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Work Matters

Employment Law News

In this issue

In Brief

In our February edition of *Work Matters*, we focused on the European Court of Justice decision in *HMRC v Stringer & Others* and its implications for the leave entitlement of employees on long term sickness absence. The House of Lords has now had an opportunity to consider the issues arising from that decision. Unfortunately, the position for private employers is still not entirely clear. It would seem, however, that employees are entitled to claim their unused holiday entitlement over a number of years on termination of employment by way of a claim to the tribunal for an unlawful deduction from wages, provided they can show a consistent "series of deductions".

The single Equality Bill continues to progress. The Bill itself has now been published and is in the process of being debated in parliament. It is anticipated that this Bill will receive Royal assent in or around November 2009. We review the main proposals.

In light of the repeal of the statutory dismissal procedures, one live issue is whether employers should still consider implementing an appeal stage in cases of redundancy and we review such guidance as there is on the point.

In our News Focus section we report on an important decision about the service of dismissal notices.

Finally, we look at a recent Employment Appeal Tribunal decision that considered the extent of the Tribunal's territorial jurisdiction.

Case of the Month

The House of Lords has finally handed down its decision in the case of *HMRC v Stringer & Others*. The predictable part of this decision is the reversal (because of the ECJ's findings) of the Court of Appeal's decision that an employee could not take holiday during sick leave and did not accrue holiday if he or she was absent for an entire leave year. The decision also clarifies that claims for holiday pay in this context can be pursued by way of unlawful deductions from wages claims. However, this decision leaves several important issues unanswered as to how the principle that those absent by reason of sickness continue to accrue holiday is to operate in the private sector.

Background

In 2006, the House of Lords referred *Stringer* (together with four consolidated cases) to the European Court of Justice ("ECJ") to seek clarification on workers' rights to holiday during long-term sick leave. In summary, the ECJ decided that:

- a worker who is absent from work on sick leave accrues holiday despite not being at work.
- it is for Member States to decide whether a worker can take holiday during sick leave.
- at the end of a leave year, a worker on sick leave who has been prevented from taking holiday must be allowed to carry it over.
- the right to be paid in lieu of holiday on the termination of employment applies even if a worker has been on sick leave for the whole or part of a leave year.

This decision raised understandable concerns about the increased employment costs and contingent liabilities that could arise in respect of those absent from work for sickness who could then (if their absence extended over a number of years) be entitled to very significant accrued holiday payment on eventual termination of employment.

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The House of Lords Decision

At the House of Lords stage, since the employer in *Stringer* was an emanation of the state, the parties accepted the ECJ's conclusions as directly binding and effective. In other words, HMRC conceded, as a public sector employer, that Mr. Stringer had accrued holiday while off sick pursuant to his statutory entitlements under the 1998 Working Time Regulations ("WTR") and was entitled to be paid in lieu of that holiday on termination of his employment.

The question that therefore remained for the House of Lords to address was whether payment in respect of the WTR holiday entitlements could be recovered by those on long term sickness absence in tribunal claims under the unlawful deductions from wages provisions of the Employment Rights Act 1996. Unlawful deduction claims must be lodged within three months of the relevant deduction. However, if the deduction complained of is part of a "series of deductions", a claim can be made in respect of the entire series of deductions, thereby evading the three month cut off point for tribunal claims. The unlawful deductions provisions could therefore enable claims to be brought in respect of long periods of sickness absence in relation to which paid holiday pay was not provided.

The House of Lords decided that:

- a payment under WTR for the statutory element of annual leave constitutes wages for the purposes of the unlawful deductions from wages provisions on the basis that holiday (and associated pay) is consideration for work done.

- similarly, a payment for untaken holiday counts as wages as it is consideration for services already performed.

Consequently, failures to make payment in respect of an employee's statutory holiday entitlements under the WTR are deductions from wages that can be recovered through the employment tribunal by way of unlawful deductions from wages claims.

