

## Welcome

Welcome to the Winter 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@burgess-salmon.com](mailto:roger.bull@burgess-salmon.com)

## What will the new year hold?

### 31 January 2014

**Changes to TUPE** - The amendments to the TUPE Regulations will come into force in stages from 31 January 2014. The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 will bring about the changes. Please see our **email alert** for more details. The Department for Business, Innovation and Skills (BIS) has also produced a **Guide to TUPE**.

There are transitional provisions to allow a lead in period for employers to plan for some changes. For transfers taking place on or after 1 May 2014, the requirement to provide employee liability information is being increased to 28 days before the transfer, rather than the current 14 days.

### 6 April 2014

The government is proposing to implement the following changes (although all the legislation is not yet in place so implementation may be delayed):

- **Flexible working** - The right to request flexible working will be extended to all employees with 26 weeks' continuous service (and not just parents or carers). The current statutory procedure for dealing with requests will also be replaced with a new duty on employers to deal with requests in a reasonable manner and within three months, unless an extension is agreed. As is currently the case, employers will be able to refuse a request for flexible working based on one of the statutory grounds and a new code of practice and best practice guide will be published by Acas. However, it appears this change may be delayed.
- **Mandatory pre-claim Acas conciliation** - Before submitting an employment tribunal claim, claimants will be required to lodge details of their claim with Acas, at which point the parties will be offered conciliation for a period of one month, which will "stop the clock" on the usual time limit for submitting the claim. If the conciliation is refused by either party, or is unsuccessful, the claimant can then present their claim to the employment tribunal.
- **Financial penalties** - The power for employment tribunals to impose financial penalties on employers who lose an employment tribunal claim will come into force. The penalty, to be imposed where an employer breaches workers' rights and there are 'aggravating features', will be 50% of any award by the employment tribunal, subject to a cap of £5,000, and will be halved if the penalty is paid within 21 days.
- **Discrimination questionnaires** - Section 138 of the Equality Act 2010 will be repealed which will abolish the current discrimination questionnaire procedure.



## Seminars

Our popular Hot Topics seminar takes place in Bristol on 30 January 2014 and in London on 6 February 2014. We are also holding a seminar on disability discrimination and the duty to make reasonable

adjustments in Bristol on 13 March 2014 and in London on 20 March 2014. For details, please go to [www.burgess-salmon.com/seminars](http://www.burgess-salmon.com/seminars) or email [seminars@burgess-salmon.com](mailto:seminars@burgess-salmon.com).

## Share and share alike

The government has published its response to the consultation on how the proposed shared parental leave (SPL) scheme should work when it comes into force in 2015. The scheme will give eligible mothers and fathers the right to share a maximum 52 weeks' leave to care for a child, and as part of this, eligible couples will be entitled to up to 39 weeks' shared parental pay.

Some interesting points set out in the response to the consultation are:

- Employees will be required to give a non-binding indication of their expected pattern of leave when they notify their employer of their intention to take shared parental leave.
- Employees will be required to give their employers eight weeks' notice to begin SPL, which will include a two week discussion period. Employees will be limited to three notifications for leave, or changes to periods of leave, although it will be open for the employer and employee to agree further changes if they wish.
- A mother who has given notice before the child's

birth will be entitled to change her mind up to six weeks after the birth.

- Each parent taking SPL will be entitled to 20 keeping in touch (KIT) style days, in addition to the mother's entitlement to 10 KIT days for maternity leave.
- Employees returning from SPL will have the right to return to the same job so long as they have taken 26 or fewer weeks' leave in total. This 26 week total includes periods of maternity, adoption, paternity and shared parental leave. Once they have exceeded 26 weeks' leave they will be only entitled to return to the same or similar job.
- Employees will be required to provide the same information in order to take SPL as is currently required for fathers taking additional paternity leave.

Overall, the government appears to have taken on board some of the concerns raised by employers during the consultation but whether the shared parental leave system becomes as popular as the government hopes it will be is yet to be seen.

## Money for nothing

In yet another case regarding the calculation of holiday pay, the Advocate General has given his opinion on how holiday pay for workers earning a basic salary and commission should be calculated.

In the case of *Lock v British Gas Trading Limited* the Advocate General suggested that remuneration whilst on annual leave should include an amount to reflect commission that would have been earned if the employee had not taken annual leave. The Advocate General's view was that it was for a national court to determine how the amount should be calculated but he thought that taking an average amount received by the employee over a representative period of for example, the previous 12 months, would be appropriate. In coming to his decision, the Advocate General noted the case of *Williams v British Airways* (which we discussed in our last edition

of **In Focus**). In that case the ECJ held that, where a worker's pay comprised more than one element, one being intrinsically linked to and dependant on, work being carried out, the worker's remuneration while on annual leave should be calculated in such a way as to ensure that they were not worse off because they had taken holiday. Otherwise they would be deterred from taking their holiday entitlement which would be contrary to the purpose of the directive.

It remains to be seen whether the ECJ will follow this Advocate General's opinion. If it does, employers who with workers whose remuneration is made up of a basic salary and regular variable component, for example, commission or voluntary overtime, may have to consider reviewing the calculation of holiday pay.

## News in brief

- Acas has begun consultation on amendments to the Code of Practice on Disciplinary and Grievance Procedures regarding the right to be accompanied at disciplinary and grievance hearings and what constitutes a "reasonable request". This is as a result of the case of *Toal v GB Oils*, which we reported in our last edition of **In Focus**.
- The government has begun consultation on zero hours employment contracts, seeking evidence on the use of such contracts and views on possible options to limit abuse, including banning exclusivity clauses, government guidance or an employer-led code of practice setting out best practice.

## Email alerts

To access our recent email alerts please visit [www.burges-salmon.com/practices/employment/news/default.aspx](http://www.burges-salmon.com/practices/employment/news/default.aspx).

## In the office



We thought we would share a photo of when the Employment team volunteered at 'The Willows', a Brandon Trust care home for the severely disabled. The team split their efforts over two days and worked in all weather conditions, including glorious sunshine and torrential rain, to transform the garden into a more usable space for the residents.

One Glass Wharf  
Bristol BS2 0ZX  
Tel: +44 (0) 117 939 2000  
Fax: +44 (0) 117 902 4400

6 New Street Square  
London EC4A 3BF  
Tel: +44 (0)20 7685 1200  
Fax: +44 (0)20 7980 4966

[www.burges-salmon.com](http://www.burges-salmon.com)

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A list of members, all of whom are solicitors, may be inspected at our registered office: One Glass Wharf, Bristol BS2 0ZX.