

EMPLOYMENT UPDATE

February 2009



Welcome to the first edition of CFR's Employment Update. The objective of this publication is to provide our clients and contacts within the employment sector with a user friendly reference guide to any interesting case law and or legislative developments within the employment law arena.

In this issue, we highlight some topical areas such as a recent case on holiday leave accrual during sick leave, new limits for compensation awards for unfair dismissal, an age discrimination case and a significant EAT decision on disability discrimination involving a carer of a disabled person. We hope you find this useful and would be delighted to receive your feedback thoughts or comments.

Michael Black, Employment Partner

BONUS PAYMENTS IN THE RECESSION

Many businesses in the recession will have no alternative but to substantially reduce bonus payments or to avoid paying any bonus at all. Usually the contract of employment will clarify that any bonus awarded is entirely discretionary although it is not uncommon for the contract to identify certain factors such as individual performance or profitability that should be taken into account. However, it is important for the employer to remember that it must exercise its discretion in a rational way. In the case of *Clark v Nomura International plc*, a financial services company was in breach of contract when it refused to pay a discretionary bonus to a senior trader. The contract made it clear that the bonus was not guaranteed and was dependant upon individual performance but the High Court decided that the employer's discretion was limited by an implied term that it should not exercise its discretion irrationally or perversely. Where an employer is in financial difficulties it must be careful to avoid litigation in attempting to reduce or avoid making bonus payments in view of the impact of this implied term which can limit its ability to do so. Employers should also be careful not to allow the "discretionary" bonus payments to become contractual entitlements through the custom and practice of making regular payments.

NEW LIMITS/RATES

The limit on the compensatory award for unfair dismissal are due to increase from £63,000 to £66,200 and the maximum amount of a 'week's pay' for the purposes of calculating a redundancy payment or for the basic or additional award of compensation for unfair dismissal will rise by £20 to £350. These changes occurred in England and Wales with effect from 1 February 2009. No date has been confirmed for similar increases in this jurisdiction but expect to see these increases in Northern Ireland in the coming months.

Subject to Parliamentary approval, from April 2009 the standard rate of statutory maternity, paternity and adoption pay will increase from £117.18 to £123.06 and the standard rate of statutory sick pay will increase by £3.75 to £79.15.

NEW RIGHTS FOR EMPLOYEES WITH CHILDREN UNDER 16

The Labour government has announced its plans to extend the right to request flexible working to include parents with children up to the age of 16. This change is set to be implemented in or around April 2009 following a review carried out by Imelda Walsh, Sainsbury's HR Director. Employers will be expected to consider such requests carefully and to refuse them only on a limited number of specified grounds.

Please note: The content of this newsletter is for information purposes only. Further advice should be sought from a professional advisor before any action is taken.

INCREASED RISK OF TRIBUNAL CLAIMS FOLLOWING INFORMATION COMMISSIONER DECISION

Job candidates may be allowed to see other applicants' details, including interview notes, in light of a recent decision by the Information Commissioner ('IC') against Leicester City Council ('the Council')

The IC ruled that a council employee, who had applied for two internal vacancies, had the right, under the Freedom of Information Act ('Fol') to see what the other candidates had written as long as their identities were kept secret. The complainant had his request for information about the recruitment process and other candidates turned down by the Council who relied on the exemption contained in section 40 (2) of the Fol. But the IC decided that the exemption applied to some of the details in a job application, but not to all of it. It held that some of the information about applicants' experience and qualifications could be provided in an anonymised form, without breaching their rights under Data Protection legislation. The IC ruled that the Council must provide the information requested "either by redacting (editing) the application forms so that all information from which a candidate could be identified was removed, or by supplying brief summaries of applicants' experience and qualifications."

Clearly this presents public sector employers with a dilemma as it may now be possible for unsuccessful candidates to access information from the interview selection process and to use this information in a discrimination claim against the employer. Employers must be careful in handling the selection process with a view to minimising the risk of a discrimination claim in the tribunal. In particular, while it is important to take detailed notes during the interview process there should be no written references to an applicant's suitability or otherwise for a post based on factors such as their age, sex, religion, race or any disability. The full decision of the IC can be viewed here:-

http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50184888.pdf

ASSOCIATIVE DISABILITY DISCRIMINATION

An English Employment Tribunal recently held in *Coleman v Attridge Law LLP* that the Disability Discrimination Act (DDA) can be construed to outlaw discrimination (including harassment) on the ground of a person's connection with someone who is disabled. Employees who care for the disabled already have a right to time off for emergencies involving those under their care and they also have the right to request flexible working. This recent decision effectively means that such employees can have recourse to the DDA where they are treated less favourably in relation to their duties of caring. For example, if an employer refuses an employee's request for flexible working when such a request relates to their caring responsibilities, an associative disability discrimination claim might result.

BRUSSELS BOMBSHELL ON HOLIDAY ACCRUAL FOR LONG-TERM SICK

Last month the European Court of Justice (ECJ) issued its decision in *Stringer v HMRC* on the issue of holiday accrual for workers on long-term sick leave. The ECJ ruled that all workers are entitled to up to 4 weeks of holiday pay for every year they are on sick leave. It has also ruled that holiday not taken by an employee on sick leave in one holiday year can be carried over into the next holiday year. This will be in addition to any holidays the employee is entitled to for the next leave year. The ECJ's decision is immediately effective for public sector employers but it does not have retrospective effect, i.e. it will only affect workers on sick leave from the date of the decision. Private sector employers must wait until the House of Lords (who referred the matter to the ECJ) rules on the matter although it is also likely that changes will be introduced by Government to amend the Working Time Regulations, which currently prevent statutory minimum holiday entitlement being carried over from one year to the next.

NEVER TOO OLD TO CLAIM

Selina Scott, the former Channel Five News reader and Television Presenter, has reportedly settled her Age Discrimination complaint against Channel Five. Mrs Scott reportedly received £250,000 following her complaint of age discrimination against Channel Five when the channel unlawfully reneged on an agreement for her to stand in for a fellow Newsreader on maternity leave. In June 2008 the Channel had announced that two other Newsreaders, aged 28 and 32, would instead cover the maternity leave. Mrs Scott had argued that her contract was terminated at the last minute because she was "too old".

The Employment Team

Please do not hesitate to contact any member of our Employment Team to discuss the Employment Update or any other employment law/HR matter.



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Michael has a wealth of expertise regarding employment and discrimination law, working with both the private and public sectors. The advice he provides ranges from all aspects of discrimination law, equal pay, breach of contract, restraint of trade and employee relations through to unfair dismissal, disciplinary issues, redundancy, executive severance packages, health and safety, TUPE, data protection and employment aspects of commercial transactions.



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Aisling joined our Employment Unit in 2001 and now handles wide-ranging employment and discrimination cases. Her approach has achieved successful conclusions and fulsome praise from clients representing both the public and private sector. Phrases like 'professional support and guidance', 'good piece of work which clarified our thinking', 'quick turnaround time' show that Aisling's style gets results.



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Claire advises clients on a variety of Employment and Equality issues, both contentious and non contentious, including employment contracts and policies, dismissals and redundancies, unlawful discrimination and the Working Time Regulations. Claire also liaises with the Corporate department to assist with employment related matters in the acquisition and disposal of companies.

For further details on our Employment practice please see our website www.cfrlaw.co.uk