Undecided Questions

That is unfortunately far from the end of the story. The ECJ held that holiday continues to accrue during sick leave. However, the WTR only allows for payment in lieu of accrued holiday on termination of employment (rather than at the end of each leave year). Second, the WTR does not allow carry over of holiday into subsequent years. The House of Lords did not explicitly address three crucial practical issues that remain unclear:

- whether a worker must actually take or seek to take his or her statutory holiday entitlement during a specific leave year in order to trigger the entitlement to be paid for that leave. That said, the case law prior to the ECJ decision in *Stringer* suggests that the worker need not take or request leave in order to trigger the right to be paid out on termination of employment.

- whether payment in lieu of accrued holiday can be claimed by those on long term sickness absence while they remain in employment. The right to payment in lieu of accrued holiday under the WTR only arises on termination of employment and the WTR specifically provide that the entitlement to leave cannot be replaced by payment in lieu other than on termination of employment.

- how the ability to claim pay for accrued holiday on termination of employment interacts with the WTR provision that holiday entitlement is not carried over into future years, particularly in circumstances where the employee has not been refused a request for holiday.

The ECJ's decision has direct effect only for public sector employers. The questions that the House of Lords has left unanswered will only be resolved by amendment of the WTR or further litigation in relation to the private sector.

Next Steps

Since uncertainty prevails, amendment to the WTR and/or further litigation is inevitable. In the meantime, employers should take the following practical steps:

- review how many employees are absent on long-term sick leave and whether those employees have requested and/or been allowed to take holiday.

- review any PHI policy, to determine whether an employee taking "holiday" while on long-term sick leave will break the period of absence for the purpose of PHI cover. If so, employees who assert the right to holiday should be warned of this consequence.

- consider whether they wish proactively to manage the contingent risk of claims for accrued holiday entitlement or await further

case law or statutory guidance (for example, amending the WTR to allow for carry over of holiday in line with the ECJ's guidance) on how to deal with these issues.

Equality Bill

The long-awaited first draft of the Equality Bill (the "Bill") was published on 27 April this year. The aim of the Bill is to consolidate, simplify and harmonise the complex array of existing discrimination legislation. While the Bill is welcomed in many quarters as a positive step towards achieving equality in society and protecting certain groups of vulnerable people, there are inevitable consequences for UK employers. Although the Act is unlikely to come into force until the end of next year, employers should take some time at this stage to consider how the new requirements will affect them.

We set out below some selected features of the Bill. These will, of course, be subject to the usual parliamentary debates and legislative approval over the coming months.

Format of the Bill

The Bill specifies general principles that apply to each protected characteristic. Protected characteristics under the Bill remain unchanged. By way of a recap, these are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnerships
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

Despite speculation about new categories of protection for parents and carers and in relation to genetic predisposition, these have not been included in the Bill.

Defence of "Occupational Requirement"

This defence has been introduced in relation to all protected characteristics. Previously the defence of a "genuine occupational requirement" was only available to some of the protected characteristics.

Association and Perception

Discrimination on the grounds of a person's association with someone with a protected characteristic or the (false) perception that they have a protected characteristic is to be clarified. The Bill prohibits direct discrimination and harassment based on association and perception in respect of all protected characteristics. This is achieved in the Bill through new definitions of some key concepts.

Direct discrimination will no longer be less favourable treatment **on the ground of** a particular characteristic—instead, the less favourable treatment must be **because of** a particular characteristic.

Similarly, harassment will no longer be defined as engaging in unwanted conduct **on a** prohibited ground—instead, unwanted conduct must be **related to** a protected characteristic.

The new wording "because of" may well cause some confusion and is bound to be the source of future case law.

Changes to Equal Pay

Secrecy clauses – The Bill provides that secrecy clauses (those clauses that prevent employees from discussing their pay) will be unenforceable against employees who have entered into discussions with colleagues with a view to discovering whether any pay differences are based on discriminatory reasons.

Gender pay reporting – The Bill contains a provision that allows the Government to issue regulations requiring employers with 250 or more employees to publish information relating to their employees' pay. The Government has stated that this power will not be used before 2013, in order that employers may voluntarily provide such information in this period. This proposal has been criticised because figures may give a distorted view of a business's pay position.

