



# Employment Bulletin

June 2005

## Opting out of the 48-hour week

Considerable press coverage has been given to the European Parliament's recent suggestion that the UK's right to allow individuals to opt-out of the 48-hour week should be scrapped. The proposal came from a committee of the Parliament who state that the opt-out is in 'flagrant contradiction' to the objectives of the European Working Time Directive.

There is, however, a long way to go before we reach the point of any

abolition of the opt-out. Both the full European Parliament and the Council of Ministers have to approve the proposal. Even then the opt-out provision will not be removed until three years after a proposed new Working Time Directive comes into force. In the meantime employers can continue to use opt-out agreements for individual employees who agree to disapply the 48-hour limit on average weekly working time.

## Time scale for consulting on collective redundancies

Under UK law employers must consult employee representatives when proposing to make 20 or more employees at one establishment redundant within a period of 90 days or less. Consultation must begin 'in good time' and in any event must begin at least 30 days before the first of the dismissals takes effect (or 90 days if the employer is making 100 or more employees redundant).

In the past employers often served notices of dismissal before the end of the consultation period, which was thought acceptable provided that the consultation had reached a meaningful state and the notice did not expire before the end of the consultation period. This course of action is no longer possible as a result of a recent decision of the European Court of Justice.

The European Court decided that a redundancy occurs when an employer gives notice to dismiss, not when the dismissal takes effect on expiry of the notice. Accordingly, an employer could

not terminate contracts of employment before it had engaged in the notification and consultation procedures. The Collective Redundancies Directive imposes an obligation to consult 'with a view to reaching an agreement'. The effectiveness of such an obligation would be compromised, said the Court, if an employer could terminate contracts during the course of the procedure or even at its outset.

The effect of this ruling is to extend the redundancy process. Employers need to ensure that they allow extra time and take appropriate advice as to the procedures to be followed.

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# Harassment - stalking legislation catches employers

The Protection from Harassment Act 1997 was principally aimed at tackling the menace of stalking and makes pursuing a course of conduct amounting to harassment both a criminal and civil offence. In a recent case an employee asked the Court of Appeal to consider whether his employer could be held 'vicariously' liable for alleged harassment by a manager in breach of the 1997 Act.

Vicarious liability means that the employer is held to be liable for the acts of its employees. It occurs in two situations:

- Under the common law when an employee commits a tortious act in the course of his or her employment e.g. where an employee negligently causes another person to suffer an injury.
- Under statute when an employee commits an act of discrimination and the relevant legislation makes specific provision for vicarious liability e.g. under the sex, race, disability, religious and sexual orientation legislation.

The Court's view was that in principle an employer could be liable for a breach of the Protection from Harassment Act 1997 committed by one of its employees in the course of his or her employment. The case was sent for a

full trial to determine whether the employer was liable in this case.

The Court of Appeal's decision constitutes an extension of the principles of vicarious liability and could lead to increased claims against employers. Potentially, employees may be able to succeed with claims for harassment under the 1997 Act where similar claims at common law or under the anti-discrimination legislation would fail, for example where the harassment was not on the grounds of sex, race or one of the other protected grounds. However, a number of questions remain unanswered and there is a possibility of an appeal to the House of Lords. Watch this space for further developments.

## New compensation limits

New statutory compensation limits came into effect on 1 February 2005. The maximum compensatory award for unfair dismissal increased to £56,800 and the maximum 'week's pay' used to calculate the unfair dismissal basic award and statutory redundancy payments increased to £280.

Note also changes to the rates for statutory maternity, paternity and adoption pay as from 3 April 2005. These have changed from £102.80 to £106 per week. The rate of statutory sick pay increased from £66.15 to £68.20 from the same date.

## Jury Service

With effect from 6 April 2005 employees who are doing, or have been summoned to do, jury service have new protection. They have a new right not to suffer any detriment as a result of being required to do jury service. In addition dismissals as a result of carrying out jury service will be automatically unfair unless the employee's absence was likely to cause substantial injury to the business and in that knowledge the employee unreasonably refused or failed to ask to be excused from jury service.

## TUPE and Pensions

The Transfer of Employment (Pension Protection) Regulations 2005 came into force on 6 April 2005. Previously most rights under occupational pensions did not transfer on the transfer of an undertaking under TUPE which meant that employees could lose existing rights to contributions and benefits. These new regulations now require the new employer following a transfer to make certain contributions either into an occupational scheme or a stakeholder scheme.

