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Employment Bulletin

January 2009

FORTHCOMING DEVELOPMENTS IN 2009

As ever, there are a number of key developments on the horizon in the sphere of employment law and this article highlights a few of the important issues to look out for this year.

Dispute Resolution

The Employment Act 2008 is due to come into force in April 2009 and will repeal the infamous statutory dismissal/disciplinary and grievance procedures. It was hoped that these statutory procedures would encourage the internal resolution of disputes and consequently reduce the number of tribunal claims being instigated. However, they have had quite the opposite effect, with lawyers frequently becoming involved in disputes at a much earlier stage. Employers have struggled over the practical application of the confusing procedures and this total repeal is being welcomed by all.

The main changes are that, in relation to dismissals after 6 April 2009:

- the concept of automatic unfair dismissal for failing to comply with the statutory dismissal procedure will no longer exist;
- it will no longer be a pre-requisite for an employee to raise a grievance in order to bring a claim in the Employment Tribunal;
- employers will no longer be under an obligation to hear grievances from ex-employees;

- time-limits to bring certain employment claims will not automatically be increased from three months to six months simply due to the filing of a grievance. Most claims will, therefore, need to be brought within a three month time-limit (six months for equal pay and redundancy claims) but Employment Tribunals retain the right to consider claims brought out of time if, in the case of unfair dismissal, it was "*not reasonably practicable*" to bring the claim in time or, in the case of discrimination, where it is "*just and equitable*" to extend the time-limit.

In November 2008, ACAS produced a revised Code of Practice on disciplinary and grievance matters, which is still in draft form and awaiting approval from Parliament. A draft of this code can be found at the ACAS website (www.acas.org.uk) and is likely to be approved before April 2009. The key point to note in relation to the Code of Practice is that failure to follow its terms is not only evidence of an unfair process but could also result in a claimant's compensation being increased by up to 25%. The discretion to apply an uplift lies with the Employment Tribunal.

Annual Leave
As of 1 April 2009, a full-time employee's entitlement to annual leave will be increased from 24 to 28 days, inclusive of bank and public holidays. Most employers already offer in excess of the statutory minimum and therefore this change is unlikely to affect many companies.

Flexible Working
In 2008, the Government commissioned a review by Sainsbury's Head of Human Resources, Imelda Walsh, in relation to the right to request flexible working. As a result of this review, the Government has introduced legislation which comes into force in April extending the right to request flexible working to those with children up to the age of 16.

Equality Bill
The Equality Bill shall continue its progress this year through Parliament. Essentially, the Bill proposes to:

- consolidate the existing discrimination law into one single act;
- extend age discrimination laws to cover the provision of goods and services;
- ban secrecy clauses which prevent employees from discussing salary; and
- widen the scope of positive action so that employers can favour a candidate from an under-represented group when there are two equally qualified candidates.

Agency Workers
On 5 December 2008, an EC Directive on temporary workers was published and agreed by the UK. This Directive gives member states until 5 December 2011 to implement its provisions into national law and seeks to give agency workers equal treatment to permanent employees after 12 weeks' employment.

Working Time
In December 2008, the European Parliament reviewed the UK's use of the opt-out of the 48-hour working week and decided that this should be abolished in the next three years. However, for the moment the UK is being allowed to retain the opt-out on the conditions that:

- a worker is not allowed to opt out of the 48-hour working week for more than a year without renewal;
- such opt-out is void if it was signed on or within four weeks of starting work; and
- in any event, a worker cannot work more than 60 hours per week.

Discussions are due to continue this year between the UK and the European Parliament, Council and Commission to resolve this issue.

Other Changes

- The maximum compensatory award for unfair dismissal will increase from £63,000 to £66,200 on 1 February 2009.
- A week's statutory pay will increase from £330 to £350 on 1 February 2009.
- Statutory maternity, paternity and adoption pay will increase from £117.18 to £123.06 per week from 5 April 2009.
- Statutory sick pay will increase from £75.50 to £79.15 per week from 6 April 2009.

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HOLIDAY PAY DURING LONG TERM SICKNESS ABSENCE: HAVE UK EMPLOYERS NOW BEEN STRUNG OUT TO DRY....?