Defences to claims – The Equal Pay Act 1970 is largely replicated in the Bill. However, the "genuine material factor" defence (where a difference in pay

for equal work is due to a genuine material factor other than the difference in sex) has been amended to simply require a "material factor" because the word "genuine" adds no real value to its meaning. Employers will still have to show that the reason for difference in pay is legitimate and not a sham.

Direct discrimination – The Bill clarifies that where a person can show evidence of direct sex discrimination in relation to contractual pay, but there is no actual comparator doing equal work, that person can bring a direct discrimination claim. For example, if an employer tells a female employee, "I would pay you more if you were a man", but there is no male comparator whom she can use to claim for breach of an equality clause, the female employee can bring a claim of direct discrimination.

Disability Discrimination

Indirect Discrimination – The Disability Discrimination Act 1995 ("DDA") does not prohibit indirect discrimination on the grounds of disability as it was thought that the protection against disability-related discrimination, coupled with the duty to make reasonable adjustments, covered this ground. However, the House of Lord's decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* severely limited the effectiveness of this protection by holding that:

- the correct comparator for disability discrimination claims is a person who acted in the same way but is not disabled; and
- unless the employer has the person's disability in mind as a motivating factor, the alleged discrimination cannot be for a reason related to the disability.

The Equality Bill effectively reverses this decision by introducing the new concept of "discrimination arising from disability". This will replace the concept of "disability-related discrimination" and side step the results that *Malcolm* produced. Employers can still avoid liability for detrimental treatment where they can show that the treatment was a "proportionate means of achieving a legitimate aim", but under the Bill this must now be objectively justified, as opposed to the mere subjective justification that is required under the current law. This change will bring the protection in relation to disability in line with all the other protected characteristics.

The Bill also prohibits indirect disability discrimination where a provision, criterion or practice puts or would put persons sharing the claimant's "characteristic" (i.e. their disability) at a disadvantage.

Removal of list of capacities – Under the DDA a previous disability must have a long-term adverse effect on the ability of an employee to carry out certain day-to-day activities. These activities are set out in an exhaustive list in the DDA. The definition of "disability" in the Bill does not contain the list of activities. It is thought that, although unlikely to change the protection materially, this may make it easier in some cases for employees to establish that they are disabled.

Harassment

The position in relation to harassment on the grounds of sex has now been extended to harassment in relation to all other protected characteristics (except for pregnancy and maternity or marriage and civil partnership). When the provisions of the Bill come into effect, employers will be liable for harassment in the workplace by third parties if the employee has been harassed on at least two occasions (whether by the same third party or not) and the employer is aware that the harassment has taken place and it has not taken reasonable steps to prevent it happening again.

Positive Discrimination

Despite speculation about the introduction of a duty of positive discrimination, the Bill is actually quite limited in this respect and, in fact, "positive discrimination" and employment quotas are not permitted. "Positive action", however, is encouraged (but importantly is not compulsory). Positive action allows an employer who reasonably believes that a protected group is disproportionately badly represented within its business to employ one of two candidates who are "as qualified" as each other on the basis that the candidate is a member of such a group. Unfortunately the Bill gives no guidance on how employers should decide when two candidates are "as qualified" as each other and our view is that employers are unlikely, therefore, to volunteer to do this when a wrong decision is likely to invite a discrimination claim.

Tribunals' Powers

Tribunals are currently able to make recommendations to benefit a successful claimant in discrimination claims. The Bill proposes to widen tribunals' ability to make recommendations to benefit the employer's whole workforce. The Government's hope is that such recommendations

will "help prevent similar types of discrimination occurring in the future". Although these recommendations would not be binding on employers, failure to comply with them may be used as evidence to support subsequent similar discrimination claims. Recommendations could include, for example, the introduction of an equal opportunities policy, ensuring a harassment policy is more effectively implemented, setting up a review panel to deal with equal opportunities, retraining staff, and making public its selection criteria for staff transfer or promotion.

