Newsletter

BURGES SALMON

In Focus

Autumn 2013

Welcome

Welcome to the Autumn edition of In Focus, our quarterly update keeping you informed of developments in employment law.

For further information on employment issues, please email roger.bull@burges-salmon.com

Working it out

The complex provisions of the Working Time Regulations continue to keep the employment tribunals busy as there have been a number of cases relating to holiday entitlement and pay recently.

In *Sood Enterprises v Healy*, the EAT ruled that where a worker is unable to take holiday due to sickness, the minimum four weeks' holiday derived from the EU Working Time Directive must be carried over at the end of the holiday year (in line with previous cases). However, the additional 1.6 weeks' statutory holiday under the Working Time Regulations does not need to be carried over and will be lost unless the individual has a contractual right to carry it over.

Whilst this may be good news for employers, the recent employment tribunal decision in *Neal v Freightliner Limited* will not be such good news. In this case, the employment tribunal ruled that an employer should take into account voluntary overtime when calculating the amount of holiday pay. Although the Working Time Regulations exclude voluntary overtime for workers with normal contractual hours, the decision of the ECJ and Supreme Court in *British Airways v Williams* established that a worker must be no worse off financially during statutory annual leave than if they had continued working and their normal remuneration should include basic salary and remuneration "intrinsically linked to the performance of the task".

The *Neal* case was only an employment tribunal decision and an appeal has been lodged, but it does follow the Supreme Court decision in *British Airways v Williams*, so employers should consider

whether it could have an impact on current practices and, if appropriate, seek advice on the calculation of holiday pay.

Although these cases only relate to the first four weeks' annual leave derived from the EU Working Time Directive and an individual claim may be small, settling a claim relating to the calculation of holiday for the entire workforce going back a number of years can be expensive.

The John Lewis Partnership slogan "Never knowingly undersold" became "Never knowingly underpaid" in many headlines when it was reported that the Partnership had paid out £47.3 million after an astute new employee spotted that holiday pay was not being calculated correctly. The calculation should have been based on the average hours and pay actually earned by the employees in the previous 12 weeks but it had failed to take into account that employees who work on bank holidays and Sundays are paid a higher hourly wage.

TUPE reform

The government has published its response to the consultation on the reform of TUPE and the most notable news is that the government has decided not to remove the service provision change rules.

Although the original plan was to bring the reforms into force in October 2013, the government now intends to bring new regulations into force in January 2014. For more details of the key changes, please see our **email alert.**

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Collective redundancies

In the last edition of In Focus we reported the decision in the case of *USDAW & Others v WW Realisation 1 Limited (in liquidation)* and *USDAW v Ethel Austin Limited (in liquidation)*, which changed the rules on collective consultation in a redundancy situation so that the duty to consult collectively now arises where 20 or more redundancies are proposed across an employer's business as a whole rather than just at one establishment.

The EAT has now granted the government permission to appeal the decision. We expect that the Court of Appeal will refer the case to the ECJ to be joined with the case of *Lyttle & Others v Bluebird UK Bidco 2 Limited* in which questions concerning the meaning of "establishment" have also arisen and been referred to the ECJ by the Northern Ireland Industrial Tribunal.

Friend or foe?

The EAT has held that an employee may choose whomever they like when exercising their statutory right to be accompanied at a disciplinary or grievance hearing, provided the companion is a relevant trade union representative or work colleague. Although the ACAS Code of Practice on Discipline and Grievance suggests otherwise, the EAT has decided that it is the request to be accompanied that needs to be reasonable, not the identity of the companion, and employers cannot refuse a request on the basis that the presence of that particular companion is unreasonable. However, any employer that is concerned about the presence of a particular companion may want to weigh up the disadvantages of having the companion present compared to the maximum compensation that may be awarded for breach of the right (currently two week's pay, capped at £450 per week). *(Toal v GB Oils)*.

That's my business

With the increased use of smartphones, tablets and homeworking, many employees have a number of devices on which business emails are stored and it can be difficult for an employer to keep control of this information after the end of the employment relationship. However, the Court of Appeal has recently confirmed that an employer is entitled to require an individual working for the business to produce business emails stored on their personal computer or other devices for inspection and copying *(Fairstar Heavy Transport NV v Adkins)*.

This will be particularly useful for any employer that is seeking to enforce restrictive covenants. We have a lot of experience in this area so please contact us if you would like any further advice on protection against competitive activity or want to know more about our **pre-recruitment risk assessment service.**

News in brief

- From 1 October 2013, new obligations apply to all public companies quoted on the London Stock Exchange regarding reporting of directors' remuneration. For more details, please see our **briefing.**
- Section 40 of the Equality Act 2010 has been amended to remove protection for employees from third party harassment with effect from 1 October 2013. The provisions will still apply to harassment which took place before 1 October 2013 but the repeal means that an employer's liability for third party harassment now returns to being governed by the case law on discrimination and harassment in employment.
- The Information Commissioner's Office has published a new code of practice on dealing with subject access requests which gives useful information about the information that must be supplied in response to a request and examples of information that does not need to be supplied.
- ACAS has published a non-statutory guide to accompany the statutory code relating to pre-termination negotiations and settlement discussions. The guide sets out how employers should make a settlement offer and explains the scope of the new protection whereby evidence of the settlement discussions will not be admitted in an ordinary unfair dismissal claim unless there is improper behaviour. It also gives examples of conduct which would amount to improper behaviour.
- The Department for Business, Innovation and Skills has published guidance on the new employee shareholder employment status that came into effect on 1 September 2013.

In the office

Congratulations to **Ian Taylor** and his wife Fran, on the birth of their first child, a boy.

Congratulations also go to **Akshay Choudhry** and his wife Jenny, who have had their first baby, a boy.

Our best wishes go to **Emily Greswell** who has decided not to return from her maternity leave.

Email alerts

To access our recent email alerts please visit **www.burges-salmon.com/practices/employment/news/default.aspx**

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