



Employment Law Update

Spring 2010 Issue

Contents

Current Rates

Employment Protection Awards
Maternity, Paternity and Adoption Pay
Statutory Sick Pay

Recent Developments

Sickness Absence
Work and Families

Future Proposals

The Equality Bill

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EMPLOYMENT LAW UPDATE

CURRENT RATES

Employment Protection Awards

These awards are usually increased on 1 February in each year. However, for the first time the maximum compensatory award for unfair dismissal was revised downwards on **1 February 2010**. Due to the economic crisis, the limit on statutory redundancy payments and unfair dismissal basic awards were increased early in October 2009 and will be reviewed in February 2011 at the earliest.



The current rates are as follows:

Award	Current Rate
Unfair Dismissal Compensatory Award (maximum)	£65,300.00 (previously £66,200)
One week's pay for statutory redundancy and basic award	£380.00
Maximum amount for the basic award and statutory redundancy payment	£11,400.00

Awards for discrimination claims have no maximum limit.

Maternity and Paternity Pay

Statutory Maternity Pay and Statutory Adoption Pay are payable for a period of 39 weeks. Statutory Paternity Pay is payable for a period of two weeks. SMP, SAP and SPP will increase from 6 April 2010 as follows:

Type of Payment	Previous Rate from 1 April 2009	Current Rate from 6 April 2010	Payment Period
Statutory Maternity Pay and Statutory Adoption Pay (higher rate)	90% of normal weekly earnings	90% of normal weekly earnings	First 6 Weeks
Statutory Maternity Pay (basic rate)	£123.06	£124.88 per week or 90% of normal weekly earnings if lower	Next 33 Weeks
Statutory Paternity Pay	£123.06	£124.88 per week or 90% of normal weekly earnings if lower	2 Weeks

Statutory Sick Pay

Statutory Sick Pay is payable if an employee is incapable of work for 4 or more consecutive days. The entitlement starts from the 4th qualifying day up to a maximum of 28 weeks. The SSP rate will remain at **£79.15** per week and will be reviewed in April 2011.

RECENT DEVELOPMENTS

HOLIDAYS AND SICKNESS ABSENCE

The European Court of Justice (“ECJ”) has held that holiday entitlement does accrue during long term sickness absence and employees are entitled to receive a payment in lieu of accrued holidays if their employment is terminated during sickness absence. Employees can also reclaim their holiday entitlement if they were unable to take their holiday due to sickness.

Background

Employees and Workers are entitled to statutory holiday entitlement of 20 days per year (plus bank holidays) under the Working Time Regulations 1998 (“WTR”). This was introduced following a European Union Directive. Under the WTR, unused holiday leave cannot be carried forward to the next year.

The ECJ’s ruling in two recent cases has clarified the position of holiday entitlement during sickness absence.

(i) Stringer v HMRC 2009

In this case several employees were on long term sick absence. One of the employees wanted to take accrued holiday leave during his sickness absence and others, who were dismissed during their sick leave, asked for payment in lieu for their accrued holidays.

Following an appeal to the Court of Appeal which ruled in the employer’s favour, the

case went to the House of Lords which referred it to the ECJ for clarification as the WTR emanated from a EU directive.



Decision

The ECJ referred to the Working Time Directive and held that national laws and practices **can** prevent workers from taking annual holidays while they are on sick leave. However, workers continue to **accrue** their holiday entitlement for the entire duration of sick leave and on their return to work, should be allowed to take the accrued holiday leave during the holiday year or if that’s not possible, carry it over to the following holiday year. The ECJ added that if the worker’s employment was terminated during sick leave, they are entitled to be paid for accrued holiday entitlement.

(ii) Pereda v Madrid Movilidad 2009

In this case, Mr Pereda, a highway parking enforcer had booked holiday leave. He then had an accident at work and as a result was unfit for work and unable to go on his pre-booked holiday. His employer refused to let him take holiday leave, near the end of the leave year, on the grounds that he had already used his holiday entitlement during sickness absence.



Subsequently Mr Pereda commenced legal action against his employer. The case was referred to the ECJ by the Spanish Court.

Decision

The ECJ held if a worker falls sick for a period before the start of a pre-planned holiday leave and continues to be sick



during this period then the employer must allow this holiday leave to be taken at a later date or for it to be

carried over to the next holiday year.

“FIT NOTES” TO REPLACE “SICK NOTES”

From 6 April 2010 “fit notes” will be introduced to replace “sick notes”.

Currently, sick notes (or Medical Statements) are the forms issued by doctors advising their patients to refrain from work for a specified period due to sickness or injury. They are commonly used by employers for sick pay purposes.

Under the sick note system, doctors can only advise on whether their patients' health condition means that *they should or should not work*. There is no provision for stating that the patient may be able to work with some support e.g. reduced hours.

With a view to reducing sickness absences as well as helping people get the support



they need to get back to work, the new “Statement of Fitness for Work” (the fit note) will

mean that doctors can advise that an employee is either:

- unfit for work; or
- may be fit for work (with some support)

Doctors will give a “may be fit for work” statement if they think that their patient's health condition may allow them to work if they get suitable support from their employer. If the employee is too ill to work, the doctor will advise that they are “unfit for work” for a specified period, similar to the sick note.

