Holidays and Sickness Absence

_Stringer v HM Revenue and Customs_

- Statutory annual leave continues to accrue when an employee is off sick, whether the employee is absent for the whole holiday year or only part of it.

- An employee who is off sick must be permitted either:
  - if the employee requests it, to take (and be paid for) statutory holidays during sick leave, i.e. convert a period of unpaid sick leave into paid holiday leave; or
  - to take the accrued holidays on return to work, whether in the same holiday year or the next.

- Carry over of the untaken holidays must be allowed if necessary.

- If employment is terminated, the employee must be paid for all statutory holiday leave accrued.

_Pereda v Madrid Movilidad_

- If an employee falls sick just before, or during, a period of planned holiday leave, he or she must be permitted on request to take the holidays at a later time.

  Basically, employers may _not_ deny any employee the right to take, and be paid for, their statutory annual holiday.

  Employers may however, if they wish, instruct employees who have been off sick long-term but have returned to work to take statutory leave on specified dates.

_Neidel v Stadt Frankfurt am Main_

- The ECJ has ruled that the statutory right of employees who have been absent from work due to sickness to carry forward unused holiday leave to the next holiday year is restricted to the four weeks of statutory annual leave prescribed by the EU Working Time Directive. _Note:_ employees’ contracts may, however, confer further
rights.

- **NHS Leeds v Larner**

  There is no need for an employee on sick leave to request annual leave in order to be entitled to pay in lieu of holiday on termination of employment.

### Proposed Changes to Legislation

*The Government proposes to:*

- Amend the Working Time Regulations so that workers who have been unable to take their statutory annual leave due to sickness absence (or maternity, paternity, adoption, or parental leave) can be permitted to carry it forward to the next holiday year.

- Limit this carry-over in respect of workers who have been on sickness absence to the four weeks statutory leave required by the Working Time Directive – unless agreed otherwise.

  However, for employees who have taken maternity, paternity, adoption or parental leave, there will be an automatic right to carry over the additional 1.6 weeks as well.

- Permit employers to:
  
  - insist that employees who return to work after a period of sickness absence take their statutory annual leave in the current holiday year where possible; or
  
  - require employees to defer outstanding holiday leave until the following year if this is justified by business needs.

This would in effect give employers the choice – when an employee returned to work before the end of the current holiday year – to require the employee either to take any outstanding statutory leave in the current holiday year, or defer it to the next year.

### Contractual Issues and Notice Periods

- **Blair and ors v Hotel Solutions London Ltd**
  
  Contractual entitlement to overtime

- **Gisda Cyf v Barratt**
  
  *Wang v University of Keele and*
Publicis Consultants v O’Farrell
Notice periods.

Misconduct

- *Gosden v Lifeline Project Ltd*
  Misconduct involving use of e-mail

- *Liberty Living plc v Reid*
  The importance of policies being consistent

- *Crawford v Suffolk Mental Health Partnership NHS Trust*
  When suspension from work can amount to a breach of trust and confidence

- *Zulhayir v JJFood Services Ltd*
  The concept of self-dismissal.

Redundancy

- Traditionally, a redundancy situation arises only when the employer needs fewer employees than before, due for example to a downturn in business or the introduction of new technology.

- *Packman v Fauchon*
  Whether the need to reduce employees’ hours can lead to redundancy.

- *Eversheds Legal Services Ltd v De Belin*
  Discrimination in redundancy selection.

References

- *Jackson v Liverpool City Council Court of Appeal*
  Whether a reference was fair

- *Bullimore v Potheary Witham Weld Solicitors*
  Victimisation four years after employment ended.

Minimum Wage

- All workers are entitled to be paid at least the national minimum wage for all hours worked.
What about on-call hours when the worker is asleep?

City of Edinburgh Council v Lauder
Whether carers on call during the night are entitled to the minimum wage for hours spent asleep.

Note the position is different under the Working Time Regulations, where all on-call hours spent at the workplace must be counted for the purposes of the 48-hour week.

Changes to Tribunal Procedures

The maximum level of deposit that a tribunal may order as a condition of continuing with a claim was increased from £500 to £1000.

The cap on costs/expenses awards and preparation time orders that tribunals may impose rose from £10,000 to £20,000.

Unfair dismissal claims can now be heard by an employment judge sitting alone, however either party can request a full tribunal.

These changes came into force in April 2012.

Further Proposed Measures

The Government has confirmed that it will introduce fees for tribunal claimants from summer 2013.

