

# EMPLOYMENT LAW UPDATE

January 2012

## WHATS NEW.....

### Employment Law Reforms

The Department for Business, Innovation and Skills (BIS) has confirmed that the increase in the qualifying period for unfair dismissal claims to two years will only apply to those starting a new job on or after 6 April 2012.

Employees whose employment started before 6 April will remain subject to the one-year qualifying period. Thus, someone with 18 months' continuous employment on 6 April will not lose their right to claim unfair dismissal, and an employee with 11 months' service on that date will still only have to wait one month before being able to claim. The regulations to extend the qualifying period will be published shortly and will be subject to Parliamentary debate.

BIS also stated that it will not implement the revised EU Directive on Parental Leave in March 2012. Instead, due to the ongoing Modern Workplaces policy development, the Government will use the additional year's grace allowed by Article 2(3) of the Directive and implement the changes in March 2013.

Consequently, the number of weeks of unpaid parental leave will increase to 18 per parent per child ahead of the other changes proposed in the consultation for 2015, such as a new flexible system of shared parental leave and an extension of the right to request flexible working.

Further details on the intended dates for a number of reforms



announced last year as part of the Employment Law Review were given by the Employment Relations Minister Edward Davey in a written answer to Parliament on 17 January. Subject to parliamentary approval, changes to be effected via secondary legislation - witness statements being taken as read, the removal of witness expenses, judges sitting alone in unfair dismissal cases and changes to limits for cost awards and deposit orders - will come into force on 6 April 2012. Measures requiring primary legislation, including early conciliation, financial penalties for employers, judges sitting alone in the EAT as a default arrangement and an amended formula for uprating tribunal awards and redundancy payments, will be implemented when parliamentary time allows.

The revised procedural code for employment tribunals expected as a result of Mr Justice Underhill's fundamental review of the Employment Tribunal Rules of Procedure is expected to come into force in 2013, following public consultation and subject to parliamentary approval.

#### **Court of Appeal confirms payments to employees on TUPE transfer taxable**

The Court of Appeal has confirmed the decisions of the Upper and First-tier Tribunals that payments made to employees on a TUPE transfer

were taxable in *Kuehne + Nagel Drinks Logistics Ltd, Stott and Joyce v HMRC* [2012] EWCA Civ 34.

The Court of Appeal has upheld the decision of the First-tier and Upper Tribunals that lump sums paid to employees on the transfer of a business that were made partly to compensate the employees for the loss of pension rights and partly as an incentive for the employees to work willingly and without industrial action were taxable as employment income. The Court of Appeal agreed with the lower tribunals that the question was whether the payments had arisen from the relevant employment. If the employment was a substantial cause of the payments (as had been found), they were taxable as employment earnings even if there was another reason for them.

This decision confirms that a payment made for two or more inseparable reasons must be treated as employment income if at least one of those reasons would give rise to such treatment alone (even if some of the others would not). This means that, where possible, a payment should be split between various grounds to reflect the weight given to those grounds. The tax and National Insurance Contribution's treatment can then reflect the nature of the payment.

## CASE BULLETIN

### EU Right to 4 weeks' Paid Annual Leave has Direct Effect

In *Dominguez v Centre Informatique du Centre Ouest Atlantique* the ECJ has held that the right to four weeks' paid annual leave in Article 7(1) of the EU Working Time Directive has direct effect. Therefore, the claimant might be able to rely directly on Article 7(1), but only if the referring court is satisfied that her employer, which deals with social security, is an emanation of the state.

The Claimant had an accident and was off sick between November 2005 and January 2007. The French industrial relations court rejected her claim for 22.5 days' paid leave in respect of that period as, under the French Labour Code, a worker is only entitled to paid annual leave if he or she has worked for ten days or a month during the reference period. The Court of Cassation made a reference to the ECJ asking whether such a rule was compatible with the Directive and, if not, whether it should disregard the national provision.

The ECJ reiterated that entitlement to annual leave is a particularly important principle of EU social law from which there can be no derogations. Therefore, the Directive prevents Member States from unilaterally applying a condition which prevents certain workers being entitled to annual leave. Although Member States may lay down conditions for the exercise of the right to annual leave, they may not make the very existence of that right subject to any preconditions whatsoever. Accordingly, the relevant provisions of the Labour Code were incompatible with the Directive.



The Court then considered whether the national law should be disregarded. It noted that the referring court should first consider whether domestic law can be interpreted in a way which is compatible with the Directive, using all the interpretative methods available to it in domestic law. If such an interpretation is not possible then the referring court would have to consider whether the Claimant could rely on Article 7 (1) against her employer. The ECJ considered that Article 7(1) does have direct effect as it imposes, in clear terms, a precise and unconditional obligation on Member States.

