

Employment Update

August 2009

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Lords rule on enforcement of claims for unpaid holiday pay *HM Revenue and Customs v Stringer and ors*

Earlier this year, the European Court of Justice reported its decision in *Stringer and ors v HM Revenue and Customs*. It held that workers on long-term sick leave are entitled to paid annual leave despite not being able to take it. However, this ruling left unanswered the issue of whether a claim for unpaid holiday pay must be brought under the Working Time Regulations 1998 (WTR), or whether it can be brought as an unlawful deduction from wages claim under the Employment Rights Act 1996 (ERA). This issue was considered by the House of Lords. [More...](#)

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Any comments or queries?

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Case notes

Lords rule on enforcement of claims for unpaid holiday pay

Earlier this year, the European Court of Justice reported its decision in *Stringer and ors v HM Revenue and Customs*. It held that workers on long-term sick leave are entitled to paid annual leave despite not being able to take it. However, this ruling left unanswered the issue of whether a claim for unpaid holiday pay must be brought under the Working Time Regulations 1998 (WTR), or whether it can be brought as an unlawful deduction from wages claim under the Employment Rights Act 1996 (ERA). This issue was considered by the House of Lords.

Claims under the WTR have to be brought within three months of the relevant holiday, whereas a claim under the ERA has a more advantageous time limit for workers and can be brought for the whole series of deductions provided it is brought within three months of the last in the series. The Revenue accepted that it was obliged under the WTR to pay a sum in respect of unpaid holiday, but argued that it had not made a deduction from 'wages' within the meaning of the ERA and therefore the appropriate remedy was under the WTR.

The House of Lords held that claims for non-payment of statutory holiday pay could be brought as an unlawful deduction from wages claim because statutory holiday payments do fall within the definition of 'wages'. However, the ruling did not address some important questions, including whether workers on sickness absence can be paid in lieu of accrued but untaken holiday, as the WTR currently states that payment in lieu can only be made on termination of employment.

HM Revenue and Customs v Stringer and ors

EAT gives guidance on harassment claims

Ms Dhaliwal, a British citizen of Indian ethnic origin, was employed by Richmond Pharmacology Ltd. In September 2007 Ms Dhaliwal had resigned and was working her notice when the company's medical director told her that their paths were likely to cross again in future 'unless you are married off in India'. Ms Dhaliwal raised a grievance, which was not resolved to her satisfaction. She brought a claim before an employment tribunal, alleging racial harassment.

The tribunal held that the remark violated Ms Dhaliwal's dignity and constituted harassment within the meaning of the Race Relations Act 1976. The company appealed on the grounds that the tribunal had not properly applied the test in the Act. The EAT dismissed the appeal. It stressed that the three separate elements of the test (unwanted conduct, purpose or effect of that conduct and the grounds for the conduct) should be examined and satisfied in order to establish liability. In this case all three elements were satisfied.

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However, the EAT did state that where the abuse is overtly racial, there is no need to examine the mental processes leading to offensive conduct.

Richmond Pharmacology Ltd v Dhaliwal

Doctors are entitled to legal representation at disciplinary hearings

Dr Kulkarni worked as a junior doctor for the Milton Keynes Hospital NHS Foundation Trust (the Trust). He was suspended following allegations that he indecently assaulted a patient. Dr Kulkarni was represented by a non-legally qualified adviser from the Medical Protection Society (MPS) at an internal disciplinary hearing. His standard terms of employment stipulated that each NHS Trust must make its own arrangements for disciplinary proceedings. He was informed that under the Trust's Policy he was not entitled to legal representation.

Dr Kulkarni sought a High Court declaration that the Trust was acting unlawfully and in breach of contract. He submitted that the Trust had discretion to allow him legal representation and that a failure to do this was a breach of his article 6 right to a fair trial under the European Convention on Human Rights. The High Court rejected these arguments and he appealed.

The Court of Appeal construed the wording of the Trust's contractual disciplinary procedure to mean that he was entitled to representation by a legally qualified person at internal disciplinary hearings, but this person could only be a friend, colleague, partner or MPS representative. They could not be a lawyer independently instructed by Dr Kulkarni. The Court also suggested that article 6 is engaged where an NHS doctor faces charges which could end his career if proved. A failure to allow legal representation would therefore have been unlawful.

