by which they can be derecognised.

Increased protection against dismissal of employees taking official lawfully organised industrial action. Extension to 12 weeks for protected period during which it is automatically unfair to dismiss an employee.

New right not to be dismissed or suffer other detriment because of Jury Service.

Changes in right to request to work flexibly.

6 April 2005 - Information and Consultation of Employees Regulations 2004

Effective for all employers with 150 or more employees. Regulations establish a general framework for informing consulting employees on an ongoing basis about developments in the organisations they work for.

4 April 2005 - Gender Recognition Act 2004

This provides transsexuals with the opportunity to obtain legal recognition of their acquired gender. The legislation also amends the Sex Discrimination Act 1975 increasing the protection afforded to all employees against less favourable treatment meted out on the grounds that they intend to undergo or are undergoing or have undergone gender reassignment. The DTI has also produced a booklet with guidelines on issues which may arise. A complimentary copy is available on request.

4 April 2005 - Road Transport (Working Time) Regulations 2005

These will come into force on 4 April and will apply to commercial workers and crews of heavy goods vehicles and public service vehicles.

3 April 2005 - Revisions to Rate of Statutory Maternity, Paternity Pay and Adoption Pay

The standard rates are to be increased to **£106** per week or 90% of the persons' average weekly earnings if that is less than £106).

Budget 2005

The 2005 Budget covered the following issues: taxation of out-placement counseling and training, computer and bicycle exemptions, payments to employees attending universities and technological colleges, benefits relating to spinout companies as well as the annual review of allowances and other limits.

2. Employer Supported Childcare Scheme

From 6 April 2005 employers will be able to provide UK employees with up to £50 per week of childcare costs free of income tax and social security charges. To obtain this fiscal exemption the employer must offer the benefit to all employees in work places where the scheme operates, to enter into a contract with an approved child carer to provide the service, ensure that a chosen nanny complies with new registration requirements or offer the benefit through child care vouchers.

3. Continuity of Employment

London Probation Board v. Kirkpatrick EAT.

Mr Kirkpatrick was dismissed. Two months later he was reinstated in an internal appeal. A month after that the employer reneged and restored the original dismissal. Unless the reinstatement meant that continuity of employment continued, Mr Kirkpatrick was out of time to bring a claim based on the original dismissal and lacked one year's qualifying period for the second dismissal. The court held that there was nothing inconsistent with an employer and employee agreeing periods of continuity of employment, particularly if the decision follows an internal appeal hearing. The reinstatement provided the continuity required.

4. TUPE - Objection to TUPE Transfer

Ladies Health and Fitness Clubs Limited v Eastmond (unreported EAT 94/03.)

The Claimants were employed by a number of health clubs that were in financial difficulties. There were a number of attempts at restructuring. The Claimants supported a petition objecting to the transfer to one of the intermediary companies. The Employment Tribunal held that their actions whilst showing hostility and non-cooperation towards the proposed business transfer did not amount to an objection by them. An objection by employees might be uninformed but this could still constitute a valid objection. An objection must amount to more than expression of concern and must constitute a refusal to transfer. Where an objection is made, the TUPE principles do not apply to the contract and the employee remains in employment until the transfer date when his or her employment is then terminated by operation of law.

TUPE - Consultation

Howard v. Millrise Limited [2005 IRLR 84.]

Mr Howard, a lithographic printer, was given one month's notice of

dismissal on the grounds of redundancy. The company then went into liquidation and its undertaking was transferred as a going concern to S G Printers. He served out his notice and then his employment ended. He brought a claim against Millrise for failure to inform and consult prior to the TUPE transfer. The Appeal upheld the finding that his complaint was well founded and remitted the case to the Employment Tribunal to determine compensation. If there are no recognised trade union representatives or other elected representatives in place, the Regulations require the employer to invite affected employees to elect representatives and if they fail to do so within a reasonable time they must give each affected employee the information required by Regulation 10 (2).

TUPE - Draft Regulations

These have now been published and there is a short period for consultation until **7 June 2005**. They will come into effect on **1 October 2005**. They deal with contracting out, transfer related dismissals, changes to terms and insolvency issues.

5. Compromise Agreements

University of East London v Hinton (UK EAT/0495/04 LA).

