

# Legal Developments



## Employment – June 2009

### House of Lords rules that holiday pay can be accrued while on sick leave

In *HM Revenue & Customs v Stringer and others*, the House of Lords has overturned a Court of Appeal decision and ruled that workers can bring claims for statutory holiday pay under the *Employment Rights Act 1996*.

The House of Lords' decision follows the European Court of Justice (ECJ) ruling in January that workers do accrue paid holiday for their entire sick leave and must be allowed to take it on their return to work or be paid in lieu of it if their employment ends. As the ruling did not comply with the UK's *Working Time Regulations*, which requires employees to use all their holiday within a year, the House of Lords had to decide whether the ECJ's decision applied in the UK.

This ruling means that a worker who has been denied holiday pay while on sick leave can launch an employment tribunal claim for unauthorised deduction from wages under the Act. Consequently, these workers will be able to take advantage of the more generous time limits that apply to unlawful deduction claims. Unlike the *Working Time Regulations*, which limit claims to three months, a worker will be able to make a claim for unlawful deductions that go back more than three months.

### Increase in statutory redundancy pay will take effect on 1 October 2009

In the 2009 Budget, the Government announced that it would increase the weekly limit used to calculate statutory redundancy pay from £350 to £380. However, no date was given at the time for when the rise would come into force.

The Department for Business, Enterprise & Regulatory Reform (recently renamed the Department for Business, Innovation and Skills) has now confirmed that the increase will take place on 1 October 2009.

Whilst the Government's reasoning behind its decision to increase the limit is to provide more support for those people made redundant, the increase will actually affect all compensation payments to which the week's pay limit is relevant. The introduction of this one-off increase means the annual up-rating of the limit in February 2010 will be suspended. The current limit will therefore remain unchanged until February 2011.

### Government consults on proposed changes to 'sick notes'

The Government is consulting on draft Medical Statement Regulations which will amend the medical statement currently used by doctors to certify sickness.

The Government wants to change the emphasis of the medical statement to help employers and employees focus more on what the individual can do, rather than just their incapacity. The Government therefore aims to replace the

current handwritten MED3 'sick note' with a new 'fit note', which will hopefully quicken the individual's return to work.

The consultation will end on 19 August 2009 and it is hoped that the new 'fit note' will be used from spring 2010.

## National minimum wage increases for October 2009

The Government has announced increases in the national minimum wage, which will take effect from 1 October 2009.

The adult rate will rise from £5.73 to £5.80 an hour; the development rate for workers aged between 18 and 21 will rise from £4.77 to £4.83; and the rate for 16 and 17-year-olds will rise from £3.53 to £3.57.

The adult rate of the minimum wage will be extended to 21 year-old workers from October 2010.

## Paternity leave plan postponed

The Business Secretary Lord Mandelson has postponed plans to allow parents, including people in lesbian and gay civil partnerships, to share a year's paid maternity leave after business leaders complained it would be costly and create a further administrative burden.

The plans would have given fathers six months' paid leave to look after a child once it reached six-months-old, allowing mothers to return to work early. The law currently stipulates that fathers can take either one or two weeks' paternity leave, which must be taken continuously. In addition, the Government also promised to extend paid maternity leave from nine months to twelve months. No date has yet been announced for extending maternity and paternity rights, as the practicality and cost implications of the regulations are being reviewed in the light of the current economic climate.

## Tough new measures announced to enforce tribunal awards

The Justice Secretary Jack Straw has announced new measures to force employers to pay damages awarded against them by employment tribunals. This follows new research by the Ministry of Justice which revealed that 39 per cent of claimants granted awards, covering unfair dismissal, equal pay and workplace discrimination, had not been paid, while only 53 per cent had been paid in full.

Under the new provisions, which are expected to be in place by the end of the year, High Court Enforcement Officers will be given powers to recover awards granted by employment tribunals or agreed upon in out-of-court settlements. They will be allowed to take company stock, machinery and equipment worth the debt owed after just 48 days, without waiting for a County Court judgment.

This announcement comes at the same time as a Court of Appeal ruling in *Rank Nemo (DMS) Ltd v Coutinho*, which said that an ex-employee could file a discrimination case for victimisation against an employer that failed to pay an employment tribunal award owed (further details of this ruling appear below).

## An ex-employee can proceed with a claim for victimisation against ex-employer for non-payment of a tribunal award

In the case of *Rank Nemo (DMS) Ltd v Coutinho*, the Court of Appeal held that the ex-employee could proceed with her claim for victimisation for failure of the ex-employer not to pay her award of £72,500 for race discrimination and unfair dismissal. The reasoning of the Court of Appeal was that other creditors of the Respondent had been paid, and that the non-payment of the award was due to the fact that the Claimant had undertaken a "protected act" for the purpose of discrimination legislation.

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The Respondent tried to argue that the Claimant was trying to enforce the tribunal judgment but that the Court of Appeal was not the appropriate venue to do so. The court held that the fact that an employment tribunal had no jurisdiction to enforce an unpaid award did not prevent it from investigating whether the reason for the non-payment supported a claim for post-termination discrimination.

## Actual comparators needed for claims under Part-Time Workers Regulations

The case of *Carl v University of Sheffield* highlights that under the *Part-Time Workers (Prevention of less favourable treatment) Regulations 2000*, a part-time worker must identify an appropriate full-time worker as a comparator. Unlike other discrimination legislation where the comparator may be actual or hypothetical (which means a higher percentage of cases being filed based on the “hypothetical” concept), this case re-iterates that under the above regulations the comparator has to be actual. To identify a comparator, the part time worker must identify an appropriate full-time worker as a comparator, who must be:

1. employed by the same employer;
2. employed under the same contract;
3. engaged in the same or broadly similar work; and
4. working or based at the same establishment as the part-time worker.

The other issue that was addressed in the above case was whether the part-time worker status should be the sole reason for the less favourable treatment. This case reiterates that the “part-time” status does not have to be the sole reason, but must be the “effective and predominant cause” of the less favourable treatment that the part-time worker complains about.

## Extension in time to bring claim in case of discrimination

All employment tribunals have time limits in which the employee must bring a claim. Before the repeal of the statutory grievance procedures on 6 April 2009, in the case of discrimination (amongst others), if a grievance was raised within 3 months of the date of the act complained of, then the employee had a further 3 months from the expiry of the first 3-month period in which to bring a claim. If a claim was brought outside of this 6-month period, then it would be “out of time” and the tribunal would not have jurisdiction to hear the claim, unless the claimant could show it would not be reasonably practicably to have brought the claim in time.

In the case of *Carter v London Underground Ltd*, the Claimant brought a claim a year out of time due to her severe depression. The Employment Appeal Tribunal (EAT) found that it was reasonable to accept that the severity of the Claimant’s condition would have had a serious impact on the Claimant’s ability to take decisions about legal proceedings. The EAT also found that the act in question had played an important part in the Claimant’s mental deterioration and that the Respondent could not show any serious evidential prejudice resulting from the lengthy delay.

Employees bringing claims must remember that if they bring a claim out of time, they must show that it would have not been reasonably practicably for the claim to be brought on time. Each case will be decided on the facts of each individual case.

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