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**February 2009**

# EUROPEAN EMPLOYMENT LAW BRIEFING

## IN THIS ISSUE

**CASES:**



**NEWS:**

## CASES

**Member States are free to determine the conditions in which paid annual leave may be taken, but must not subject the right to any preconditions.**

In the conjoined cases of *Schultz-Hoff v Deutsche* and *Stringer & Others v HM Revenue & Customs* the European Court of Justice ("ECJ") made a preliminary ruling concerning the interpretation of Directive 2003/88/EC (the "Directive"). This Directive lays down the minimum safety and health requirements for the organisation of working time, including annual leave requirements.

The ECJ held that it was for each Member State to determine the conditions for the exercise and implementation of annual leave. Member States should prescribe in their domestic legislation the circumstances in which a worker may take annual leave, without subjecting the right to any preconditions.

Each Member State is free to determine whether or not paid annual leave can be taken during any period of sick leave. If national legislation forbids a worker from taking paid annual leave during sick leave the worker must be given the opportunity to exercise their right to paid annual leave during another period.

Despite any national legislation to the contrary, the right to paid annual leave is not extinguished at the end of the leave year where the worker was on sick leave for the whole or part of the leave year and has not had the opportunity to exercise their right to paid annual leave due to such illness.

On termination of the employment relationship the worker is entitled to payment in lieu of paid annual leave accrued, but not taken.

*What do employers need to consider?*

Employers should review their paid annual leave and sick leave provisions to ensure that they are compliant with this judgment.

**Under TUPE employers are only required to give their view of the implications of a transfer of an undertaking and are not in breach of their information and consultation obligations if that view is not correct.**

*In Royal Mail Group Ltd* ("RMG") *v Communication Workers Union*, the Post Office Ltd ("PO"), a wholly owned subsidiary of RMG, operated a network of post offices. RMG decided to transfer a large number of post offices to WHSmith.

PO accepted that there was a transfer of an undertaking by the creation of the WHSmith franchise but believed that the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") did not operate to transfer any employees, because of PO's policy of either redeploying employees or permitting them to accept voluntary redundancy before the transfer. There were a series of meetings between the union and PO and it became apparent that the parties had differing opinions about the application of TUPE.

Affected staff were told that they could either remain in service or receive voluntary redundancy. In addition, WHSmith offered bonuses to staff who joined them. The staff were told that they would not have a claim under TUPE because of the offer of re-deployment.

When the transfer took place not all of the employees had left or been redeployed. In addition, some fixed-term and temporary staff were dismissed at the point of the transfer. The Union claimed that there was no proper information and consultation process, as required by regulation 13, TUPE.

The Employment Appeal Tribunal held that TUPE applied to some of the employees and did transfer some employment contracts to WHSmith. PO was not in breach of TUPE by misstating the effect of TUPE or by identifying the measures it proposed to take on the premise that its analysis of TUPE was correct. There was no evidence to suggest that PO did not genuinely believe the position that they had adopted.

The EAT held that under regulation 13, TUPE employers are only required to provide their view of the legal implications of the transfer and are not in breach of their information and consultation obligations if that view is not correct. The purpose of regulation 13 is to enable the union to understand, and if necessary take issue with, the employer's perception of the situation and the steps that the employer is proposing to take with respect to that transfer. The employer is therefore only obliged to inform about the measures that are envisaged.

If the aim of the information and consultation requirements was for the employer to provide legally accurate information then TUPE would have made this clear. The EAT added that there would be no defence for an employer who alleged that they did not inform or consult at all because they did not believe that there was a TUPE transfer.

*What do employers need to consider?*

An employer should seek to provide information prior to a transfer as accurately as possible. If a tribunal decides that the employer has deliberately or recklessly misled employee representatives or trade unions it would be open to it to find the employer had failed to comply with the information and consultation requirements of TUPE and award compensation, which may be substantial.

**If an administrator intends eventual liquidation employees may not transfer under TUPE.**

In *Oakland v Wellswood (Yorkshire) Ltd* Mr Oakland was the director, shareholder and employee of Wellswood Ltd ("Oldco"). Oldco ran into financial trouble. Mr Oakland found a buyer to purchase Oldco but the buyer was not willing to purchase Oldco as a going concern. Consequently, a pre-pack administration method was utilised: Oldco was put into administration and the buyer incorporated a new company Wellswood (Yorkshire) Ltd ("Newco"). Newco would thereby purchase the assets of Oldco but would not be liable for the existing book debts.