Public Sector

A number of the proposals in the Bill will affect the public sector only. For example, the Bill proposes that public sector bodies exercise their functions in ways that will reduce socio-economic disadvantages. This is a completely new legislative concept.

A further new idea is the introduction of a "Single Equality Duty" for public sector bodies. This is the requirement that public authorities have regard to the need to eliminate discrimination, harassment and victimisation, to advance equality of opportunity between persons who share a protected characteristic and those who do not, and to foster good relations between persons who share a protected characteristic and those who do not.

Although these new concepts apply solely to the public sector, the Government envisages that the concepts will trickle down into the private sector through public procurement. Public bodies should base their commissioning decisions for potential contracts on businesses' equality credentials and/or whether an area or industry is especially under-represented by a particular protected characteristic.

Next Steps

The Bill remains subject to the usual parliamentary process and the Government anticipates that it will reach the House of Lords in the 2009–2010 Parliamentary session. Subject to any changes resulting from a general election, the Bill should receive Royal Assent in early 2010 and come into force later that year.

News Focus

The unlamented statutory dismissal and disciplinary procedures, which were abolished by the Employment Act 2008, applied to redundancy dismissals (except in the situation where the collective redundancy consultation requirements applied because 20 or more redundancies were proposed in a 90 day period at one establishment). This meant that the standard three step procedure needed to be followed in relation to many redundancy dismissals to avoid automatic unfair dismissal and compensation uplifts.

The new ACAS Code, which came into force on 6 April 2009, explicitly does not apply to redundancy dismissals. Consequently, given that the statutory procedures have now been repealed, there is no obligation to follow the prescriptive steps of the statutory procedures to avoid the risk of the uplift, available in relation to dismissals falling within the scope of the ACAS Code, of up to 25% to the compensation awarded by the tribunal in a successful claim to reflect unreasonable breach of the Code's requirements. Nevertheless, in order to avoid unfair dismissal, it is of course necessary in any event to follow a fair redundancy procedure, taking particular care to use a fair and objective selection process. One question that remains unanswered (and on which there are differing views) is whether a fair redundancy process entails an obligation to offer an appeal against dismissal.

With the abolition of the statutory minimum dismissal procedures, the case law on fair procedures predating their introduction is presumably relevant once more. The decisions on the old law did not establish an absolute requirement that appeals be offered against redundancy dismissals. In *Robinson v Ulster Carpet Mills* (1991), the Court of Appeal in Northern Ireland held that to refuse the employee a right of appeal did not render a dismissal unfair. However, this was in the context of an agreed dismissal procedure that allowed for appeals against misconduct but not redundancy dismissals. The EAT in that case was also clearly influenced by the fact that at that time the relevant Code of Practice did not prescribe a right of appeal and no decision could be found by counsel for the parties holding that an appeal was a requisite part of a fair procedure. The EAT in *Taskforce (Finishing & Handling) Ltd v Love* (2005) went further than the fact specific decision in *Robinson*, holding that the lack of an appeal will not lead automatically to an unfair dismissal. Nonetheless, the *Taskforce* decision does indicate that the lack of an appeal or review procedure *is "just one of the many factors to be considered in determining fairness".*

Even against the background of these old decisions, there are strong arguments for employers to provide for redundancy appeals, even if to do so elongates the whole process and its associated uncertainty (especially since a successful appeal

can potentially lead to the redundancy of an individual not initially selected for redundancy). An appeal allows for the possibility of the remedying of prior procedural defects in terms, for example, of the proper application of selection criteria. That an appeal can cure prior procedural defects in redundancy cases in the same way as for any other dismissal was confirmed in *Lloyd -v- Taylor Woodrow* 1999 even so in that case the comments were made that the collective experience of the EAT at the time was that *"a right of appeal is unusual in cases of redundancy dismissal"* and that proper consultation prior to dismissal "*ought to obviate the need for an appeal"*).

