

UK: Employment Update

Welcome to the July edition of Employment Update. This month we report on a Court of Appeal decision on whether an employer is required to make reasonable adjustments by reason of an employee's association with a disabled person. This update also considers another ECJ decision on holiday pay; this time whether the right to be paid survives death. Finally, we review the new Employment Tribunal powers to order Equal Pay audits and the employment provisions of the Small Business Enterprise and Employment Bill.

The duty to make reasonable adjustments does not arise by reason of an employee's association with a disabled person

It is now settled law that an employee may be directly discriminated against on the ground of disability, or any characteristic protected by the Equality Act, where the disability or protected characteristic is not that of the employee discriminated against, but that of another person with whom the employee is associated; this is sometimes referred to as associative discrimination. For example, if an employee is denied a pay rise because she takes all her holiday entitlement to look after her disabled child this would provide a platform for disability discrimination by association.

The Court of Appeal has recently considered the extent of an employer's obligation to make a reasonable adjustment where a provision, criterion or practice (PCP), puts a disabled person at a disadvantage. Failure to comply with the Equality Act duty to make a reasonable adjustment is an act of discrimination.

In the case in question, H was employed by the MOD in Germany and she had a disabled daughter who, on finishing schooling, wanted to undergo training that was not available there. H asked to be relocated to another base in order to facilitate training for her daughter but her request was refused. H claimed that this amounted to disability discrimination by reason of a failure to make a reasonable adjustment i.e. she was essentially arguing that there was an obligation on her employer to make reasonable adjustments to a PCP (that is the location of her work) to enable a disabled person associated with her (her daughter) to undergo training and education. In essence the court had to consider whether the Equality Act imposes an obligation on employers to make reasonable adjustments by reason of an employee's association with a disabled person.

The Court of Appeal rejected the arguments that the Directive from which the Equality Act is derived conferred such a right and that accordingly the Equality Act should be interpreted to this effect. In the Court of Appeal's opinion it was quite clear that the Directive only requires employers to take measures by way of reasonable adjustment for the assistance of their employees, or prospective employees, who are disabled, there is no wider obligation.

This is a welcome clarification by the Court of Appeal that the concept of associative discrimination does not apply to the obligation to make reasonable adjustments. It continues to be the case, however, that an individual may claim direct discrimination or harassment arising from their association with a second person with a characteristic protected by the Equality Act (sex, race, disability, age, religion or belief, marital status and so on).

[Hainsworth v Ministry of Defence]

Key issues

- The duty to make reasonable adjustments does not arise by reason of an employee's association with a disabled person
- Entitlement to pay in lieu of accrued holiday survives the death of an employee
- Equal Pay audits: new Tribunal Powers
- The Small Business Enterprise and Employment Bill: Employment Provisions

Entitlement to pay in lieu of accrued holiday survives the death of an employee

The Working Time Directive (The Directive) provides that a worker is entitled to be paid in lieu of accrued but untaken holiday upon termination of employment. The ECJ has recently considered whether this right to be paid in lieu of accrued holiday (Piloh) also applies in the event that the employment relationship is ended as a consequence of the worker dying.

In the case in question, B had been absent from work on ill health grounds and as a consequence had accrued 140 ½ days leave at the time his employment ended upon his death. His wife asked his employer to make a Piloh in respect of this holiday; her request was refused.

The ECJ ruled that in cases where the employment relationship has ended upon the employee's death the employer's obligation to make a Piloh is not extinguished. It also clarified that the obligation to make a Piloh was not conditional upon the employee having made a prior request for the Piloh.

The ECJ's decision is unsurprising, however, a number of related holiday pay issues remain uncertain. The ECJ did not address (because it was not asked to do so) the issue of what rate of pay should be used to calculate the Piloh.

What holiday is taken into account when calculating Piloh?

The Working Time Regulations (the Regulations) have gold plated the right to paid leave so that workers are entitled to the basic four week entitlement guaranteed by the Directive plus an additional 1.6 week's paid leave.

Earlier ECJ decisions have distinguished between the Directive's minimum holiday entitlement and any additional 'gold plated' holiday conferred by Member States, such as the additional 1.6 weeks', and held that Member States need not provide for a Piloh in relation to any 'gold plated' holiday entitlement. The UK's Regulations do, however, provide for the Piloh to include payment in relation to accrued, but untaken, gold plated holiday.

Piloh after extended sick leave

After much legal uncertainty the current position is that where an employee has been absent on sick leave for a period spanning more than one holiday year the basic four week holiday that accrues in each holiday year may be carried forward to a subsequent holiday year and will be taken into account in any Piloh calculation. However, the Employment Appeal Tribunal has now determined that the additional 1.6 weeks (or 8 days) cannot be carried over unless there is an express agreement between employer and employee providing for this. Therefore only the 'gold plated' holiday entitlement that has accrued in the holiday year of termination will be taken into account for the purposes of the Piloh calculation.

Calculation of pay in lieu of accrued holiday

How should the Piloh be calculated? The Regulations state that the employee is entitled to be paid at the rate specified in a relevant agreement, or a week's pay for each week of leave. What is a week's pay for these purposes? The ECJ has repeatedly held that a worker is entitled to be paid normal remuneration for periods of annual leave; with recent decisions stressing that remuneration intrinsically linked to the performance of the contract (e.g. commission) should be included in the holiday pay calculation.

