



March 2008

## Legislation Update

### Increase in "Working Time Holiday"

Workers are now entitled to 4.8 weeks of paid annual leave each year, which equates to 24 days for a worker who works five days per week. This is deemed to be inclusive of any entitlement to public or bank holidays. In other words, workers are not entitled to paid leave for public/bank holidays in addition to these 24 days. The minimum entitlement will rise again to 5.6 weeks on 1 April 2009 (28 days).

### Increase in National Minimum Wage

From 1<sup>st</sup> October 2008 the rates will increase as follows:  
for workers aged 22 or above, from £5.52 to £5.73;  
for workers aged 18 to 21, from £4.60 to £4.77; and  
for workers aged 16-17, from £3.40 to £3.53.

### Increases to unfair dismissal awards

From 1 February 2008 the maximum compensatory award for unfair dismissal claims rose from £60,600 to £63,000. The limit on a week's pay (taken into account in calculating a basic award and statutory redundancy payment) has also risen from £310 to £330. The maximum basic award and statutory redundancy payment will therefore now be £9,900.

### Increase to maternity and paternity pay rates

From 6 April 2008 statutory maternity, paternity and adoption pay rises from £112.75 a week to £117.18 a week.

### Increase to statutory sick pay rate

From 6 April 2008 statutory sick pay will increase from £72.55 a week to £75.40 a week.

### Flexible Working rights for carers

Changes have been made to the definition of 'adopter' for the purposes of the statutory right to request flexible working, and to extend the right to private foster carers. You may remember that from April 2007 the right had already been extended to carers of adults needing help, for example with personal care, mobility, nursing tasks or practical household tasks.

## What is the meaning of religion?

Not long after the Employment Equality (Religion or Belief) Regulations 2003 came into force, concerns arose that they did not protect non-believers, and that the requirement for a philosophical belief to be 'similar' to a religious belief did not add anything. As a result of these concerns, the Equality Act 2006 included changes to the definitions of 'religion' and 'belief' which took effect from 30 April 2007. 'Religion' now means any religion, and 'belief' means any religious or philosophical belief. In addition, any reference to a religion or belief includes a reference to a lack of religion or belief. However, in contrast to Northern Ireland, there is still no protection from discrimination on the grounds of political belief in the UK.

## SSP for agency workers

Following the Court of Appeal decision in *Commissioners for HMRC v Thorn Baker Limited* and others that SSP is not payable to agency workers whose contract with the agency is for a specified period of 3 months or less, HMRC has announced the Department of Work and Pensions' intention to amend the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. The amendment will provide that agency workers with contracts of less than three months will be able to claim statutory sick pay. Agency workers with contracts of more than 3 months are already entitled to statutory sick pay. There is currently no indication when the change will take place but preparatory work will take place 'during the coming months'.



## Other developments in legislation...

### Statutory paternity leave consultation

The Work and Families Act 2006 made provision for new mothers to take up to a year's paid maternity leave, and for new fathers to be given up to six months' paid additional paternity leave (APL) if the mother did not take the full year. This is in line with the Government's stated aim of providing parents with more choice in child care responsibilities and, for the first time, the option of dividing a period of paid leave entitlement between them. As we reported in our last newsletter, all employed mothers are now entitled to one year's maternity leave, and statutory maternity pay has been increased to nine months for those with the requisite length of service (26 weeks by the 15th week before the expected week of birth), but the remaining provisions have not yet been brought into force.

The Department for Business, Enterprise and Regulatory Reform (DBERR), formerly the DTI, has recently completed a consultation process on how the APL scheme will actually be brought into force and administered. DBERR is proposing a self-certification process, under which the father and mother will certify (to the father's employer) key facts confirming the father's eligibility for APL. This will include a declaration from the mother that she was entitled to statutory maternity leave and pay, and that she is returning to work and ending her maternity leave. This has been described as a 'light touch' approach which will be more straightforward to administer than the alternatives, such as requiring the mother's employer to confirm eligibility, or a system of compliance checks by HM Revenue and Customs (HMRC).

Whilst it remains the Government's goal to introduce these changes by the end of Parliament, we understand that they will not be implemented in April or October 2009. The Government is now looking to implement the changes for babies due on or after April 2010. Perhaps there's a message there for anyone betting on the general election date!