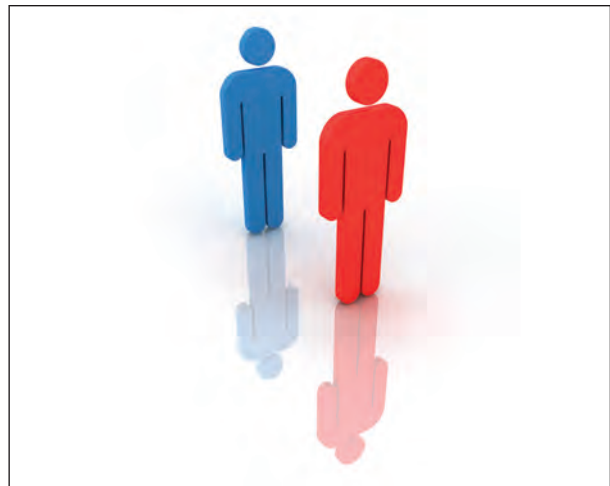
There has been much uncertainty over the last few years as to whether employees on long-term sick leave are entitled to holiday pay under the Working Time Regulations 1998 ("WTR"). The Court of Appeal in the case of Kigass said "No". However, the decision in Kigass (along with other similar consolidated cases) were appealed to the House of Lords under the name *HMRC v Stringer & others*. The holiday entitlement during sick leave issues in *Stringer*, where they related to the application of the EC Working Time Directive ("EWTD") were then referred to the ECJ by the House of Lords.

The ECJ handed down its opinion on *Stringer* on 20 January 2009. It held:

- That any condition which required a worker to actually have performed some work during the leave year to qualify for leave entitlement is contrary to the EWTD. Any period of unavoidable absence from work (including sick leave) is still counted as part of the period of service;
- Accordingly, even a worker who is on sick-leave for the whole of an annual leave year will remain entitled to the period of four weeks' paid annual leave, despite the fact he/she is not actually at work. Note: workers are only entitled to their minimum statutory leave, not their contractual leave (if greater);
- It is for national courts to decide whether the paid leave can be taken during the sickness absence (which is permitted by the EWTD), or whether it should be carried over to another year. Either way, the worker is entitled to be paid in respect of their holiday entitlement at some point;
- The right to paid annual leave is not extinguished at the end of a leave year if the worker was on sick leave for the whole or part of the leave year and was still on sick-leave when his/her employment terminates. He/she is entitled to payment in lieu of holiday entitlement.

The House of Lords will now give a final judgment in the *Stringer* case. However, it is likely that, given the ECJ's opinion, the House of Lords will probably overturn the former Court of Appeal decision which stated that rights to paid holiday leave did not accrue during periods of sickness absence, so that workers will be entitled to accrue and take holiday leave while on sick leave.

This is, it appears, a victory for workers with potentially significant costs implications for employers which will not be welcomed, particularly in the current economic climate. As is usual with ECJ decisions, they leave a number of ancillary issues unanswered which remain to be determined by the UK courts and employment tribunals so the position is still somewhat unclear. Further, it is only once the House of Lords makes its decision that it is



binding for most employers. Until then employers (and their advisers) will have to take a view as to the likely outcome of the House of Lords in the *Stringer* case in light of the ECJ ruling. The questions surrounding "carried over leave" will pose significant and tricky legislative problems for the Law Lords. If they decide that the WTR is incompatible with EU law, then the government will also be obliged to amend the legislation – although such amendment will (employers will happily note) not be retrospective.

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CREDIT CRUNCH

This bulletin would not be complete without a mention of the “credit crunch”. Not a day goes past without more news of corporate insolvencies and redundancies and this trend looks set to continue in 2009. What has been encouraging in these difficult and unstable times is the approach some companies have taken to minimise or delay the consequences of the economic crisis.

In some high-profile accounting firms, employees are being given the opportunity to take unpaid or part-paid sabbaticals or work part-time, either permanently or temporarily. In other cases, employees have agreed to take a pay cut on a short-term basis as an alternative to redundancy. In magic circle law firms, there has been a notable increase in the number of solicitors being redeployed and retrained in other areas of law. These measures have allowed employers to be more flexible in managing its workforce and employees are grateful to be given alternative options to redundancies. After all, *a* job is better than *no* job.