Oldco appointed two insolvency practitioners to act as Joint Administrators. On the same day Oldco sold its assets to Newco. Newco acquired Oldco's premises and several employees, including Mr Oakland. The employees, other than Mr Oakland, received redundancy payments from the Secretary of State.

The Joint Administrators reported that the primary aim of the administration, to rescue Oldco as a going concern, would not be possible. Instead, they focused on achieving the best result possible for the creditors rather than simply winding up Oldco immediately.

Subsequently, Newco dismissed Mr Oakland and he brought a claim for unfair dismissal. Newco alleged that Mr Oakland did not have the qualifying service of one year and was not eligible to commence an unfair dismissal claim. Newco alleged that Mr Oakland's employment did not transfer automatically and consequently there was no continuity of employment between Oldco and Newco.

Under regulation 4 of TUPE, where there is a relevant transfer of an undertaking, the employees employed by the Seller will automatically transfer, together with all their rights and liabilities, to the Buyer. Under regulation 8(7), where the transferor is "subject to bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor", the employees do not automatically transfer. The EAT had to consider whether administration could fall within 8(7).

The Employment Appeal Tribunal held that there was a relevant transfer, within the meaning of regulation 3 TUPE. Oldco was subject to insolvency proceedings and had appointed Joint Administrators. In addition, the insolvency proceedings were instituted with a view to the liquidation of the assets of Oldco. These factors collectively meant that Regulation 8(7) TUPE was applicable and consequently the employees did not transfer.

Parliament did not specify which particular insolvency proceedings are to be characterised as having been "instituted with a view to the liquidation" of the transferor company's assets. The Department for Business, Enterprise and Regulatory Reform advice is that administrations do not fall within regulation 8(7) TUPE because they are not opened with a view to liquidating assets and are not analogous to bankruptcy proceedings. However, the EAT concluded that the appointment of the Joint Administrators was with a view to the eventual liquidation of the assets of Oldco and that regulation 8(7) was applicable.

This decision was also driven by policy, namely the 'rescue procedure', whereby purchasers are not deterred by the effects of TUPE.

*What do employers need to consider?*

This case will make pre-pack administration business sales more attractive to buyers as employees may not transfer under TUPE and consequently employee claims may be avoided.

There is also scope to enable the buyer to negotiate new, and perhaps reduced, employment contracts to those previously agreed by the purchasing company.

**A company policy forbidding employees from wearing a cross visibly may not amount to indirect religious discrimination.**

In *Eweida v British Airways Plc* ("BA") Ms Eweida, a devout practising Christian, worked for BA as a part time member of the check-in staff. BA adopted a uniform policy which permitted employees to wear anything under their uniforms, provided it was not visible. BA made exceptions for religious items which were part of a "mandatory" scriptural requirement and could not be concealed; such exceptions included the turban, hijab and skull cap.

Contrary to this policy, Ms Eweida insisted on wearing a plain silver cross visible over her uniform. She accepted that it was not an article of her faith to wear a cross in that manner, but instead she felt it was a personal expression of her faith. She was warned and sent home.

BA offered Ms Eweida an alternative job which would not require her to abide by the uniform policy, thus enabling her to wear the cross necklace. She refused and remained absent from work until BA later amended its uniform policy. The policy was amended to allow staff to display a faith or charity symbol on their uniform, provided that it was approved by BA.

Ms Eweida alleged harassment and both direct and indirect discrimination on the grounds of religious belief, contrary to the Equality (Religion or Belief) Regulations 2003. The claims were rejected. She appealed against the decision of indirect discrimination.

The Employment Appeal Tribunal held that Ms Eweida was not indirectly discriminated against on the ground of her religion or belief. There was no evidence that Christians, as a group, were put at a particular religious disadvantage when compared with non-Christians. Ms Eweida failed to adduce evidence to suggest that a significant number of people, other than herself, shared her strong religious view that she should be entitled to wear the cross visibly and her appeal was dismissed.