## Non-legislative update

### DBERR Guidelines

DBERR has developed guidelines for television sector employers offering work experience placements, in consultation with HM Revenue & Customs, Skillset (the Sector Skills Council for the Audio Visual Industries) and others.

The Guidelines suggest good practice on:

- Preparing for the work placement - inviting and dealing with applications, identifying exactly what placement is being offered
- Placement agreements - providing written confirmation of arrangements for the placement
- Managing placements – nominating a member of staff to supervise and mentor the individual and providing a first-day induction
- Learning - agreeing specific learning objectives at the outset, observing and providing feedback.

The Guidelines also include detailed guidance on the National Minimum Wage and sample forms which employers may adapt for managing and recording work experience placements, including an application form, letter confirming details of the placement and a feedback form. Although aimed at the television sector, these Guidelines provide useful information for employers in other sectors. However, they offer practical advice rather than definitive statements of law. Clients may wish to seek employment law advice on questions such as how to avoid discrimination when advertising placements and dealing with applications, and determining the employment status of individuals on work placements which is relevant to various issues including confidentiality, intellectual property protection and the National Minimum Wage.

### Requests for personal information

The Information Commissioner's Office (ICO) has recently published a Good Practice Note on handling requests for personal information. This is a useful checklist for small and medium-sized organisations on how to deal with such requests, whether from employees or customers. The ICO website provides access to a number of other useful resources, including A Quick Guide to the Employment Practices Code which offers small businesses guidance on compliance with the Data Protection Act when recruiting and managing workers. See:

[http://www.ico.gov.uk/upload/documents/library/data\\_protection/practical\\_application/checklist\\_for\\_handling\\_requests\\_for\\_personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/checklist_for_handling_requests_for_personal_information.pdf)



## Important recent cases

### Agency workers

#### Wood Group Engineering (North Sea) Ltd v Robertson [EAT]

*In our last newsletter, we summarised two cases on this topic which indicated that the EAT was moving away from the notion that, in an agency situation, parallel employment contracts might be construed between the agency worker and each of (a) the agency and (b) the client, or end-user. The case of WGE v Robertson seems to indicate that the EAT will not find an employment contract between the agency worker and the client except in limited circumstances where there is evidence of a 'sham' agency relationship.*

#### Background

Ms Robertson had previously worked for WGE as a secretary between 1991 and 1994, and again from 1998 onwards, through an agency, HFA, which was set up and indeed was part of the Wood Group of which WGE was a part, and which supplied staff only to the Wood Group. In December 1999, when Wood Group stopped using HFA, Ms Robertson continued to work for WGE via a different agency, NES. Until 2005, Ms Robertson's only written contract had been with HFA or NES. However, in July 2005, she successfully applied for an employment position as receptionist with WGE. In March 2006, WGE terminated her employment and Ms Robertson brought a claim for unfair dismissal. WGE argued that Ms Robertson had less than the one year's service required to claim unfair dismissal.

The Tribunal found that, because of the high degree of control exercised by WGE over Ms Robertson, and the mutuality of obligation between them, there was an implied contract of employment prior to July 2005.

#### Decision

The EAT took the view that the Tribunal had misinterpreted the key Court of Appeal decision of *Dacas v Brook Street Bureau* 2004, and that here there was no implied contract of employment. They stated that it was not the case that, where there was a high degree of control and mutuality of obligation it should be concluded that there was an implied contract of employment. The *Dacas* guidance went no further than saying:

- The Tribunal should consider the possibility of an implied contract of employment;
- The Tribunal may only conclude that such an implied contract exists where it is necessary to do so and where the arrangements under which a person is working can only be explained by there being such a contract;
- If arrangements can be explained by reference to existing written contracts, then there will be no room for such an implied contract of employment unless it can be concluded properly that the contracts were a sham or misrepresentation.

#### Synergy advises...

This is the latest in a string of cases in which the EAT has sought to restrict the Court of Appeal's guidance in *Dacas*, however it goes further than previous cases dealing with 'parallel contracts'. We are now in a situation where the EAT is saying that it will rarely be the case that the agency worker is the employee of the client, whilst the Court of Appeal has been saying it will rarely be the case that the agency worker is not the employee of the client.