However, that still left the question of whether D's employer is an 'emanation of the state', against whom directly effective rights could be enforced. The ECJ noted that D's employer operates in the field of social security, but left it to the national court to decide whether it constitutes a body made responsible by the state for providing a public service. If so, the national court would have to disapply the parts of the Labour Code which conflict with Article 7. If not, the Claimants only remedy would be to bring a 'Francovich' claim against the French State to compensate for her loss due to the Directive being incorrectly implemented.

It was noted that the right to paid annual leave is not given sufficiently specific expression to enable it to apply in a private employment relationship. The ECJ, in giving its full judgment, simply restated the orthodox approach to enforcing Directive rights, namely that if the employer is a private individual, the Claimant's only remedy in the face of incompatible national law is to take a 'Francovich' claim against the State.

### No TUPE exemption for Company in Administration

In *Key2Law (Surrey) LLP v De'Antiquis* the Court of Appeal has held that companies in administration are not exempted from TUPE.

The Court approved the EAT's approach to Regulation 8(7) of the TUPE Regulations 2006, which disapplies TUPE protection for certain kinds of insolvency proceedings. It preferred to lay down a general rule that administrations do not trigger Regulation 8(7) rather than to hold, as an earlier EAT had done, that the application of Regulation 8(7) depends on whether, as a matter of fact, the administrator intended to liquidate the assets of the company.



## In the Pipeline.....

The Employment Rights (Increase of Limits) Order 2011 SI 2011/3006 has been published. The Order will increase the limits on certain employment tribunal awards and other amounts payable under employment legislation from **1 February 2012**.

The notable changes are:

- the limit on the amount of a week's pay for the purposes of calculating, among other things, statutory redundancy payments and the basic award for unfair dismissal will increase from GBP 400 to GBP 430;
- the maximum compensatory award for unfair dismissal goes up from GBP 68,400 to GBP 72,300;
- guarantee pay increases from the rate of GBP 22.20 a day to GBP 23.50 a day; and
- the minimum basic award in cases where the dismissal was unfair by virtue of health and safety, employee representative, trade union, or occupational pension trustee reasons will increase from GBP 5,000 to GBP 5,300.

The new rates apply where the event giving rise to compensation or payment occurs on or after 1 February 2012. For example, in the case of unfair dismissal the rates apply to all dismissals where the effective date of termination falls on or after this date. Where the dismissal or relevant event falls

before 1 February, the old limits will still apply, irrespective of the date on which compensation is awarded.

### Maximum Deposit Order Increases to £1,000

The Department of Business, Innovation and Skills has laid the *Employment Tribunals (Increase of Maximum Deposit) Order 2012* before parliament.

It raises the maximum for a Deposit Order, made if a claim has little reasonable prospect of success, from £500 to £1,000, and will come into force on **15th February 2012**

### Review Recommends New Body to Authorise Long-term Sickness Absence

The Government has published the results of an independent review of the sickness absence system, which recommends the creation of an Independent Assessment Service (IAS) to provide an in-depth assessment of individuals' physical and/or mental function when they have been signed off work for four weeks. The IAS would provide advice about how an individual on sickness absence could be supported to return to work. The review also analyses the current sickness absence system and makes a number of other suggestions to help combat the 140 million days lost to sickness

The review states that the current sickness absence system is failing as it pushes people away from the labour market towards inactivity, fails to invest in support for those that need it, and adds significant cost to businesses. To address these failings, in addition to the creation of the IAS, the review suggests that:

- fit note guidance should be revised to ensure that judgments about fitness to work are not job-specific. Currently, the majority of fit notes sign people off as completely unfit so employers cannot make adjustments where an illness is compatible with a return to work;
- employer expenditure to keep sick employees in work, or speed their return to work, such as medical treatments or vocational rehabilitation, should attract tax relief;
- the Percentage Threshold Scheme, which compensates employers for very high rates of sickness absence costs, should be abolished as it costs GBP50 million a year and gives employers no incentive to manage absence;
- Statutory Sick Pay record-keeping obligations should be abolished, reducing administrative burdens on employers and saving them GBP44 million;
- the 'Employers' Charter' should be updated to address misconceptions and legal uncertainty around sickness absence management; and
- further research should be carried out into why a significant number of people claiming ill health benefits who come straight from work appear not to have been paid sick pay by their employer beforehand.

The review states that its recommendations could save £400 million a year for employers, up to £300 million a year for the State, and boost economic output by up to £1.4 billion. The Government will respond to the review in due course.

*Note: This publication does not constitute legal advice.*