

Employment Law Bulletin – October 2009

Tips and the national minimum wage

From 1st October restaurants and hotels will not be able to treat tips and gratuities paid to staff by their customers and guests as counting towards the national minimum wage.

Default retirement age of 65 survives legal threat

The legal challenge brought against the Government's decision to insert a default retirement age of 65 when it implemented the UK's Age Discrimination Legislation to comply with the European Directive has failed. Earlier this year the European Court of Justice in its landmark decision decided that the UK's default retirement age was capable of justification and sent the case back to the High Court.

Whilst the High Court has now backed the UK Government's default retirement age there were "strings attached". The Judge made it clear that had the Age Discrimination Legislation been implemented now rather than in 2006 any default age would have had to have been higher. The Judge also confirmed that his decision was influenced by the fact that the Government announced shortly before the judgment that its review of the default retirement age will be brought forward from 2011 to early 2010. Commentators believe that in early 2010 the Government will introduce a later default retirement age of either 68 or 70. They may even scrap the entire notion of a default retirement age altogether and replace it with an employers "right" to retire its staff depending upon the more nebulous concept of "reasonableness" and "all the circumstances of the case" which would involve much uncertainty and variation, for example as a result of the different levels of physical activity required in different fields of work.

Action Point – now is the time to review your retirement strategies before the new laws are introduced early next year.

Right to not forego holiday spoilt by sickness

The European Court of Justice has now decided that where an employee is sick during a period of pre-arranged holiday the employee is entitled to notify the employer that for the relevant days they were not in fact on holiday but were in fact "off sick" and thereby seek to defer the holiday days affected by sickness to a different date. In this particular case (*Pereda v Madrid Movilidad*) the ECJ said that the two concepts of sickness absence and holiday were totally separate and therefore if an employee was off sick he was not "on holiday" and was therefore entitled to additional replacement holiday to ensure that he was not deprived of his entitlement to rest, relaxation and leisure. It is clear that it is necessary for the employee to make a request to defer their holiday. Some employees may still choose to take holiday while on sick leave, especially where the employee has exhausted their entitlement to paid sick leave and would otherwise be receiving unpaid sick holiday instead of paid holiday.

N.B. this case dealt with the interpretation of the European directive on working time and not the UK's own regulations implementing the European Directive. This case therefore has only a direct effect on public sector workers and we will need to wait and see whether the UK Employment Tribunal will follow this judgment when they apply the UK Working Time Regulations to UK private sector employees. It is perhaps worth noting that the employee in this case was the victim of an accident just before his booked holiday started and the injuries he had suffered were obvious. It was not a question of an employee saying "Oh, by the way, on the second and third days of my holiday I had a bit of a cold and if I hadn't been on holiday I wouldn't have come in to work on those days and on the last day I had an upset tummy and didn't enjoy that day either so I want another 3 days of holiday" – i.e. the case is not a license to holiday at will.

Increase in statutory redundancy/unfair dismissal payments

From 1 October 2009 the maximum limit for a week's pay when calculating statutory redundancy pay and the basic award of unfair dismissal increases from £350 to £380 (though we have been told that this figure will not increase again until February 2011 by which time we would hope there would be less need for redundancies).

Centralised vetting system for people working with children and vulnerable adults

Under the Safeguarding Vulnerable Groups Act the centralised vetting system will allow employers to make checks online where an employee is required to work with children and vulnerable adults. Failure to make the online check can lead to a fine of up to £5,000.

Increase in national minimum wage rates

From 1 October the standard adult rate increases from £5.73 to £5.80.

Right for shareholders to obtain copies of directors service agreements

In addition to the existing obligation on companies to keep available for inspection a copy of every director's service contract with the company (or a subsidiary of the company) or a written memorandum setting out the terms of the contract and to allow any shareholder to inspect such contract or memorandum without charge, shareholders are now also entitled to, on payment of a fee, be provided with a copy of such contract or memorandum.

Should you have any questions concerning these or any other employment related matters please do not hesitate to contact any member of our employment group:- David Fenton [**d.fenton@teacherstern.com**](mailto:d.fenton@teacherstern.com), Kelly Whitfield [**k.whitfield@teacherstern.com**](mailto:k.whitfield@teacherstern.com), Emma King [**e.king@teacherstern.com**](mailto:e.king@teacherstern.com) and James McVeigh [**j.mcveigh@teacherstern.com**](mailto:j.mcveigh@teacherstern.com).

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