President Elias noted in his judgment in *James v Greenwich Council* (which has been referred to the Court of Appeal) that many agency workers are highly vulnerable and need to be protected from the abuse of economic power. It has to be acknowledged that, whilst it may suit some agency workers to have flexibility in their working arrangements, many more may be obliged to accept the terms of business presented by an agency in order to be offered a job through that agency. Whilst on a straightforward analysis you might expect the agency itself to have employment obligations towards its workers, in practice this is usually not the case since there is no day-to-day control, and no mutuality of obligation. Agency workers are therefore left in an uncomfortable situation, since they may be employed by neither the agency nor the client, and are therefore outside the scope of laws protecting employees. According to Sedley LJ in *Dacas*, this conclusion is simply not credible; "there has to be something wrong with it". However, the Government has recently passed up an opportunity to come to the rescue of agency workers through legislation on this issue. We are left with a situation where the law is unclear, and workers (and businesses) do not know where they stand.



## Right to return to the same job

### Blundell v Governing Body of St Andrew's Catholic Primary School [EAT]

***As you will probably know, an employee returning from maternity leave (ML) is entitled to return to the same job in which she was employed before her absence or, if she is returning from additional maternity leave, if this is not reasonably practicable, to another job which is suitable for her and appropriate in the circumstances (Regulation 18 of the Maternity and Parental Leave etc. Regulations 1999). The EAT has for the first time issued guidance on what constitutes the "same job" for the purposes of return from ML.***

In this case, Ms Blundell was (and still is) one of 18 teachers at St Andrew's, where the head would usually try and keep a teacher in a particular role, for example reception class, for two years, then move them to another class to broaden their experience. Ms Blundell taught reception class in 2002/2003, and in June 2003 told the head teacher she was pregnant. The head was concerned that, if she left mid-year to go on maternity leave, this might cause disruption to the children in her class. She therefore proposed to allocate her to "floating" duties in the next academic year until she commenced her maternity leave. Ms Blundell turned down this proposal, and the head reluctantly allocated her to the same reception class.

Ms Blundell went on maternity leave in January 2004, but was not asked before she went about her preferences as to class allocation the following year. When she met the head to discuss class allocation shortly before her return in autumn 2004, she was offered either "floating" duties or class 2. Ms Blundell contended that she was entitled to return to the 'same job' which, in her case, meant teaching reception. The EAT noted that under Regulation 2(1) "job" should be defined by reference to:

1. the nature of the work she is employed to do in accordance with her contract; and
2. the capacity and place in which she is so employed.

Therefore "job" is a factual label, not determined purely by the contract (if that had been the intention, the words "in accordance with her contract" would apply equally to "capacity" and "place"). An illustration of this is that, even if an employment contract includes a mobility clause, it would not necessarily be permissible for the employer to assign the employee to a different workplace on her return from maternity leave. The reason behind this is that a returning employee is vulnerable, and still learning to accommodate the needs of her young child alongside those of her work. The aim of the Regulations is to allow the employee to return to a work situation which is as near as possible to the

one she left - continuity, rather than dislocation. Capacity means more than just "status", though it may encompass it.

The level of specificity with which the three matters, "nature", "capacity" and "place" are to be addressed is one of factual determination and judgment for the Tribunal. In their approach to this, the Tribunal should have in mind:

1. the purposes of the legislation (to ensure that there is as little dislocation as is reasonably possible in the employee's working life); and
2. the fact that the Regulations provide for exceptional cases, namely where it is not reasonably practicable for the employer to permit an employee to return to her previous job.

With this in mind, "job" can be quite specifically defined, since the employer has latitude under Regulation 18(2) to provide another, suitable, job.

Therefore, the Tribunal is not obliged to freeze time at the moment the employee goes on maternity leave, and may have regard to the normal range of variation that has previously occurred. In this case, Ms Blundell's capacity was to be viewed more realistically as that of class teacher, rather than reception class teacher; her place of work was the school, rather than the reception classroom.

The Claimant did succeed in showing that the head's failure to consult with her in June 2004 as to her preferences for the following academic year (as she had other teachers) amounted to a detriment.