Fees will be introduced at two levels, depending on the nature of the claim:

For level 1 claims (straightforward claims such as redundancy pay or other sums due on termination), the fees will be: £160 to lodge the claim and £230 for the hearing.

For level 2 claims (more complex claims such as unfair dismissal, discrimination, equal pay and whistleblowing), the fees will be: £250 to issue the claim and a £950 hearing fee.

There will be a requirement for all potential tribunal claims to be lodged with ACAS before proceeding to tribunal. This is so that ACAS can offer the parties the opportunity to engage in early conciliation rather than having the case proceed directly to a tribunal hearing. Details are yet to be announced.
There is also a proposal that tribunals will have the discretion to levy a financial penalty on any employer who loses a claim, where it is found that the employer breached the worker’s rights.

This will happen where the tribunal concludes that “the breach has one or more aggravating features”, for example where the action was deliberate or committed with malice, or where the employer has a dedicated human resources team.

The penalty will be half of the total award, with a minimum of £100 and a maximum of £5,000, and with a 50% discount if paid within 21 days.

Employers may be able to offer without prejudice “settlement agreements” to terminate an employee’s employment.

The proposal is that if an employer raises a discussion with an employee with a view to terminating his or her employment, that discussion, and any financial offer made, will not be permitted to be disclosed to an employment tribunal in any subsequent claim for unfair dismissal (i.e. if the employee refuses to accept the settlement).

**Unfair Dismissal Claims**

- The qualifying period of service required to claim unfair dismissal was raised from one year to two years with effect from 6 April 2012.
- This affects only employees appointed on or after 6 April.
- Those employed before 6 April 2012 retain the right to claim after only one year.

**Direct and Indirect Discrimination**

- With the exception of age discrimination, direct discrimination can never be justified, no matter what the circumstances are.


- In contrast, indirect discrimination is open to justification.

- The test for justification is whether the employer’s actions or policies were proportionate to the achievement of a legitimate aim.
Objective Justification

This means that the employer must:

- Have a legitimate business aim underpinning their actions, policy or provision; and

- Be able to show that what they did was proportionate with a view to achieving the stated aim.

“Proportionate” means, broadly, appropriate and necessary.

Guidance on objective justification, published by the Equality and Human Rights Commission, states that “it is not easy to prove objective justification, and employers have to provide valid evidence if they are challenged”.

- **Seldon v Clarkson Wright and Jakes**
  The difference between the tests for justification of direct and indirect discrimination.

Cases Alleging Discrimination

- **Cherfi v G4S Security Services Ltd**
  Refusing time away from work-site to attend prayers was justified

- **Chondol v Liverpool City Council**
  Foisting religious beliefs on others can justify dismissal

- **Ladele v London Borough of Islington**
  Conflict between religious beliefs and the rights of gay people

- **Grant v Land Registry and anor**
  Whether outing a gay employee at work is discrimination.

Cases Alleging Harassment

- **Bivonas LLP v Bennett**
  Harassment can occur even if a remark is not intended for the employee to read or hear

- **Nixon v Ross Coates Solicitors**
  Workplace gossip can amount to unlawful discrimination
EU Proposals for “Shared Parental Leave”

Further changes to maternity and paternity laws are proposed at EU level:

- The first 18 weeks of maternity leave will be reserved for the mother.
- The remaining weeks will be able to be taken by either parent according to their own preferences.
- Parents will be able to take leave concurrently, and to stop and start leave to suit their circumstances, rather than having to take it all in one block, as at present.
- It is proposed to incorporate the right to unpaid parental leave into the new scheme.
- The changes are likely to be implemented in 2015.

No details are available yet.

Parental Leave

- Parental leave (which is unpaid) is to be increased to 18 weeks for each parent from March 2013.
- Currently, eligible employees in the UK are entitled to take up to 13 weeks parental leave (18 weeks where the employee’s child is disabled).

Eligibility depends on the employee having a minimum of one year’s continuous service with the employer. The child in respect of whom parental leave is requested must be under five years of age (except in the case of a disabled child, when the age limit is 18).

- The extended right will apply to all employees regardless of their type of contract.
- There are no plans to require employers to pay employees on parental leave.

Right to Request Flexible Working

- The Government is proposing to extend the right to request flexible working to all
employees, regardless of their caring responsibilities. At present, the right applies only to those who care for a child under 17 or a dependent adult.

- The requirement to have at least six months’ service will remain in place.
- The statutory procedure for handling a request is to be removed and replaced by Guidance.