“May Be Fit To Work”

The form provides for the doctor to state that a patient “may be fit for work” taking into account the following advice:

- a phased return to work;
- altered hours;
- amended duties;
- work place adaptations

The doctor can also provide any additional comments on the patient's condition.

The fit note has been designed to give an employer the information needed to begin a discussion with an employee on whether they can return to work with suitable adjustments, despite their illness or injury. An employer should consider the doctor's comments and discuss this with the employee. If a return to work is possible then the employer should agree any temporary changes to the job or hours and what support they will provide and for how long.

If an employer is not able to facilitate any changes or adjustments they should explain this to the employee and then use the Statement as if the doctor had advised "not fit for work". The employee does not need to go back to their doctor for a new Statement to confirm this.

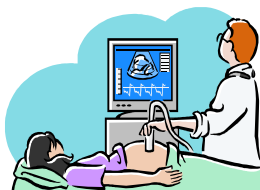
Other Points

- The maximum duration a Medical Statement can be issued for will be reduced from six months to **three**

RISK ASSESSMENT FOR PREGNANT EMPLOYEES

In the recent case of ***O'Neill v Buckinghamshire CC***, the Employment Appeal Tribunal (EAT) has clarified the employer's responsibilities for carrying out risk assessments for pregnant staff.

The EAT confirmed that there is no strict requirement for employers to



months during the first six months of a health condition;

- The Statement is still not required until after the seventh calendar day of sickness;
- There is nothing to prevent an employer referring the employee for an occupational health assessment in addition to the Statement.

Comment

The Government's intention is to reduce sickness absences in the workplace by encouraging employees to return to work earlier with support from employers. It remains to be seen how this will work in practice. In cases of long term sickness absence, most doctors currently provide a full report stating what work an employee might do with suitable adjustments. The fact that they will need to address this at an earlier stage may be helpful. However, it is unlikely to address the issue of the employee who simply doesn't want to return to work.

carry out a risk assessment for every pregnant employee. For an employer to fall under a general duty to conduct a risk assessment the following preconditions must be met:-

- The employee has notified the employer in writing that she is pregnant;

- The work is of a kind which could involve a risk of harm or danger to the health and safety of the expectant mother or baby; and
- The risk arises from either processes, working conditions or physical, chemical or biological agents in the workplace.

The EAT indicated that where an employee is exposed to risk, the failure of the employer to carry out a risk assessment may lead to a sex discrimination claim against it.

Comment

This case is welcome news to employers clarifying that there is no strict obligation on the employer to carry out a risk assessment for all pregnant employees. However as a matter of good practice, an employer should consider whether a risk assessment is necessary and have this documented so that in the case of any challenge by the employee, the employer is able to justify its decision.

NEW RIGHTS FOR PARENTS TO SHARE MATERNITY LEAVE

New rights for parents to share some of the mothers' maternity leave will apply for babies due on or after **3 April 2011**. The Government's aim is to give families greater flexibility in how they choose to look after their children. However, it is predicted that the take up of this new right will be low.

Currently, all pregnant employees have the right to 52 weeks maternity leave. Fathers



are entitled to 2 weeks paternity leave. Parents can also take up to 13 weeks unpaid leave at any time up to a child's fifth birthday.

As part of the changes, fathers will be entitled to take additional paternity leave during the second six months of the mother's maternity leave, if the mother wishes to return to work early with maternity leave outstanding.

Any maternity pay which would have been paid to the mother during the second six months of her maternity leave will be paid to the father by his employer.

Details of how much notice the father has to give to his employer has yet to be finalised. It is expected that the father will have the right to return to work and not to suffer any detriment in connection with the leave, similar to maternity leave.

FUTURE PROPOSALS

The Equality Bill 2010 - A revolution in the law of equality

A push for streamlining

Over the past 35 years, discrimination legislation has been introduced piecemeal. Currently, there is legislation aimed at preventing discrimination in employment in areas as diverse as age, disability, race, sexual orientation, pregnancy, gender and religion or belief. However, the legislation (much of which originated in the EU) is currently set out in various different statutes and regulations.

The Equality Bill is due to come into force in October 2010. One of the main aims of the Equality Bill is to amalgamate all previous legislation in the area of equality and discrimination into one comprehensive Act.

As well as streamlining law that is already in existence, the Equality Bill is also going to push forward the law in the area of equality and discrimination. In particular, the new concepts of dual discrimination and positive action.

Dual Discrimination

The Equality Bill lists certain characteristics which are deemed to be “protective characteristics”. These are all grounds upon which (other than in specific circumstances) it is not possible to discriminate. These protective characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.



What the current law does not cover is the possibility that an individual is being discriminated against as a result of more than one characteristic. For example, a woman of Indian origin may be facing discrimination at work, and this discrimination is not only a result of her being a woman, or only as a result of her being Indian, but is due to the combination of the two factors i.e. being an Indian woman.

