

# EMPLOYMENT LAW UPDATE

Employment Law News from Flint Bishop Solicitors

Issue2 Spring 2009

## Welcome to the spring edition of the Flint Bishop newsletter.

In this edition we look at the Heyday challenge to the default retirement age of 65. We look at a recent decision concerning entitlement to holiday pay for employees on long term sick leave. We explain how the statutory dispute resolution procedures are changing and look at a recent interesting case on compensation. Finally, there is a summary of forthcoming legislation to look out for.

### Heyday: It's not over yet

The National Council on Ageing, known as Heyday, sought an application to the courts seeking a declaration that parts of the age discrimination legislation were incompatible with EU law.

Current legislation permits employers to retire employees at the age of 65. This main focus of the application was whether this was lawful. The English courts stayed the case and referred it to the European Court of Justice (ECJ).

On 5 March 2009 the ECJ gave its judgment and found that a national rule permitting employees to be retired at aged 65 or over could, in principle, be justified.

The case will now go back to the English courts who will decide whether our national retirement age can be justified.

Regardless of what happens, the Government is committed to reviewing the retirement age in 2011. It may be that a lawful retirement age of 65 is scrapped.

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

Rob Tice  
Head of employment law



## Double recovery

In *Stuart Peters Limited v Bell* [2008], Ms Bell was successful in a constructive unfair dismissal claim and the Tribunal had to consider if she was entitled to be paid in lieu of her 6 months notice. When the original Tribunal did not offset her earnings from income received during what would have been her 6 month notice period, the employer appealed to the Employment Appeal Tribunal (EAT). The EAT dismissed the appeal and supported the Tribunal's decision.

This case confirms that where an employee is unfairly dismissed (either expressly by their employer or constructively, ie they resign in response to the employer's behaviour) they do not have to give credit for earnings from new employment during the period equivalent to their notice period, where they have not received proper notice.

## Holiday rights for the long term sick

The ECJ has delivered its judgment on *Stringer and others v HM Revenue and Customs*. This case concerned the rights of employees to annual leave whilst on long term sick.

The ECJ reached the following conclusion:

- 1 A worker must be allowed to carry over annual leave, if they are on long term sick and unable to take that leave.
- 2 The question of whether a worker is able to take annual leave during a period of sick leave is a matter for the English courts to decide.
- 3 Finally, annual leave must be paid when employment ends, that is regardless whether they have been off sick for the whole year or part of the year.

This judgment, whilst it is a success story for employees, will likely have significant financial consequences for employers. For those working in the public sector, this ruling will apply with immediate effect. For those working in the private sector, it will now be for the English courts to determine how this judgment will be applied. We will report again on this issue.

## New statutory procedures

The Employment Act 2008 will come into force on 6 April 2009. The main aims are to abolish the statutory dismissal and disciplinary procedures and the grievance procedures. The statutory procedures will be replaced by the new ACAS Code of Practice on Discipline and Grievance ("the ACAS Code"), this can be found at [www.acas.org.uk](http://www.acas.org.uk). Employers must refer to this code as the Tribunals will take it into account when deciding if a dismissal is fair.

Although the statutory procedures are abolished the Act still gives tribunals discretion to increase or reduce awards by up to 25% in certain cases where the employer or employee unreasonably fails to comply with the ACAS Code.

The Code is also supplemented by a non statutory guide, "Discipline and grievances at work: The ACAS guide", which gives further guidance on best practice. While the guide does not have to be taken into account by Tribunals, it does contain some useful guidance that has been developed from case law. Thus, it should not be ignored when dealing with any disciplinary or grievance issues.

A copy can be found at <http://www.acas.org.uk/CHttpHandler.ashx?id=981&p=0>

It should be noted that whilst the Act comes into force on 6 April 2009, there are transitional provisions that will apply.

## April 2009 – What's in the pipeline?

- **1 April 2009** – statutory annual leave entitlement will be increased from 4.8 weeks to 5.6 weeks.
- **6 April 2009** – extension of the right to request flexible working to parents of children under the age of 17.
- **6 April 2009** – the statutory dispute resolution procedures will be repealed in their entirety. There will no longer be fixed periods of conciliation for using ACAS. Employment Tribunals will have the power to reach judgments without the need for a hearing.
- **6 April 2009** – statutory sick pay will be £79.15 (up from £75.40). The weekly rate for statutory maternity, paternity and adoption pay will be £123.06 (up from £117.18)

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.

But, if you do not wish to receive future issues of Employment Law Update, please **click here** and we will remove you from our database.

Flint  
Bishop  
SOLICITORS

Lexcel  
Practice Management Standard  
Law Society Accredited



*Putting you first*