*What do employers need to consider?*

Employers implementing a uniform policy must ensure that it does not unlawfully discriminate against religious groups. This case led to significant media coverage and campaigning activity. Employers should, where possible, treat employee requests for exceptions to a uniform policy for religious reasons in a sensitive manner and should consult with employees with a view to reaching an amicable conclusion.

**Following resignation in the heat of the moment, provided the employee is given a reasonable "cooling off" period, the employee's resignation may be deemed effective.**

In *Ali v Birmingham City Council* ("BCC"), Mr Ali claimed he was, due to personal circumstances, under "pressure, stressed out and couldn't think straight" and resigned. BCC offered him a 20 minute cooling-off period to reconsider his decision. He was still distressed after the 20 minute period and consequently BCC offered him a further 10 minute cooling-off period. He then confirmed his resignation. Subsequently, Mr Ali telephoned BCC and was told that because he had resigned he did not have an automatic right to return. He was later informed that his contract would not be reinstated and that his resignation was effective.

Mr Ali claimed he had been unfairly dismissed. The Employment Tribunal held that the resignation was effective and that it did not have jurisdiction to hear his claim. He appealed to the Employment Appeal Tribunal.

The EAT upheld the ET's decision: the use of unambiguous words was held to be an effective resignation, subject to a number of exceptions, such as resignation in the heat of the moment, whereby an otherwise unambiguous resignation may not be effective.

There was no evidence that Mr Ali had acted in the heat of the moment when he resigned. In any event, BCC had given him the opportunity to reflect and he still remained adamant about his decision. He did not ask for the resignation to be rescinded until more than four days after he had resigned. Consequently, the EAT held that there was strong evidence to suggest that the resignation was a clear decision.

The decision of the ET could only be challenged by demonstrating an error of law, which was not established in this case. The ET had considered the question of whether Mr Ali was given a reasonable period of time to reflect upon his decision and concluded that BCC "very properly gave the Claimant an opportunity to reflect".

In any event, Mr Ali waited four days before attempting to rescind his resignation. Previous case law suggests that parties should only be entitled to a short space of time, one or two days, to retract their actions. Consequently Mr Ali's case would have failed even if it was considered to be one of the special circumstances.

*What do employers need to consider?*

In cases of resignation in the heat of the moment an employer should allow the employee a reasonable opportunity to reflect upon their decision. The employee should be given time alone to consider the decision. In this case the employee was given 30 minutes to reflect, however previous case law has indicated one to two days as the appropriate time period.

**Providing special priority payments to officers working 24/7 rotating shift patterns is not contrary to the Equal Pay Act 1970.**

In *Blackburn & Anor v West Midlands Police* the appellants, female "front line" police officers of the West Midlands Police, commenced proceedings under the Equal Pay Act 1970. The 1970 Act ensures that the contractual terms under which a woman is employed are no less favourable than those under which a male comparator is employed. However, if the employer can establish a genuine non-sex reason for a difference in pay it will provide a defence to a claim under the 1970 Act.

The Police Regulations 2003 govern the payment of allowances to police officers. Under a national agreement, targeted at frontline/operational officers, a Special Priority Payment Scheme (the "Scheme") was devised. The Scheme benefited those officers "whose published, rostered working patterns either involve a shift pattern or regular working hours covering a bandwidth of at least 4 hours between midnight and 6:00am over a cyclical 168 hour period".

Whilst front line police officers are generally required to work a 24/7 rotating shift pattern the appellants were excused from such shift work by reason of their childcare responsibilities. They alleged that they were employed on like work with their male comparators who received special priority payments and that they too should receive such payments. They argued that they were indirectly discriminated against because the Scheme had a disparate impact on women and put them at a particular disadvantage when compared with men.

The High Court held that the objective, to single out and reward those individuals working night shifts, could not be achieved if those who did not work night shifts also received the special priority payments. The consequence of this objective is that the predominantly male group is paid more than the predominantly female group for some reason other than sex. It was held that whilst it is "desirable that employers adopt flexible working practices which will enable women to work part-time or at hours compatible with their childcare", the Act does not require employers to pay women on the "basis of the work they would have done if they had not had the childcare responsibilities". Consequently, the wish to reward night-time working was a legitimate aim and the 24/7 rotating shift requirement corresponded with that aim.