Whilst redundancies are often seen as a quick fix to a problem, it is not always the right option and the short-term costs can be significant. If absolutely necessary then, of course, there is no option but the flexibility currently being demonstrated by both employers and employees alike means there are many more options available.

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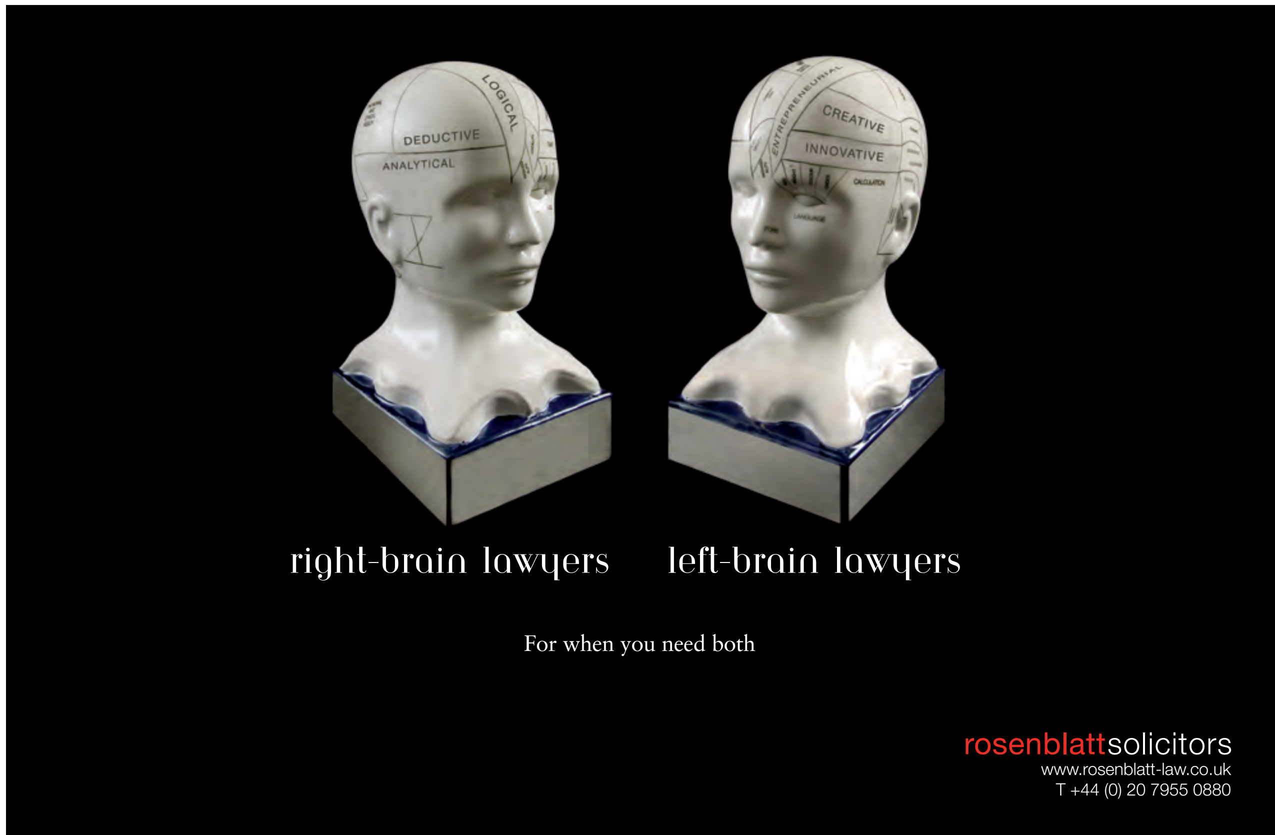

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This bulletin is intended to summarise developments in employment law. It should not be taken as definitive legal advice on any of the subjects covered. Should you have any queries arising out of this bulletin, or require any employment advice, please contact Andrea London on 020 7955 0880. If you would like to receive further editions, please email your details to info@rosenblatt-law.co.uk