Mr Hinton made certain protected disclosures and alleged that he had suffered detriments as a result. He took voluntary redundancy and signed a compromise agreement. This contained a long list of possible claims which were compromised but did not include any reference to his whistleblowing claim. He later brought proceedings. The Appeal Tribunal held he was barred from proceeding. His claim fell within the scope of the general clause in the agreement stating that the agreement was made in full and final settlement of all claims which he had or may have had against the employer in connection with his employment, its termination or otherwise. As long as the compromise contains a general clause dealing with all claims, an employee should not be able to bring further claims once an agreement has been signed. However, employers should still ensure, where possible, that a list of claims to be compromised is as detailed as possible in order to avoid any argument. Employers should also remember that a compromise agreement does not give a blanket waiver over claims which have not yet been raised.

6. Sick Pay

Scottish Courage Limited v Guthrie EAT 788/03.

Mr Guthrie was signed off sick by his GP for 4 weeks. The employers' occupational health adviser and medical adviser formed the view that he was fit to return to work. However, Mr Guthrie did not return to work as his GP did not think he was fit for work. The employer withheld sick pay on the basis that they did not think his illness was genuine. He brought a claim for unlawful deduction of wages. Although there was a contractual term that sick pay was not payable unless the Company was satisfied that the sickness absence was genuine, the Appeal Tribunal held that there was no evidence from which the employer could have concluded the sickness as not genuine, so Mr Guthrie's claim succeeded. The case demonstrates that in cases of sickness absence, particularly where there is a conflict of medical evidence, Tribunals will tend to give employees the benefit of the doubt and allow them to follow their

own GP's advice.

7. Contracts of Employment - Frustration

Four Seasons Healthcare Limited v Maughan EAT 6.10.04 0274/04

Mr Maughan was employed as a nurse at a care home. He was suspended without pay following an allegation that he had abused a patient. He has later charged them with a number of offences and his bail conditions prevented his attending work. The police requested that the Company carry out no investigation of the matter until after the completion of the prosecution. The Company decided that his suspension would continue without pay until the investigation could take place. He was later convicted and sentenced to two years' imprisonment. Mr Maughan then brought an unauthorised deductions from wages claim relating to the period of unpaid suspension. The Tribunal held that he was entitled to unpaid wages but that his contract was then frustrated when he was sentenced to imprisonment. The company argued that his contract was frustrated the very moment he assaulted a patient. The Appeal Tribunal did not agree. For frustration to occur there must be some outside event or extraneous change of situation not foreseen or provided for by the parties within the contract. The contract had not been terminated immediately on any assault nor by the employee's bail conditions.

8. Pensions - Pensions Act 2004

The Pension Protection Fund will provide a core level of benefits to members of schemes whose employers have become insolvent with effect from **April 2005**. The Fund will not apply to schemes which start to wind up prior to **April 2005**. Members above the scheme's normal pension age and those who have retired early due to ill health will receive 100% of their current benefits. Other members will receive 90% of the capped level of benefits currently expected to be £25,000 per annum.

Pensions - TUPE

Under the new Act - when a TUPE transfer occurs from a transferor employer who provides a pension scheme, the transferee employer must make arrangements to provide for the continuation of pension benefits. The changes however will give new employers a fair degree of leeway in that they are not obliged to replicate the pension arrangements offered by their predecessors. Accordingly the new scheme can be a defined benefit scheme, a defined contribution scheme or a stakeholder arrangement into which the employer must make contributions. This may mean the obligation could amount to no more than matching employee contributions up to 6% into a stakeholder pension scheme.

Pensions - Remedy

Henderson v. Stephenson Harwood and Others - 27 January 2005

The High Court upheld the Pension Ombudsman's decision to compensate a complainant by directing his employer to admit him to membership of the pension scheme rather than awarding him damages. The firm and the employee both appealed against this decision. Held the Ombudsmen was entitled and indeed bound

to award the employee a remedy to rectify the firm's failure to perform its contractual obligations. He had a measure of discretion as to the appropriate award. The Ombudsman was therefore entitled to make a conditional specific performance award. The fact that Mr Henderson had only sought damages so that a Court would not have awarded its specific performance did not mean that the Ombudsman was restricted in the same way in the exercise of his statutory powers.

9. Maternity Leave and Flexible Working

The DTI has published a consultation paper on its proposal for longer statutory pay and maternity leave and an extension of parents' right to request to work flexibly. The main proposals are to extend maternity pay and adoption pay from six months to nine months by **April 2007** with a goal of a year's paid leave and extending the right to request flexible working hours to carers of adults and parents of older children. Consultation closes on **25 May 2005**.