## Fixed-term contracts

Since 2002 the Fixed-term Employees Regulations have prevented less favourable treatment of employees on fixed-term contracts as compared against permanent employees. A recent case involving the Department for Work and Pensions challenged their policy of terminating the contracts of employees after 51 weeks (thereby avoiding unfair dismissal rights accruing) regardless of whether there was sufficient work for them. The Court of Appeal held that by their nature fixed-term contracts came to an end when the fixed-term expired and therefore merely not renewing a fixed-term contract could not amount to less favourable treatment.

## Religious discrimination

Legislation outlawing discrimination on grounds of religion or belief came into force in December 2003. Statistics from the Department of Trade and Industry show that between 1 December 2003 and 31 October 2004 there were only 230 applications under the new law. And it has taken over a year for the first claimants to succeed in convincing a tribunal that religious discrimination has taken place.

In the first successful case a practising Christian employee complained of discrimination when her employer changed her work rota so that she would have to work on Sundays and would be prevented from attending her regular church service. The tribunal found that the employer had indirectly discriminated against the employee.

In the second case the employee had asked to take his 25-day leave entitlement together with a week's unpaid leave to make a pilgrimage to Mecca. The employer did not respond and the employee's manager told him to assume that he could go. On his return the employer sacked the employee. His claim of unfair dismissal and religious discrimination was upheld and the tribunal awarded him almost £10,000 compensation.

## Sexual orientation

In one of the first successful claims under the regulations governing discrimination on the grounds of sexual orientation Alan Whitehead, a gay manager at Brighton Palace Pier, has been awarded nearly £10,000 in a landmark ruling. Mr Whitehead resigned after discovering from a colleague that he had been the subject of a homophobic remark by the pier's General Manager. The case shows that employers can be liable for such remarks even if they are not made directly to the victim and emphasises the importance of having equal opportunities policies and training.

## Triggering the collective consultation requirements

An interesting issue arose in a recent case concerning triggering the collective redundancy consultation provisions. The employer in question was closing one branch where 26 employees worked. The employer assumed that 12 employees would be made redundant and the rest would be re-deployed. The employer's view was that it was not 'proposing to dismiss' 20 employees. Consequently, whilst employees were consulted individually, no collective consultation was undertaken.

The Appeal Tribunal held that if what the employer proposes is to keep the employee in employment on what is in reality a different contract of employment, it is proposing to terminate the existing contract. It was clear that all 26 employees would lose their jobs. Some might be re-deployed - but to different locations and with fresh job descriptions. Collective consultation should have taken place and the case was sent back to the Employment Tribunal to make an award of compensation.

This is a cautionary tale as the potential exposure to compensation in a case like the one reported above is over £29,000. It is wise to establish at the start whether collective consultation is required.

# 'Rolled-up' holiday pay

Under the Working Time legislation workers are entitled to a minimum of four weeks' paid annual leave. This sounds straight forward enough but has caused a number of legal arguments, including whether employers can pay a 'rolled-up' hourly or weekly contractual rate expressly including an element of holiday pay. This means that when the worker takes holiday, no additional payment is made.

The Appeal Tribunal have recently given guidance on this issue. It confirms that 'rolled-up' holiday pay is lawful, provided that there is a mutual agreement for genuine payment for holidays and which represents a true addition to the contractual rate of pay for worked.

The Appeal Tribunal went on to state that any provision for rolled-up pay and the amount allocated to holiday pay should be clearly incorporated into the contract of employment. In addition, employers should keep records of holidays taken and reasonable steps should be taken to ensure that workers take their holidays before the end of the relevant year.

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## Holiday pay while on sick leave

The Court of Appeal have decided that employees on long term sick leave who have exhausted their rights to statutory and contractual sick pay have no right to the 4 weeks paid holiday provided by the Working Time Regulations. This was because the purpose of the Regulations was to prescribe minimum health and safety standards and giving a worker who had been absent for a long time for sickness reasons 4 weeks paid holiday served no health and safety purpose. However this decision raises a number of questions such as: does it only apply if you have been absent for a whole holiday year? What if the employee returns 4 weeks before the end of the holiday year - can they then take those whole 4 weeks as paid leave or do they lose a proportion? These issues will have to be resolved by further case law or by legislation.

# Contacts

This Bulletin is designed to provide a summary of the subject matter. It does not purport to be comprehensive or a substitute for specialist legal advice in individual circumstances.

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