

## **Holiday Pay and long-term sickness – An Update**

The House of Lords has recently looked at this issue in the long running case of *HM Revenue & Customs v Stringer and others* (also referred to as *Ainsworth v HMRC*) following a referral from the European Court of Justice (ECJ). Under the Working Time Regulations (WTR) workers are entitled to 28 days paid annual leave. The ECJ has decided that annual leave does continue to accrue during periods of sickness absence which can be carried over to subsequent years if a member state does not allow annual leave to be taken during periods of long term sickness.

The House of Lords decided that a claim for holiday leave which has accrued during a period of long term sickness or on termination can now be claimed either as unpaid holiday under the WTR or as a claim for an unauthorised deduction from wages. This has the effect of allowing a worker to bring a claim for an unauthorised deduction within 3 months of the last in a series of deductions. This will allow employees to bring claims going back over a period of time if they are part of a series and allows them more generous time limits than under the WTR where a claim must be brought within 3 months of the relevant holiday.

## **Funding Employment Tribunal claims**

Generally in the Employment Tribunal the successful party cannot recover their costs from the losing party. This contrasts with civil court claims brought in the County or High Courts where a winning party can expect to recover all or a proportion of their costs from the losing party. The costs of representation are an additional burden to the employer or employee even if they successfully bring or defend the claim and a represented employee will have to have a relatively substantial claim in order to cover the costs of representation.

There are 4 ways in which an employee may be able to fund a claim.

1. Private funding where an employee engages a representative at their usual hourly rate or perhaps for a fixed fee. The employee is responsible for paying the representative's costs whatever outcome of the claim.
2. If the employee is a trade union member, the trade union maybe willing to assist with the claim or fund representation if appropriate. This is usually through an external firm of solicitors.
3. An employee may also have the benefit of legal expenses insurance known as before the event insurance. This can be found attached to household, car or contents insurance. The representative's costs are covered by the insurance company under the terms of the insurance policy.
4. A further option is that the claim could be funded under a 'contingency fee agreement' or 'damages based contingency fee agreement'. This allows the representative to take their fees as a percentage of the damages won by the employee but the employee will not have to pay the representatives costs if unsuccessful. Contingency fees are not currently allowed in civil courts but have been used in the Employment Tribunal for a number of years.

## **Forthcoming legislation**

### **Equality Bill 2008-2009: Commons Committee stage complete**

The Equality Bill 2008-2009 completed its committee stage in the House of Commons on 7 July 2009, with relatively few amendments. The key amendments were the introduction of a new clause dealing with multiple discrimination (or "combined discrimination" as it is referred to in the Bill) and changes to the definition of pregnancy and maternity discrimination to address concerns that the Bill as drafted would have reduced the level of protection given to pregnant employees.

### **Working Time Regulations: limited derogation for junior doctors from 1 August 2009**

The limit on the average working week for junior doctors was due to drop from 56 hours to 48 hours on 1 August 2009. However, following concerns over patient safety and quality of training, the Government is extending a limited derogation for some junior doctors, imposing a 52-hour limit until 31 July 2011. For other junior doctors, the 48-hour limit will apply from 1 August 2009.

### Employment Tribunal costs

The recent case of **Daleside Nursing Home v Mathew** is a clear example where the conduct of the Employee was penalised with costs. An employee claimed to have been subjected to direct racial discrimination by her manager because of a racist remark that the manager was said to have made. On hearing the claim the Employment Tribunal concluded that the allegation was untrue, the remark had not been made, and the claim failed. The Employment Tribunal found that the false allegation was a 'deliberate and, to an extent, cynical lie' but did not make a costs order even though asked to do so by the employer. The employer appealed against this decision and the Employment Appeal Tribunal decided that the Employment Tribunal should have concluded that the employee had acted unreasonably in pursuing a claim which the Tribunal had found, as a matter of fact, to be untrue.

The case was unusual as there was a clear finding by the Employment Tribunal that the central allegation of the claim was untrue. There are very few reported cases dealing with the issue of legal costs in similar situations. This case looks likely to one that will be referred to by many employers where cases are brought against them which they believe have no factual basis and should serve as a reminder to representatives to advise employees of the potential costs risk of pursuing an unfounded claim.

### Increase in redundancy pay limits

In April's budget the Government announced that the weekly limit used to calculate Statutory Redundancy Payments was going to be increased from £350 to £380 to provide extra help to employees who are made redundant. This increase will have effect from 1<sup>st</sup> October this year and will benefit employees who are made redundant after this date. Employees will continue to receive 1.5 times the weekly limit for each year of employment over the age of 41 and 0.5 times the weekly limit for each year of employment under the age of 22.

The weekly pay limit is also used to calculate other payments such as the 'basic award' in unfair dismissal claims. These also look set to be increased to £380 in October this year.

There will not be a further increase in February 2010.

### The Safeguarding Vulnerable Groups Act 2006

This Act established a centralised vetting system, the Independent Safeguarding Authority (ISA), for those working with children and vulnerable adults. Although the Act was intended to come into force in 2007, it now appears that it will be 12<sup>th</sup> October 2009 before the vetting system will be launched. Employers of people who work with a vulnerable group will be required to follow the pre-employment vetting procedure. Employers who fail to carry out the checks or who knowingly employ a barred individual can be liable to criminal sanctions. If an employer dismisses a person because they identify a risk to the vulnerable group they will be under a duty to inform the ISA of the dismissal.

### About the Thursfields employment team -

If you have any employment-related queries or would like to discuss the kind of employment law service Thursfields can provide, please contact Sarah Everton or Michelle Chamberlain on 01562 512412. Email [severton@thursfields.co.uk](mailto:severton@thursfields.co.uk) or [mchamberlain@thursfields.co.uk](mailto:mchamberlain@thursfields.co.uk).

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