*What do employers need to consider?*

Employers should ensure that the contractual terms under which a woman is employed are no less favourable than those under which a male comparator is employed. If the contractual terms do put women at a disadvantage to their male comparators the employees' pay must be equalized unless there is a genuine reason for the difference not based on sex.

If an employer wishes to reward a particular group of employees it must always identify a legitimate objective and ensure that the means adopted correspond with that objective.

**"Homophobic banter" could be harassment even where the victim is known not to be gay**

In *English v Thomas Sanderson Limited* the Court of Appeal held that "homophobic banter" directed at an employee could be harassment under the Employment Equality (Sexual Orientation) Regulations 2003 (the "Regulations") even where the victim is not gay or is not believed to be gay. The court held that repeated use of offensive phrases relating to an individual's sexuality will amount to harassment under the Regulations, irrespective of the victim's actual or perceived sexual orientation.

## LEGISLATION

**Employment Act 2008**

The Employment Act 2008 (the "Act") received royal assent on 13 November 2008 and is expected to come into force in April 2009.

- The Act will repeal the statutory dismissal, disciplinary and grievance procedures with effect from 9 April 2009. Employers and employees will no longer be required to comply with the statutory procedures governing dismissals and disputes in the work place. Instead, tribunals will be entitled to refer to the new

ACAS code of practice on disciplinary and grievances when determining the majority of employment cases.

- Tribunals will have discretion to make adjustments to compensation of up to 25% in the case of non-compliance by the employer or the employee with the relevant code. The relevant code includes the new ACAS Code of Practice or a code issued by the Secretary of State.

- Section 98A of the Employment Rights Act 1996, concerning procedural fairness, will also be repealed. Tribunals will need to refer to the previous case law on procedural fairness, including *Polkey v AE Dayton Services* where it was held procedural unfairness would automatically give rise to a successful unfair dismissal claim, but a tribunal could reduce an employee's compensatory award to reflect the chance that there would have been a fair dismissal irrespective of the procedural failings.

In light of the amendments to the dispute resolution procedures, ACAS has revised a new code of practice. The Code has been approved by the Secretary of State for Business, Enterprise and Regulatory Reform. The Code is, however, awaiting approval from Parliament. The Code is due to come into force from 6 April 2009.

**Disability Discrimination consultation paper; Improving Protection from Disability Discrimination**

The government has produced a consultation paper, "Improving Protection from Disability", highlighting the proposed amendments to disability discrimination law. The consultation paper considers how the concept of disability discrimination will be approached under the proposed Equality Bill.

Currently, the Disability Discrimination Act 1995 provides for the concept of disability-related discrimination. Recent case law has complicated this area of law and made it increasingly difficult for a disabled person to establish disability-related discrimination.

The consultation paper proposes abolishing the concept of disability-related discrimination, and instead adopting the concept of indirect discrimination. The concept of indirect discrimination is utilised in other UK anti-discriminatory legislation. The basic premise is that where an apparently neutral provision, criterion or practice ("PCP") puts, or would put, individuals with a protected characteristic (such as race, sex, or as proposed, disability) at a particular disadvantage compared with others it will be indirectly discriminatory, unless the PCP can be justified as being a proportionate means of achieving a legitimate aim. Consequently, under the proposals, once a prima facie case of indirect discrimination has been established the employer will only be able to defend the claim if they can prove that the PCP was objectively justified.

In addition, the consultation proposes the introduction of a requirement that an employer who is under a duty to make reasonable adjustments for a disabled person must do so before attempting to justify any claim of indirect discrimination.

**Flexible Working Proposals**

Currently, a qualifying employee may request flexible working arrangements in order to care for a child under 6 years of age (or 18 years of age if the child is disabled). The Minister for Employment Relations and Postal Affairs has confirmed that, with effect from April 2009, the right to request flexible working will be extended to parents of children up to the age of 16.

**Current Statutory Rates**

| Type of Payment | From April 2009 | From April 2008 |
|---|---|---|
| Statutory Annual Leave Entitlement | 5.6 weeks | 4.8 weeks |
| Statutory Maternity, Paternity and Adoption pay | £123.06 per week | £117.18 per week |
| Standard rate of Statutory Sick Pay | £79.15 per week | £75.40 per week |

If you have any questions concerning the material discussed in this client alert, please contact the head of our European employment team:

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