10. Redundancy - Consultation

Hardy v. Tourism South East

Jane Hardy claimed that her employer failed to inform and consult the workforce about the proposed redundancy as part of its restructuring. The Appeal Tribunal adjudged that collective consultation obligations were engaged even where the employer intended to offer alternative employment to the majority of employees, thereby bringing down the number likely to be dismissed below 20.

Redundancy - Suitable Alternative Employment

Lionel Leventhal v North 2004 EAT 0265

Mr North was employed as a senior Editor of a publishing company. The company decided it needed to reduce its overheads. The most effective way of doing this was to make Mr North redundant as there were no other alternative cost saving provisions. At no time did Mr North or the company consider making another editor redundant and offering Mr North that role with less pay. The EAT held that where an employer fails to consider bumping another employee this may lead to an unfair dismissal finding. In considering suitable alternative employment, the employer should, in the circumstances, consider less senior positions whether vacant or not. An employer cannot necessarily use an employee's failure to register an interest in less senior roles as a defence to a subsequent unfair dismissal allegation. Whether the employer should consider bumping a less senior employee will depend on the circumstances of each individual case.

Redundancy - Collective Redundancies

Junk v. Wolfgang Kühnel ECJ 27105 (-188/03)

The European Court of Justice held in this case that an employer carrying out collective redundancies **must** consult with workers' representatives and notify the competent public authority **before** giving employees notice of dismissal. The UK law currently provides that employers must at least consult appropriate representatives when proposing to dismiss 20 or more employees at one establishment within 90 days or less, at least 30 days before the first dismissal takes effect. Employers could then serve notice of dismissal on employers whom they were proposing to dismiss, **before**

the end of the consultation period providing the consultation period had reached a reasonable stage and the notice did not expire before the end of the consultation period. *Junk* no longer allows this. The ECJ has ruled that the redundancy occurs when the employer gives notice not when the dismissal takes effect so the consultation period must have ended before the notice of dismissal can be served. Employers will have to count back to the date on which employees were given notice of dismissal rather than the date on which the notice will expire, which means the redundancy process will be extended by the notice period. Employers will now have to factor in extra time, otherwise they risk breaching the consultation obligations and being held liable for protective awards.

11. Stress Injuries at Work

Hartman v. South Essex Mental Health Community Care NHS Trust and Others - C/A/21.1.05

The Court of Appeal has handed down their judgment of six appeals on the issue of employers' liability for psychiatric injury suffered by employees owing to the pressures or stresses at work. The majority of the cases turned on the question of whether the employees' injuries had been reasonably foreseeable. The overall test remains the conduct of the reasonable prudent employer giving positive thought for his workers' safety in the light of what he ought to know. Liability for psychiatric injury caused by stress at work is in general no different in principle than liability for a physical injury and it is only where the injury is foreseeable and flows from an employer's breach of duty that it would give rise to liability. It does not follow that because an employee suffers stress at work and the employer is in some way in breach of duty in allowing that to occur that the employee is then able to establish a claim in negligence.

12. Compensation - Interest and Unfair Dismissal Awards

Melia v. Magna Kansei Limited UK/EAT/0339/04/DA

The Employment Appeal Tribunal has stated that it is legitimate toward "interest" as long as it is not described as that, for unfair dismissal. When assessing compensation as is just and equitable since a Tribunal would give a discount for accelerated receipt at 2½%, it is therefore equally legitimate to give an increase for decelerated receipt at 2½%. Any uplift for decelerated payment is still subject to the £56,800 statutory cap. Interest is currently awarded at 8% for discrimination cases.

Compensation - Credit for Incapacity Benefit

Morgans v. Alpha Plus Security Limited

The Employment Appeal Tribunal has held that Tribunal must deduct the entire amount of incapacity benefit from a compensatory award. Failure to do so would result in a wrongful windfall for the Claimant. Receiving incapacity benefit is a form of mitigation of loss and the monies must be deducted in full. The EAT left over the question of whether a Claimant who fails to apply for any incapacity benefit can be said to have failed to mitigate his loss.