#### **Synergy advises ...**

This case provides some helpful guidance on this issue, and it will be interesting to see how it is applied by the Tribunal to different sets of facts. If in doubt in these circumstances, we would always recommend that clients call us to talk through the particular scenario, and what they are proposing.



## Grievance procedures

### GMB Union v Brown [EAT]

***Ms Brown was employed as political assistant to the regional secretary of the GMB, against whom she brought a grievance following the breakdown of their working relationship. Since she was suffering from stress, she did not want the regional secretary to deal with the grievance himself (as provided in the GMB's grievance procedure), on the basis it could damage her health.***

He refused to vary the procedure, which resulted in months of argument and Ms Brown being absent from work due to stress. The last straw came some months later when it was again suggested that she should "continue the dialogue" with him to find an amicable solution before moving to the next stage of the procedure and Ms Brown found herself no further forward in the grievance process. Ms Brown resigned and claimed unfair constructive dismissal. The EAT upheld the Tribunal's decision that the refusal to depart from the grievance procedure amounted to a breach of the relationship of trust and confidence entitling her to resign and claim constructive dismissal.

#### Synergy advises ...

A good grievance procedure can be an important tool in trying to resolve workplace disputes. However, employers should always consider whether the procedure should be applied flexibly depending on the circumstances. Consider including the option of addressing a grievance to an alternative manager if, for example, the grievance relates to the complainant's line manager. We would also recommend stating that disciplinary and grievance procedures are non-contractual and will be applied as policy guidelines only.

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## Without prejudice discussions

### Framlington Group Ltd and anor v Barnettson [CA]

***The general rule is that, if the 'without prejudice' rule applies, nothing said during a conversation may be adduced in evidence in a court or tribunal. The rationale is that parties should be encouraged to have open discussions to try and resolve a dispute without putting their case at risk.***

The importance of this issue in employment-related matters is that if the without prejudice rule is found not to apply, evidence may be adduced of discussions that have taken place, for example before a Stage 2 disciplinary meeting, as a result of which the employer may be found not to have complied with the statutory disciplinary and dismissal procedures with the result that any award to the employee may be increased by up to 50%. If an employer approaches the employee with a view to engaging in without prejudice discussions and the employee refuses, there is the risk that the employee may adduce that approach as evidence that the employer has predetermined to dismiss before the Step 2 meeting. From the employee's point of view, they may be reluctant to initiate without prejudice discussions for fear of appearing weak.

The 2004 case of *BNP Paribas v Mezzoterro*, which predates the introduction of the statutory disciplinary and grievance procedures, brought this issue to the fore. Here, the EAT set out that for communications to be without prejudice the following must apply:

- there must be a genuine dispute; and
- negotiations must be a genuine attempt to settle that dispute.

In this case, Ms Mezzoterro had brought a grievance alleging discrimination, and a meeting called to discuss proposals for severance were therefore found not to be without prejudice since the grievance concerned discriminatory treatment, not termination. The rationale for this decision was that a grievance might be upheld or dismissed for reasons acceptable to the employee, in which case it may never reach the stage where the parties are in dispute. However, it is unclear how this case should be applied in the context of the statutory procedures. Commentators have argued that there ought to be some sort of set formula that an employer may follow, in the form of statutory guidance or a statutory form to be signed by the parties so that without prejudice discussions may take place without risk to employer or employee. The key issue in determining whether the without prejudice rule applies is whether the communications are made in respect of a dispute, as opposed to a mere grievance? In the more recent case of *Framlington*, the Court of Appeal addressed the question of what amounts to a dispute.

Cont...



They decided that a dispute arises when the nature of exchanges is such that the parties contemplated, or could reasonably be expected to have contemplated, litigation if they did not agree - it was not necessary for litigation to have actually begun. In this case, a dispute 'crystallised' when the employer informed a senior executive that he intended to terminate his contract, even though notice was not in fact given until some two months later. The executive was therefore not entitled to refer in his witness statement to without prejudice discussions that had taken place after that time.

### **Synergy advises ...**

For the moment, until there is further clarification on this issue, we would advise employer clients to exercise extreme caution when initiating without prejudice discussions particularly if prior to a Step 2 meeting. In these circumstances we would recommend that you contact us first to discuss a strategy for doing so.



