

EMPLOYMENT UPDATE

August 2009



Welcome to the third edition of CFR's Employment Update highlighting some recent interesting legal developments for employers.

In this issue, we focus on the Stringer case concerning holiday leave entitlement for employees off sick, the new "GP Fit Notes", recent equal pay cases and the definition of disability. We hope you find this useful and would be delighted to receive your feedback.

Michael Black, Employment Partner

SICKNESS ON HOLIDAY LEAVE – HMRC -v- STRINGER & OTHERS

The House of Lords has finally delivered its decision in the case of HMRC -v- Stringer & Others. Their Lordships reversed the Court of Appeal ruling that an employee could not take holiday during sick leave and did not accrue holiday if absent for an entire leave year. The judgment also confirms that claims for holiday pay can be pursued in the Tribunal by way of a claim for unlawful deduction of wages. Unfortunately, employers will be left with increased employment costs as a result of the Decision and it is feasible that these costs could be substantial where employees have been absent from work for a sickness over a number of years. It serves as a reminder to employers to take action swiftly where it is clear that employees will be on long term sick. Employers should review how many employees are absent and whether such staff have requested or have been allowed to take holiday. Employers should also ensure that they review any relevant PHI policy to determine the impact on the cover from holidays being taken during long term sick leave. In this situation, employees who assert their right to holiday should be advised of the adverse repercussions.

GP FIT NOTES

Government recently unveiled the new proposed medical fit note to replace the existing sick note. The changes are due to take effect next Spring and it is intended that the new "fit note" will give an employee's GP the option to indicate if they are "fit for some work now". Where the GP does so, he will be required to take a record of the employee's condition to facilitate discussion between the employer and employee about what steps can be taken to achieve the employee's return to work. The new note is aimed at getting people back to work as quickly as possible and while the exact form of the note remains unclear it is intended that they will be computer generated in GPs' surgeries. GPs will be encouraged to focus on identifying ways to get the employee back to work such as a phased return or a change of working hours. Employers will not be bound by the GP's recommendations and will remain responsible for ensuring that the employee is fit to return to work in line with Health and Safety legislation and the Disability Discrimination Act 1995.

DOCTOR WINS RIGHT TO LEGAL REPRESENTATION

In the recent case of *Kulkarni -v- Milton Keynes Hospital NHS Foundation Trust [2009]* the English Court of Appeal held that a Dr L was contractually entitled to be represented at an internal disciplinary hearing by a lawyer. The Court of Appeal went on to say that while the decision was based on the doctor's employment contract, Article 6 of the European Convention on Human Rights also implied a right to legal representation in the civil proceedings in such circumstances.

In this case the doctor was facing a potential dismissal following an allegation of sexual assault by a patient which was also tantamount to a criminal matter. The Trust had denied the doctor legal representation and he sought a declaration that this was unlawful and in breach of contract in the High Court on the basis that the Trust had a discretion to allow him to be legally represented and that their refusal was a breach of natural justice and denial of his Article 6 rights. The High Court rejected his arguments but he was successful in the Court of Appeal whose obiter comments that an employer's refusal to grant legal representation in a case which engaged Article 6 would be unlawful or significant. Leave to appeal to the House of Lords has been granted.

The case follows on from the recent High Court case of *R (On the Application of G) -v- The Governors of X School and Another [2009]* in which the serious nature of the misconduct allegations against the teacher and the severity of the consequences if they were upheld meant that the employee was entitled to an "enhanced measure of procedural protection". However, the High Court expressly stated that this decision was not intended to have wider implications and this case is also currently under appeal to the Court of Appeal.

DISABILITY DEFINITION WIDENED IN SCOPE

The recent case of *SCA Packaging -v- Boyle* heard by the House of Lords has led to the likelihood that more illnesses will qualify as a disability under the Disability Discrimination Act 1995 ("DDA"). Under the DDA employees are viewed as disabled where treatment corrects the problem provided that it is "likely" their disability would return without treatment. In this case the employee's hoarseness from nodules on her vocal chords was managed by sticking to a strict health regime. Their Lordships held that "likely" should be interpreted liberally and meant "could well happen" which is a more liberal test than the alternative and stricter "more probable than not" interpretation previously applied. The employee satisfied this test and the case will now return for a full hearing.

DISPUTE RESOLUTION REVIEW

DELNI has published a consultation seeking the views on proposals for changes to procedures for resolving employment disputes; preventative measures; the future of statutory procedures for resolving disputes; better use of alternative dispute resolution techniques and possible changes to employment related tribunals. This paper is said to be broadly similar to the changes which took place in April 2009 in Great Britain effecting changes to issues such as the abolition of Statutory Dismissal and Grievance Procedures (DGP) and the introduction of a new code on DGP.

The consultation closes on 4 September 2009.

EQUAL PAY “PIGGY BACK” CLAIMS

The Employment Appeals Tribunal, in *South Tyneside BC -v- McAvoy*, has held that a man may validly pursue a “Piggy Back” equal pay claim by comparing himself with a woman who herself has succeeded in an equal pay claim with a higher paid male comparator. Furthermore, the EAT also decided that such a claim can be brought contingently, even before the woman’s right to equal pay has been established by a tribunal and that in such circumstances, a man has the same right to payment of arrears.

This English decision is not binding on the Northern Ireland Tribunal although it is persuasive. This decision is likely to see an influx of “Piggy Back” equal pay claims.

EQUAL PAY TIME LIMITS ON TUPE TRANSFERS

In *Gutridge -v- Sudexo*, the majority of the English Court of Appeal held:-

1. Claims for equal pay losses, which have accumulated during employment up to the date of the transfer of the undertaking to the transferee (the new employer), must be brought against the transferee within 6 months of the date of the transfer (otherwise such claims would be barred by limitation rules):
2. Claims for losses after the date of the transfer can be initiated against the transferee for up to 6 years losses from the date of the claim. Such claims must be initiated within 6 months of the termination of the new employment.

In this case the female “Domestics” or “Cleaners” were employed by an NHS Trust prior to 1 July 2001. Their comparators were male maintenance assistants who were also employed by the Trust prior to and after 1 July 2001. The female claimants transferred to the respondent employer on this date by virtue of the Trust sub-contracting the Domestic Services Contract.

Although this is an English case it is of persuasive authority in Northern Ireland and as the same principles apply in both the Northern Irish and English TUPE Regulations, it is likely to be followed in this jurisdiction. The effect of this case is that employers that assume public sector service contracts will continue to be liable for equal pay claims long after the transfer has taken place for as long as those transferred employees remain employed. The loss would be based on the earnings of comparators employed by the public authority before the transfer occurred. Therefore, employers taking over such contracts should engage in thorough employment due diligence to ascertain any potential liabilities.

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.

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