

# The LA employment alert!

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### Our 2009 review and 2010 preview

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In this month's Alert we are looking at the biggest employment law issues from 2009 and taking a look at what 2010 will bring you!

# 2009 review

## Holidays and Sickness

This was the probably one of the hottest employment law topics in 2009. Despite this, the law in this area is still in a mess!

## Holiday during sickness – *HMRC v Stringer and others*

Following the European Court of Justice (ECJ) and House of Lords judgments in this case some issues are clear – but many are not!

## What do we know?

- Employees who are sick do continue to accrue holiday entitlement
- Employees can take holiday from sick leave – they are entitled to be paid for this holiday
- Under the Working Time Regulations you cannot pay an employee in lieu of their holiday entitlement except on termination of their employment
- Employees can claim holiday pay under the Working Time Regulations and also under the unlawful deductions from wages provisions. An

unlawful deductions claim can be brought within three months of the last deduction (if there is a series of deductions) – in certain circumstances an employee could claim holiday pay going back years!

What is not yet clear is whether you can require an employee to take their holiday while they are off sick, or if an employee who is sick when on holiday is entitled to take that holiday again at another time. Nor is it clear whether employees can or should carry over holiday that is untaken due to sickness to the next leave year – currently not permitted by the Working Time Regulations.

There are likely to be cases in the coming year dealing with these issues. For now, employers should deal with these situations as they arise and take advice.

If you are faced with any challenges or potential claim don't let these get out of hand! It

is likely to be far cheaper to come to an arrangement with the employees and let them take the holiday at another time than be a test case. The House of Lords decision in this case ultimately related to a figure of £16.14!

## Sickness during holiday – *Pereda v Madrid Movilidad SA*

In September we received a judgment from the ECJ in the Spanish case of Pereda. The ECJ decided that under the Working Time Directive, a worker who is ill during a period of annual leave has the right, to reschedule the annual leave and take that leave at a later time.

However, this does not seem to be the intention of the Working Time Regulations 1998 (which implement the European Directive in the UK).

The impact on UK employers is likely to depend on the distinction made by the Courts and Tribunals between public and private sector.

“Deal with these situations as they arise and take advice where necessary”



There is an argument that the rights under the Directive can be directly enforced by public sector employees. Until one of our Courts or Tribunal's applies the ECJ decision or Parliament amends the Working Time Regulations, it is arguable that in the private sector, employers can refuse to allow employees to swap their holiday for sickness absence. But - there is a risk of claims under the Working Time Regulations. UK Courts and Tribunals could find that, in accordance with the ECJ's decision in the Spanish case, employees can be permitted to take that holiday at another time.

#### What can employers do?

Ensure that you have strict reporting and notification procedures in place for sickness absence, if you pay company sick pay. If an employee is sick on holiday, make sure they are required to provide evidence!

If you just pay statutory sick pay,

then statutory sick pay notification requirements will apply. Again, until we have clearer guidance on what the requirements and entitlements are, approach each case on its own facts.

#### The ACAS Code of Practice on Disciplinary and Grievance Procedures

6 April 2009 saw the replacement of the old statutory disciplinary and grievance procedures with the new ACAS Code of Practice on Disciplinary and Grievance Procedures. In addition to the Code ACAS have produced a Guide on Discipline and Grievances at Work.

Part of the good news is that dismissal is no longer automatically unfair simply because there is a failure to follow the statutory procedures – a big relief for employers! Lawyers and employers alike are pleased to see the back of the statutory procedures which

often led to complications and made it all too easy for employees to take advantage of winning simply on the basis of a procedural defect

There are similarities between the old statutory procedures and the Code. If either the employer or employee unreasonably fails to comply with the code, a Tribunal can now adjust awards by up to 25%. Although the Code doesn't have the force of being actual legislation, Tribunals will expect employers to adhere to it and so it's worth being familiar with the Code.

It is anticipated that cases that are decided having regard to the Code will emerge in the coming year and these will give us an indication of how the Tribunals are interpreting the Code.

#### Retirement

The long running Heyday (Age Concern) litigation was finally

completed in 2009. It was held that the UK's default retirement age of 65 was lawful (for now!).

So employers can still compulsorily retire employees lawfully, provided that they carefully follow a fixed procedure. If the set procedure is followed, employers should be safe from claims of unfair dismissal or age discrimination.

This good news is likely to be short lived with a review of the default retirement age due in 2010 (see Preview).

#### Representation at disciplinary hearings

Is an employee entitled to be represented by a lawyer at a disciplinary hearing? Well two notable cases in 2009 dealt with this point and it was concluded that they were!