It is also important to appreciate that the landscape has changed since these decisions. Not only have we lived through the statutory minimum procedures, but best practice guidance has also changed. In its guidance on how best to handle redundancies ("Redundancy Handling", April 2009), ACAS advises that organisations should consider establishing a redundancy appeals procedure to deal with complaints from employees who feel that selection criteria have been unfairly applied. Such a procedure could, according to ACAS, involve a more senior member of management or by setting up a committee of management and trade union or employee representatives to consider individual grievances and any subsequent remedies. ACAS suggests that advantage of such a procedure is that complaints about selection for redundancy may be resolved internally and thus reduce the likelihood of complaints to employment tribunals. Even though this ACAS guidance has no statutory effect, its recommendations, together with the value that an appeal adds to the robustness of a consultation process, surely mean that to offer appeals against redundancy dismissals makes sense.

Lost in the Post

Making Sure Dismissal Is Properly Communicated

In *GISDA CYF v Lauren Barratt* (2009), the Court of Appeal upheld the ruling of the Employment Appeal Tribunal that the effective date of termination for the purposes of an unfair dismissal claim relating to a summary dismissal is when the letter of dismissal is actually read, not when it might have been presumed to have been read in the normal course of things.

Gisda had summarily dismissed Miss Barratt for gross misconduct and had sent her a letter notifying her of this by recorded delivery to her home address on Wednesday, 29 November 2006. The letter arrived the next day and was signed for by her boyfriend's son. Miss Barratt had left home to travel to London to visit her sister who had given birth to a child on 23 November 2006. During the period from Thursday to Saturday, Miss Barratt did not make any enquiries about whether a letter had arrived from her employer. She returned home on Sunday, 3 December 2006. The next day she asked if any post had arrived and was given the letter. On 2 March 2007 Miss Barratt presented claims for unfair dismissal and sex discrimination. It followed that if the effective date of termination was found to be on or before Saturday 2 December, the claim was out of time.

The Court of Appeal, agreeing with the Employment Tribunal and EAT held that where a decision to dismiss was communicated by letter sent to the employee at his/her home address, and the employee had neither gone away deliberately to avoid receiving the letter nor avoided opening and reading it, the effective date of termination was when the letter was read by the employee, not when it arrived in the post. As such, the effective date of termination in this case was found to be Monday, 4 December, when Miss Barratt opened and read the letter, and accordingly her claim was brought in time.

This decision is an important reminder of the need to ensure that dismissal and other notices are properly served in a timely fashion on their intended recipients.

And Finally . . .

A Review of the Territorial Scope of Unfair Dismissal Legislation

In *Dolphin Drilling Personnel Pte Ltd v Winks And Dolphin Drilling Ltd,* the EAT reaffirmed the House of Lords test in *Lawson v Serco,* which established that the Employment Tribunal has jurisdiction to hear an unfair dismissal claim (or other claims emanating from domestic legislation) if:

- the employee was working in Great Britain at the time of his dismissal; or
- where the employee moves from place to place for the purpose of work, if his or her base for work is Great Britain.

In respect of expatriate employees the position is less certain. The House of Lords considered that the employee in question would have to work for an employer based in Great Britain and would need a substantial connection with Great Britain.

A substantial connection alone, however, would not be not enough.

The employee here was British and employed by a company registered and located in Singapore. He worked on an oil rig that, although registered in Singapore, during the relevant period was based in the Gulf of Mexico and off the coast of Nigeria. He was dismissed and sought to bring a claim of unfair dismissal in the Employment Tribunal.

The Tribunal found that it had jurisdiction to consider the unfair dismissal claim because the employee had a substantial connection with Great Britain (by virtue of the fact that, amongst other things:

- he was paid in sterling;
- his work was carried out for the purposes of a business of a company registered in the UK;
- he travelled back to his home in Doncaster every week; and
- his contract provided for the application of English law).

The employer appealed. The EAT held that the Tribunal had erroneously interpreted *Lawson* as being authority for there being a single test of 'substantial connection' with Great Britain for territorial jurisdiction purposes. Whether there was a substantial connection with Great Britain was only relevant as part of the subset of special rules applicable to the situation of the expatriate employee and not a free standing test. Unfortunately, this goes no further towards resolving the ongoing uncertainty created by *Lawson v Serco*.

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