## The smoking ban – what do I have to do?

***You will all be aware that on 1 July 2007 the Government introduced its long-awaited (or dreaded, depending on your view) smoking ban. Whilst the ban has been widely publicised, there is still some confusion about how it affects the workplace.***

Here are some of the questions we have been asked recently, and a summary of our responses:

### **I know that the ban applies to enclosed and substantially enclosed premises, but what does this mean?**

As you would expect, premises are "enclosed" if they have a ceiling or roof and are wholly enclosed except for doors, windows or passageways. This is fairly straightforward. Premises are "substantially enclosed" if they have a ceiling or roof, and are at least 50% surrounded by walls.

Temporary structures, such as tents or marquees, are also covered.

### **What kind of premises does the ban cover?**

Any premises which are:

- open to the public;
- used as a place of work by more than one person; or
- used as a place of work where members of the public might attend.

### **My business partner and I work from my home office – surely this would not be covered?**

If more than one person works on the premises, even if at different times or intermittently, then strictly speaking the ban will apply. In practical terms, you need to assess the likelihood of a local authority enforcement officer (who will be responsible for enforcing the smoke-free provisions) becoming aware of an offence in these circumstances. Guidance issued to enforcement officers encourages them to take an educational, advisory and non-confrontational approach initially.

### **What are the penalties?**

Anyone found guilty of smoking in a smoke-free place is liable to a fixed penalty notice of £50 payable within 29 days (discounted to £30 if paid within 15 days) or a fine of up to £200 on conviction in a

magistrates' court. It is a defence to show that the accused did not know, and could not reasonably have been expected to know, that it was a smoke-free place.

Failure by a person who controls or is concerned in the management of smoke-free premises to comply with the duty to stop someone smoking on smoke-free premises is also an offence. It is a defence to show that the accused took reasonable steps to stop the person smoking; did not know, and could not reasonably have been expected to know, that the person was smoking; or on some other grounds it was reasonable for them not to comply with the duty. Anyone found guilty of this offence is liable to a fine of up to £2,000.

**Does this mean we can remove cigarette breaks all together? I'm pleased about the ban. I've never smoked myself, and I've always been unhappy about the time my employees spend chatting in the smoking room.**

Not so fast, although obviously the smoking room will have to go. Back in 1992, the EAT held in *Dryden v Greater Glasgow Health Board* that a total ban on smoking should be regarded as a "works rule" rather than a unilateral variation of the employment contract, and that where such a rule was introduced for a legitimate purpose (as in this case) the fact that it hits a particular employee hard does not in itself justify an inference that the employer has committed a fundamental breach. However, if you were to announce a complete ban on smoking suddenly and without consulting with your staff, it is possible that this would amount to a breach of the implied term of trust and confidence entitling the employee to resign and claim constructive dismissal.

Of course, many employers have built outside smoking shelters, taking care to ensure that they fall outside the definition of an enclosed or substantially enclosed space. However, as around 70% of smokers say they want to stop smoking, you might prefer to:

- develop a smoke-free policy in consultation with all staff
- offer staff training to help them understand the new law and what their responsibilities are
- provide smokers with support to quit smoking.

Non-smokers sometimes resent the time their colleagues spend taking cigarette breaks - longer now they have to go outside to smoke. One way of reducing this might be to say that any time smokers have spent on cigarette breaks during the day they have to make up at the end of the day, or that smoking may only take place during designated breaks.

**Our delivery staff spend most of the day behind the wheel. Should I ban them from smoking on the job?**

The answer is likely to be yes. The ban applies to vehicles which are used by more than one person, regardless of whether they are in the vehicle at the same time. It also applies to vehicles used to transport members of the public.

**No one in our office smokes. Does that mean there's nothing I need to do?**

We are afraid not. This is because anyone who occupies or is concerned with managing smoke-free premises or vehicles must ensure that no-smoking signs are displayed prominently at each entrance to the premises, and in each compartment of a vehicle. You will probably have seen images in the media of clergymen fixing "no-smoking" signs to their church walls. It seems ludicrous, but the offence for failing to display such a sign carries a fixed penalty notice of £200, with a maximum fine on conviction of £1,000.

**Further useful guidance is available from:  
<http://www.smokefreeengland.co.uk/what-do-i-do/business.html>**



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If you require any further information on any of the above items or any advice generally, please contact:

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