Kulkarni v Milton Keynes Hospital NHS Foundation Trust

Expressing sympathy for an employee had affirmed the contract

Mr Cook was employed by Ministry of Sound as a director. He handed in his notice in May 2007, to commence a new position with Warner Music. Mr Cook told Ministry of Sound that he would not be competing with the company in his new role. During his notice period a dispute arose surrounding his honesty in this regard. As a result of the dispute he took sick leave for stress. Ministry of Sound wrote to him to smooth things over and stated that it hoped he would be able to return to work.

Upon his return to work, Mr Cook was summarily dismissed following disciplinary proceedings on the grounds of dishonesty, breach of fiduciary duty, and for accepting a company loan of £100k after he had tendered his resignation. Ministry of Sound sought a declaration that his dismissal was lawful.

The Court of Appeal held that Ministry of Sound had accepted Mr Cook's breach of the implied term of mutual trust and confidence. By expressing sympathy, his employer had affirmed the contract and could not rely on this breach as a reason for dismissal. Ministry of Sound should have reserved its position and provided

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some indication that it would pursue disciplinary proceedings against Mr Cook for the alleged dishonesty and breach of fiduciary duty. However, as Ministry of Sound has reserved its position in respect of the loan, it was entitled to rely on it as a reason for dismissal.

Cook v MSHK Limited and Ministry of Sound Recordings Limited

Failure to disclose medical condition not misrepresentation

Ms Laird was offered the position of Managing Director of CBC subject to medical clearance. In the medical questionnaire she did not mention any history of stress and depression. Ms Laird subsequently took substantial periods of time off work with depression. She was suspended pending an internal disciplinary investigation. As part of the investigation she underwent a psychiatric examination to determine the state of her health. The examination revealed a history of recurrent depressive illness which she had not disclosed on her medical questionnaire.

CBC argued that the contract had been frustrated and Ms Laird took early retirement on an ill health pension. CBC then brought a claim against Ms Laird for fraudulent and negligent misrepresentation, seeking damages of nearly £1m.

The High Court held that Ms Laird's responses to the medical questionnaire were neither false nor misleading. She had given responses which a reasonable person in her position would have given and honestly believed the responses to be true. No misrepresentation had occurred.

Cheltenham BC v Laird

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Legislation

Agency workers to get equal rights

Following the approval of the revised Temporary Agency Workers Directive by the European Parliament in October 2008, EU countries are now required to incorporate the provisions of the Directive in their national law.

It has been indicated by the Government that the revised Temporary Agency Workers Directive will come into effect in the next session of Parliament. The Directive accommodates the arrangement reached by the CBI, TUC and Government that agency workers should receive equal rights after 12 weeks.

The Temporary Agency Workers Directive will ensure:

- Equal treatment for temporary agency workers compared to permanent workers in terms of basic working and employment conditions (including pay, holidays, working time, rest periods and maternity leave)
- Equal access to collective facilities (such as canteens, child care facilities, or transport services)
- Better access for agency workers to training both when working on an assignment and in between assignments

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Review of the Default Retirement Age (DRA) brought forward to 2010

Due to the 'change in economic circumstances' since the DRA was introduced, the Government has announced that it will bring forward its review from 2011 to 2010.

The Government has started the process of engaging with stakeholders and gathering evidence to inform the review. If the evidence shows that the DRA is no longer needed, the Government will act to make the necessary changes to legislation. However, any changes will not be implemented until 2011 in order to give employers time to prepare and employees time to consider what impact the new circumstances will have on their retirement plans.

Consultation on passing 'whistle-blowing' claim forms to regulatory bodies

At present, employment tribunals can hear employment claims arising from whistle-blowing yet cannot make any assessment or take any action on the issues of the underlying allegation which was the subject of the whistle-blowing. The Department for Business Innovation and Skills has published a consultation on 'Employment Tribunal Claims and the Public Interest Disclosure Act', which sets out circumstances in which alleged wrongdoing should be forwarded to the appropriate regulator for investigation.

Subject to Parliamentary Approval, the regulations will come into force in April 2010.

Acas annual report attributes increase in unfair dismissal claims to the recession

Acas (the Advisory, Conciliation and Arbitration Service) has published its annual report and accounts for the year 2008/09.

There was a marked rise in the number of unfair dismissal claims, from 33,352 in 2007/08 to 43,028 in 2008/09. Similarly, there was a notable increase in redundancy pay claims from 2,891 to 3,938, an increase of 36%. Acas has attributed these increases to the economic downturn. Conversely, equal pay claims and working time claims actually decreased – indeed, working time claims fell from 17,407 in 2007/08 to just 2,889 in 2008/09.

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