It should be said that these cases relate to the public sector and situations where a dismissal

would prevent the employee from working in that field in the future and so effectively ending their career. The same principle has not been held to apply where the individual is able to work for a different employer within their area of expertise.

The employees were able to directly rely on the European Convention of Human Rights in their cases since their employers were public bodies (a school and the NHS). Private sector employees are not able to benefit directly from the European Convention.

A judgment from the Court of Appeal is awaited in the school teacher case (R (on the application of G) v The Governors of X School and another [2009] EWHC 504). This is potentially a significant (and worrying) development for some employers. The decision being appealed to the Court of Appeal was that a music teacher

was entitled to be accompanied by a lawyer at a disciplinary hearing, as one outcome was that they could be prevented from working with children in the future. We need guidance from the Court of Appeal on the extent of this right. In the interim, the right has been limited to the facts of the specific cases, however it is important for public sector employers to consider this and take advice on how the judgment affects them.



“Employers can still compulsorily retire employees if they follow a strict procedure”

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# 2010 preview

## Equality Bill

The Equality Bill is expected to come into force in October 2010.

This will harmonise discrimination law and bring together the various strands of discrimination and streamline the numerous pieces of legislation currently in place which deal with different types of discrimination.

The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The Bill introduces greater consistency in the definitions of the different types of discrimination. There will also be a new concept of combined direct discrimination based on dual characteristics (eg. a disabled woman).

One particular point of interest is that the Bill will place limits on the enforceability of pay secrecy clauses which stop employees

discussing their pay. The limit would only apply where the employee is involved in a 'relevant pay discussion', which means when they're talking about pay to find out if there is any discriminatory angle.

We will report in more detail on the Bill in a future Alert.

## ISA Scheme

There has been a lot of chopping and changing with this scheme in recent weeks but the registration requirement remains.

From November 2010 individuals working in (or seeking to work in) a regulated activity, defined as anyone working closely with vulnerable adults or children, must register with the Independent Safeguarding Authority (ISA). Voluntary registration will be open from 26 July 2010.

Registration means that the employee is agreeing to be continually monitored. You will be able to register an 'interest' in



a registered person and you will then be notified of any changes to their status (eg. if ISA review their decision not to 'bar' them following receipt of new information).

## Additional Paternity Leave and Pay

Employers need to be aware of the changes that will need to be made to family friendly policies and update their policies during 2010. The actual changes will take effect in respect of parents with babies due on or after 3 April 2011 or matched for adoption on or after this date.

The change would entitle the father to a maximum of 26 weeks' leave. This could be taken once the mother has returned to work from her

maternity leave and the earliest it could be taken is 20 weeks from the date of birth of the child (or date of

## Consultation on default retirement age

The Government has moved its review of the default retirement age (currently 65) forward to 2010. The comments of the High Court in the Heyday case (see elsewhere in this Alert) add to the pressure for an increase in the default retirement age or even removal of the ability to retire employees compulsorily.

The Government is currently conducting a research report on "Employers' Policies, Practices and Preferences relating to age" and submissions have been requested by 1 February 2010.

Watch this space...

## Time off to train

For employers with 250 or more employees, a right to request unpaid time off work for training or study will be introduced in April 2010. The right will be available to employees with more than 26 weeks' service.

An employer will be able to refuse a request on certain specified grounds, which are very similar to those relied on for refusing a request for flexible working.

## Agency workers

The Agency Workers Directive has to be implemented in the UK by October 2011 at the latest. The Government has published draft Agency Worker Regulations which basically state that agency workers must receive the same treatment, pay and benefits as a comparable permanent employee.

This has caused huge concern for employers. The Government, TUC and the CBI negotiated a 12 week period, when a temp can work without receiving the same pay as a permanent comparator. However, after 12 weeks agency workers are entitled to the same hours, pay, benefits and working time as their permanent colleagues. Therefore, employers are strongly advised to review their use of agency staff in 2010.

Options include an agreement for a financial indemnity with the supplying agency (if the employer has sufficient purchasing power) or having permanent floating staff where temps would previously have been used. Another idea is to rotate temps in different tasks or have breaks between assignments, but the draft Regulations stipulate a 6 week break is needed to stop the clock.

These hotly debated draft Regulations will require very careful planning for the future.

## FINALLY

We will report on further developments in future Employment Alerts.

If there are any topics you would particularly like covered please let us know.

Best wishes for a prosperous 2010!

The LA Employment Team.

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