Currently, such an employee would need to bring a claim for sex discrimination and a separate claim for race discrimination.

The Equality Bill changes that and would allow the employee referred to in the example above to bring a claim stating that she is being discriminated against because of her being *an Indian woman*.

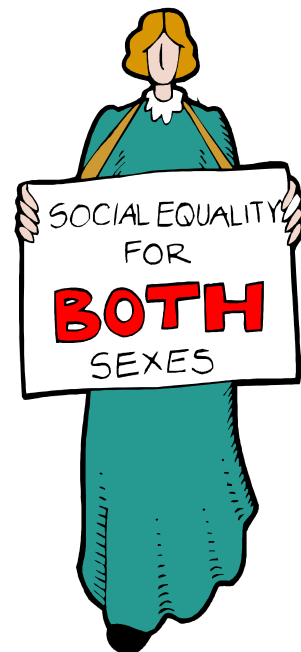
The Equality Bill does limit the combination of protected characteristics that a person may claim for to two. Accordingly, it is not possible for the employee to claim that she is being discriminated against because she is a gay Indian woman. She would have to choose which two of the three characteristics she considers are the cause for discrimination.

The Equality Bill does not prevent the employee from bringing multiple (or alternative) claims in an attempt to cover all possible combinations as the reason for the discrimination e.g. the employee could bring a claim based on her being an Indian woman, alternatively a gay woman, or alternatively a gay Indian. In that way all possible claims are covered.

Positive Action

Under the Equality Bill, if an employer is looking to either recruit or promote someone and he has narrowed it down to two candidates who are equally qualified, then the employer is entitled to employ or promote one of the two candidates on the basis that the successful candidate is part of a group with a protected characteristic e.g. a woman, and the employer feels that, for example, women, are under-represented in his workforce.

The employer is not obliged to make a decision on that basis but under the Equality Bill, he will be permitted to do so. Qualifications do not just relate to academic qualifications but to experience as well. Given that, in reality, it will be difficult for an employer to show that the qualifications of the two candidates were indeed equal, this could potentially lead to claims of discrimination from the unsuccessful candidate.



Conclusion

It is likely that the Equality Bill will come into force even if there is a change in government before October 2010. Whilst the consolidation of the existing discrimination legislation is to be welcomed, new rights inevitably lead to an increase in claims and employers will need to review their current contracts, policies and interview procedures to ensure that they are protected (as far as possible!).

EMPLOYMENT TEAM AT GSC

This update was produced by GSC's employment team. Members of the team are: Tessa Fry (Partner), David Nathan (Senior Solicitor), Nadia Adil (Assistant Solicitor) and Rashid Islam (Trainee Solicitor).

Tessa Fry is Head of GSC's Employment Law Group. She has practiced as a solicitor since 1989 and specialises in employment law. Tessa also advises on business immigration.

Tessa has considerable experience in advising companies (including multi-nationals) and individuals on all aspects of employment law from appointment to dismissal. This includes preparation of employment contracts, termination of employment, sickness absences, redundancy procedures, transfer of undertaking regulations, data protection and family friendly policies. She has also handled numerous employment tribunal claims relating to unfair dismissal, race, sex, disability and age discrimination and unlawful deduction of wages.

Tessa has represented clients in various High Court actions for breach of contract including injunctions to enforce restrictive covenants, actions for breach of copyright and confidentiality and claims for non-payment of bonuses.

Tessa has also lectured on new developments in employment law. Recent publications include articles in the London Evening Standard, People Management, Graduate Recruiter, Workplace Law and Corporate International. She was also directly quoted in "Working It Out" by Colin Cottell on Guardian Unlimited (Guardian Unlimited/money/work/working it out).

David Nathan qualified as a solicitor in January 2001 and before joining GSC, was a partner at Manuel Swaden, a four-partner firm in West Hampstead, where he specialised in employment, company/commercial and litigation.

David has experience in advising companies (including plcs) and individuals on all aspects of employment law including drafting employment contracts, service agreements, staff handbooks, compromise agreements, disciplinary and grievance procedures, redundancy procedures, unfair dismissal, wrongful dismissal, discrimination claims, employee benefits, employment law aspects of mergers and acquisitions, shareholders agreements and share purchase agreements.

David has also represented clients in employment tribunal and employment appeal tribunal matters.

Nadia Adil trained at GSC and qualified as a solicitor in March 2005. Nadia specialises in commercial litigation and employment law. She also advises on business immigration.

Nadia's employment experience includes advising companies and individuals on employment matters, in particular, drafting employment contracts, service agreements, disciplinary and grievance procedures, terms and conditions, maternity rights, employee benefits and compromise agreements. She has also represented clients in employment tribunal claims.

Rashid Islam joined GSC as a trainee in September 2008. Rashid will be qualifying as a solicitor in September 2010.

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Disclaimer

This update is intended to provide readers with information on recent legal developments. It should not be construed as legal advice or guidance on a particular matter.