Compensation - Monies Earned in Notice Period

Voith Turbo Limited v. Stowe EAT 13.12.04

The Employment Appeal Tribunal held that credit need not be given by an ex employee for earnings achieved in new employment during a period when the former employer was paying notice pay. The employee effectively has a windfall of the additional monies.

(These two cases are irreconcilable and only the Court of Appeal can say which is correct.)

13. Discrimination and Equality

ACAS has revised its excellent advisory booklet tackling discrimination and promoting equality - *Good Practice Guide for Employers*. The booklet contains a sample equality policy and good checklists. This is very much a practical guide not merely a recitation of the law. A complimentary copy is available on request.

14. Equal Pay

Unison has brokered an equal pay deal that looks likely to pay out £300m to 1500 female NHS health workers in back pay. The women who work for North Cumbria of NHS Trust have been fighting their equal pay quest for eight years. Claims were lodged in **August 1997** for 14 different jobs using five different male comparatives. The Claimants can be expected to be awarded between £35,000 and £200,000 each for up to six years' backdated pay.

15. Age Discrimination

Rutherford v. Secretary of State for Trade and Industry

Leave to Appeal to the House of Lords has been granted in the case of *Rutherford* on whether the upper age limits on the right to claim unfair dismissal is statutory redundancy payments are indirectly discriminatory. The Appeal will be heard later this year.

16. Sexual Orientation

Whitfield v Cleanaway UK

A gay manager has won the successful first case for constructive dismissal under the Employment Equality (Sexual Orientation) Act. Mr Whitfield was awarded £35,345 in compensation for unfair dismissal, harassment and discrimination. He was taunted and called names by senior colleagues and staff. The Tribunal criticised the employer's failure to come to his aid despite previous complaints by another gay member of staff.

17. Religious Discrimination

Williams Drabble v. Pathway Care Solutions Limited 2601718/04

Miss Williams' job was a resident social worker employed by PCS. When applying for the position she stated that she was a practising Christian and she could not work on a Sunday. She was later rota'd to work on a Sunday. She was told that the rota change was permanent and if this was unacceptable to her she would have to resign. The Tribunal held that the Company had indirectly discriminated against her by imposing a permanent rota change that required her to work on a Sunday and that they had constructively dismissed her. The issue of remedy was adjourned.

Khan v G and J Spencer Group Plc

The Tribunal upheld Mr Khan's religious discrimination and unfair dismissal claims after he was sacked for taking extended leave to make a pilgrimage to Mecca. He was awarded £8,224 as compensation for unlawful discrimination. Mr Khan had asked his employer if he could use his 25 day annual holiday entitlement and another week's unpaid leave to make the pilgrimage. When the employer did not respond he assumed he could go. On his return to work he was suspended without pay and subsequently dismissed.

18. Disability Discrimination - Reasonable Adjustments and Justification

Williams v. J. Walter Thompson Group Limited 2005 EWCA civ 133

Ms Williams, who is totally blind, was offered a job by JWT as a computer software operator. The company knew of her disability and that it would need to make reasonable adjustments when offering her the job. A period of two years elapsed during which nothing much happened and JWT did little towards making any adjustments. Ms Williams eventually resigned and claimed disability, discrimination and constructive dismissal. The Court of Appeal's decision upheld the Tribunal's finding there was an unjustified failure to make reasonable adjustments of which they were well aware before she joined. It also held that the unfair constructive dismissal of Ms Williams was a further act of disability discrimination.

19. Restrictive Covenants

Corporate Express Limited v. Day - High Court QBD 2004 EWHC 294

D worked for a company selling office products, as Sales Manager for National Accounts. Her contract contained two restrictive covenants applying after the termination of her contract: a six-month solicitation and dealing ban and a six-month ban on working for named competitors. After she left the company she commenced working with one of the listed competitors. The company brought proceedings against her for breach. The High Court held that the ban for working for named competitors for six months was reasonable and enforceable. The employer was exposed to a real risk that this senior employee would use her knowledge of confidential information to the benefit of the new employer. This risk far outweighed any of the problems that enforcement of the covenant created for the employee. Although the employee would suffer financial loss and a setback in her career, she would not suffer economic disaster. This restrictive covenant was therefore reasonable where the non-solicitation covenant was not, on its own, sufficient to achieve the necessary level of protection.

For more detailed information or advice or copies of any Guidance, please contact

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This information should not be treated as a substitute for specific legal advice on individual situations.

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