We have no definitive appellate decision on what is normal pay for the purposes of the Piloh calculation; a number of alternative approaches suggest themselves including the following:

- Where the employee has been in receipt of PHI payments prior to the termination then the PHI rate of pay should be used to perform the Piloh calculation on the grounds that the contractual rate of pay has been varied by the PHI arrangement; or
- The rate of pay applicable immediately prior to the employee's absence on ill health grounds should be used; or
- The rate of pay applicable in relation to the employee at the date of termination had he/she not been absent on sick leave.

Where the employee would typically have worked overtime on a guaranteed or voluntary basis or received commission (but for their ill-health absence) how should that be factored into a Piloh, if at all?

Because of the lack of clarity on this issue employers may wish to consider concluding a relevant agreement with employees which clearly sets out how Piloh will be calculated.

The law in relation to holiday pay continues to evolve almost 16 years after the legislation came into force. We are expecting judicial clarification on the treatment of commission and overtime payments in relation to the calculation of holiday pay this year, however, it may be time for the legislation to be updated and/or guidance produced by the Government on all outstanding holiday pay issues.

Equal Pay audits: new Tribunal Powers

From the 1st October 2014, an Employment Tribunal will have the power to order an employer who is a Respondent to an equal pay claim to carry out an equal pay audit. The Government has now published the final details of how the regime will apply.

When will an Equal Pay audit be ordered?

If an Employment Tribunal upholds an equal pay claim that has been lodged on or after the 1st October 2014, the Tribunal must order the Respondent to carry out an equal pay audit subject to the following limited exceptions:

- The Respondent has carried out an equal pay audit in the previous 3 years which the Tribunal considers meets the statutory requirements;
- It is clear to the Tribunal without an equal pay audit whether any action is required to avoid equal pay breaches either occurring or continuing;
- The breach that the Tribunal has identified does not suggest that there may be other breaches; or
- The disadvantages of an audit would outweigh its benefits.

A wholesale exemption against an equal pay audit order will apply in relation to micro-businesses, (i.e. businesses employing fewer than 10 employees) and new businesses.

Content of the audit and consequences of non-compliance

When making an equal pay audit order, the Tribunal will specify: (i) which classes of employee the audit must cover; (ii) the period of time to which it should relate; and (iii) the date by which the audit should be provided to the Tribunal. The Respondent will be given at least three months after the date of the Tribunal's order to produce the audit.

Upon completion, the audit has to be sent to the Tribunal who will assess whether or not it complies with the requirements of its order. If the Tribunal determines that the audit is non-compliant, it has the power to impose a financial penalty (payable to the Secretary of State) of up to £5,000.

Publication of the audit

If the Tribunal determines that the equal pay audit is compliant, it will issue an order to that effect copied to the Respondent, who then has 28 days to publish the audit; publication should be on the Respondent's website if it has one. In addition, the Respondent has to inform all the employees who are covered by the gender pay information included in the audit where they can obtain a copy.

If the employer has concerns that publication of the audit would give rise to breaches of its legal obligations, for example breaches of the Data Protection Act 1998 by disclosing an employee's personal information, then it is entitled to revise the audit information to ensure compliance with its legal obligations. If, however, it takes the view that even with revisions/redaction it cannot comply with its legal obligations then it need not publish the audit; for example, in a situation where an audit has been ordered in relation to a small department of the employer and the information disclosed in the audit would render it possible to identify an individual's personal data.

In cases where the employer has either redacted the audit data or simply not published it, it must notify the tribunal of its reasons for doing so.

The Employment Tribunal will also consider whether the Respondent has complied with its obligations to publish an audit and will issue a decision indicating compliance or non-compliance.

Guidance

The Government has elected not to publish any additional guidance on equal pay audits or on the new Regulations on the grounds that a substantial amount of guidance is already available on the EHRC website including the following:

- Code of Practice on Equal Pay which can be found: [here](#)
- Equal Pay and the Equality Act 2010 which can be found: [here](#)
- Good Equal Pay Practice which can be found: [here](#)

- Employers' Guidance on Pay and Benefits which can be found: [here](#)
- Equal Pay Toolkit which can be found: [here](#)
- Equal Pay: Tools which can be found: [here](#)

[The Equality Act 2010 (Equal Pay Audits) Regulations 2014]

The Small Business, Enterprise and Employment Bill: Employment law provisions

Last week the Government announced a number of proposed employment law changes outlined in the Small Business, Enterprise and Employment Bill (the Bill). Much of the flesh will be put on the bones of these proposals by secondary legislation; in brief, however, the proposed changes include the following:

- If an Employment Tribunal award remains unpaid the Respondent will potentially be subject to a financial penalty. An 'enforcement officer' will give a 28-day warning notice if the tribunal award remains unpaid. If the award remains unpaid by the Respondent, a 'penalty notice' will be issued. The penalty is 50% of the outstanding amount, subject to a minimum of £100 and a maximum of £5,000. If the tribunal award and the penalty are then paid within 14 days, the penalty is reduced by 50%. The penalty is payable to the Secretary of State, not the Claimant.
- Any provision in a zero hour contracts (as defined by the Bill) which tries to stop the worker working for somebody else with or without the employer's consent is void.
- Amending the Employment Tribunal rules to limit the number of postponements available to a party, and imposing an obligation on the tribunal to consider making a costs award if a late application to postpone is made.
- A new power permitting the Treasury to require repayment of some or all of a termination payment in a public sector exit. This will include payments made by reason of redundancy, ex gratia payments and payments made in lieu of notice.
- A new regime requiring prescribed persons under the whistleblowing legislation to publish details of disclosures made to them.

[The Small Business, Enterprise and Employment Bill]

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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