

EMPLOYMENT LAW UPDATE

Employment Law News from Flint Bishop LLP

Autumn 2009

Welcome to the autumn edition of the Flint Bishop newsletter.

In this edition we report on the Spanish case of Pereda which ruled that workers who fall sick on holiday can reclaim their entitlement to annual leave at another time and the long awaited outcome on the Heyday case.

It has been a busy time recently for employment law as you will see in this newsletter. It has also been a busy time in the employment team at Flint Bishop and we are pleased to welcome Laura Evans as a newly qualified solicitor into the team. Laura joins us after having completed her 2 year training contract at Flint Bishop. We wish Laura all the very best for her future career.

Workers can reclaim holidays lost to sickness

The European Court of Justice (ECJ) has recently handed down its decision in Pereda v Madrid Movilidad SA, a Spanish case. The ECJ found that an employee who does not wish to take annual leave during a period of sickness absence must be allowed to take the leave at some other time, even if this means that it needs to be carried over to the following year.

The ECJ considered that the purpose of the entitlement to paid leave is to enable the worker to rest and enjoy a period of relaxation and leisure. Sick leave on the other hand is given so that the worker can recover from being ill.

This case means that employees who fall sick whilst on leave could claim back their entitlement, (although this case concerned an employee who fell sick before his leave).

Public sector workers can gain the benefit of Pereda with immediate effect. Workers in the private sector may have to wait until the Working Time Regulations 1998 is amended by national law. Please note that this case only applies to Working Time Regulation holiday entitlement.

“ Our team are always here to help with any query no matter how large or small. ”

Rob Tice
Head of employment law



National minimum wage update

With effect from 1 October 2009 national minimum wage (NMW) rates will increase as follows:

- Standard (adult) rate (workers aged 22 or over): £5.80 (rising from £5.73).
- Development rate (workers aged between 18 and 21): £4.83 (rising from £4.77).
- Young workers rate (workers aged under 18 but above the compulsory school age that are not apprentices): £3.57 (rising from £3.53).

Where an employer provides a worker with accommodation, the cost of that accommodation can count in part towards the employer's liability to pay the NMW, but there is an upper limit on the amount that may be offset (the accommodation offset). This will rise from £4.46 per day to £4.51.

Another change to the NMW which will become effective on 1 October 2009 is that it will be unlawful for service charges, tips and gratuities processed through the payroll to count towards the employer's payment of the national minimum wage. The British Hospitality Association (BHA) has published a Code of Practice on Discretionary Tips and Service Charges to assist employers in complying with this.

Increase in statutory redundancy pay

It was announced in the 2009 Budget that a week's pay for the purposes of calculating statutory redundancy pay will be increased to £380 (resulting in a maximum potential payment of £11,400).

This will come into force on 1 October 2009. The annual uprating of this figure in February 2010 will be suspended, and the amount will remain unchanged until February 2011.

It's lawful to retire at 65

The High Court has ruled on the long awaited Heyday case, which was a challenge brought by Age Concern and Help the Aged against the default retirement age of 65. This is good news for employers, especially for those employers who operate a retirement policy at 65. However, the Government is set to review the default retirement age in 2010, so its likely that this debate will continue for some time. We will keep you updated on this.

Fit note vs. Sick Note

Government plans to introduce a fit note to replace the current sick note are expected to be introduced in April 2010.

The fit note if introduced will be electronic rather than hand written. It is designed to help more people stay in work rather than drift into long term sickness. The current sick note system gives no consideration as to whether an employee is fit to perform certain duties.

Under the new system a GP will have the opportunity to give their view on what the individual employee can do, despite their illness. Likewise, this enables employers to consider to what extent their work can be adapted to hasten a return.

It is estimated that some 172 million working days were lost due to absence in 2007, at a cost of £13 billion to employers. Most of these absences lasted more than 4 weeks.

Motive is irrelevant in direct race discrimination case

In *Amnesty International v Ahmed* the EAT confirmed that an employer that treats an employee less favourably on racial grounds cannot escape liability for direct discrimination simply because it has a benign motive for its actions. Therefore, employers should be aware that an unconscious motive or act could in some circumstances amount to less favourable treatment on discriminatory grounds.

In this case Amnesty declined to promote an employee to the position of Sudan researcher because of her northern Sudanese ethnic origin. They were concerned that appointing someone of her ethnic origin would compromise impartiality and expose her to safety risks.

Vanity Fair?

Ms Dean was employed by Abercrombie and Fitch in their Saville Row branch. The company operates a strict look policy which stipulates what uniform should be worn, how long hair and nails should be, etc. Ms Dean had a prosthetic arm and it was agreed that she could wear a cardigan to cover the link between her arm and the prosthesis. Ms Dean claimed that she was instructed to remove her cardigan as it did not comply with their strict look policy. She was later told to leave the shop floor and work in the stock room.

MS Dean issued tribunal proceedings under the Disability Discrimination Act 1995 and was awarded £7,800 for injury to feelings. The tribunal found that the act was unlawful harassment.

An increasing number of employers now have look policies. They are most commonly found in the retail, beauty, fashion and hospitality industries. Such policies are lawful provided that they are not discriminatory. However, such policies carry risks and can be difficult to justify.

United Kingdom Supreme Court

From 1 October 2009 the Supreme Court replaces the appellate committee of the House of Lords as the highest court in the UK. The Court will hear appeals on arguable points of law of the greatest public importance, for the whole of the United Kingdom in civil cases, and for England, Wales and Northern Ireland in criminal cases.

Additional Paternity leave

The Government has announced plans to introduce additional paternity leave for parents of babies due on or after 3 April 2011. This new right will apply where the mother ends her maternity or adoption leave early, and it will enable the father in effect, to take the remainder of that leave. Namely, they will be able to take 3 months paid at the statutory rate and 3 months unpaid. The proposal to increase Statutory Maternity Pay from 39 weeks to 52 weeks is still on hold.

Messing with the Law

Staff from the legal firm, Flint Bishop LLP of Derby came to the rescue of local charity, The Arkwright Society of Cromford Mill this week by giving up their weekend to help clear out one of the Grade I listed buildings on the site. Over the last 30 years the building has been used as a storage area for machinery and building materials but now the space is desperately needed for a temporary exhibition.

Sarah McLeod, Director of the Arkwright Society said "We have extensive plans to create a World Heritage Site Gateway on the site but this will take at least two years to complete and open to the public. In the meantime we want to ensure that the public have an opportunity to see the plans for themselves so we really needed the space cleared for a temporary exhibition. The exhibition will not only inform people about the history of the Mill but equally as important, it will give the Society an opportunity to consult with the public about the new development. Flint Bishop have done a marvellous job in extremely dusty and dirty conditions. We are very grateful"

Lynsey Bowen from Flint Bishop added "It is so important for the people to realise the importance of the site and the ground breaking engineering that happened there under Richard Arkwright. It will be great to see the temporary exhibition completed and educating the public."

The temporary exhibition is planned to open in the Spring 2010. Further details can be obtained from the Arkwright Society at info@arkwrightsociety.org.uk

We are keen to ensure our articles and commentary are of interest to our audience and welcome your **feedback** and any **suggestions** you might have as to future articles.

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