UK: Employment Update

This Update considers the holiday pay implications of failing to recognise that a contractor is a worker and new legislation that will limit retrospective holiday pay and other wages claims. We also report on the new Fit for Work Scheme and a case in which an employee based in Australia was able to bring an unfair dismissal claim.

Key issues

- Holiday: Workers who are prevented from taking holiday may be entitled to carry it forward
- New limits on backdated holiday pay claims
- Fit for Work: a new approach to ill health absence
- Territorial Jurisdiction: Australia based employee can bring an unfair dismissal claim

Holiday: Workers who are prevented from taking holiday may be entitled to carry it forward

A worker's statutory holiday entitlement (i.e. the four weeks' basic 'European' holiday guaranteed by the Working Time Directive and the 1.6 weeks' gold plated 'UK' holiday) must generally be taken in the holiday year to which it relates, failing which the legislation provides that it will be forfeit. Case law has however established a number of exceptions to this general principle, one of which is that where a worker is unable to take holiday due to ill health absence then he or she will be entitled to carry forward to a subsequent holiday year up to four weeks' holiday (i.e. the European holiday entitlement). How far forward such holiday can be carried is as yet somewhat unclear but in the absence of any statutory limit the carry forward is potentially unlimited. On termination a worker is entitled to be paid in lieu of any untaken holiday that has accrued in the holiday year of termination. Therefore if holiday has been carried forward from previous years as a result of ill health absence the payment in lieu should also cover such accrued holiday.

What is the position in relation to workers who are prevented from taking holiday for reasons other than ill-health absence? The Employment Appeal Tribunal (EAT) has recently suggested that if a worker has been prevented from taking holiday in the relevant holiday year through no fault of their own then that individual may be permitted to carry the four weeks' basic holiday forward to a subsequent holiday year.

In the case in question, the claimant was a salesman who was engaged on a commission only basis. He was held to be a worker and therefore entitled to paid holiday under the Working Time Regulations 1998 (the "Regulations"). The commission payments did not include any element of holiday pay. On the facts the claimant had taken some holiday each year.

The EAT accepted that if there was evidence that the claimant had not taken his statutory holiday entitlement because he could not afford to do so due to lack of holiday pay then there might be grounds for arguing that he had been prevented from taking his statutory holiday entitlement.

Whilst a worker's contract is still ongoing any claim for under/ non-paid holiday can be brought as an unlawful deduction of wages claim within three months of the underpayment or the last in a series of underpayments. Alternatively if the right to take holiday is refused the claim is not a wages claim but a claim under the Regulations that must be brought within three months of the first date on which the holiday should have been permitted to begin. Claims in relation to separate periods of holiday cannot be joined up to form a series; a three month time limit applies to each separate claim.

On termination of the contractual arrangement the worker can bring a claim to be paid in lieu of accrued but untaken holiday i.e. for the holiday that has been carried forward to the holiday year of termination as well as the holiday of the year of termination. Such a claim must be brought within three months of the termination date.

Although the EAT did not make a definitive finding on the question of whether a worker who is prevented from taking holiday can carry it forward and be paid in lieu of it on termination its obiter comments suggests that such an interpretation of the Regulations is possible. If that is the case then companies who engage individuals on a self employed/contractor only basis may be exposed to holiday claims based on an argument that the absence of holiday pay has acted as a deterrent to such workers taking holiday. Therefore, as a result of being unable to take the four weeks' basic holiday for reasons beyond their control the holiday has been carried forward and there should therefore be a payment in lieu of it on termination. Alternatively if the company failed to recognise that as workers they were entitled to take holiday and therefore declined to allow them to take it the worker would have a claim for compensation in respect of the refusal.

The extent to which a company may be exposed to such claims will be subject to a number of different variables including the following:

- Are the individuals "workers" for the purposes of the Regulations?
- Are they working under a contract to perform work or services personally where the company is not regarded as a client or customer of the individual's business undertaking?
- If they are workers was holiday taken in each holiday year?
- If holiday was not taken – what was the reason?
- If holiday was taken was it paid?
- Are the individuals still under contract?
- If not has more than three months elapsed since the contract ended?

[The Sash Window Workshop Limited v King]

New limits on backdated holiday pay claims

New regulations came into effect on 8 January 2015 which will limit the retrospective nature of holiday pay and other wages claims.

Case law to date has established that claims in relation to a failure to pay holiday pay may be brought as an unlawful deduction of wages claim. Such claims must be brought within three months of the deduction in question or the last in a series of deductions. Where there is a series of deductions in principle there is no limit on how far back the series can extend. The Working Time Regulations 1998 introduced the right to paid holiday in October 1998. Accordingly, it is theoretically possible for a holiday pay claim to be brought as a wages claim extending as far back as the introduction of the right to paid holiday in October 1998 if an individual was in employment on that date.

This theoretical risk clearly has caused much anxiety in the business community as evidenced in many press headlines last year talking about the billions that holiday pay will cost business. In order to address this concern the new regulations provide that with effect from 1 July 2015 Employment Tribunals will only be able to consider unlawful deductions from wages claims where the deductions were made within the two years preceding the date of the claim. This retrospective limit applies to most other wages claims not only to holiday pay claims subject to some very limited exceptions.

There is a six month transition period from 8 January to 1 July 2015 during which time unlawful deduction of wages claims will have no limit on how far back they can go subject always to there not being an interval of more than three months between each of the deductions thereby breaking 'the series'. It remains to be seen whether there will be a flurry of claims brought prior to 1 July.

[The Deduction from Wages (Limitations) Regulations 2014]

Fit for Work: a new approach to ill health absence

The Government is introducing a new Fit for Work service during 2015 to help cut sickness absence and the impact that it has on employees and employers. The new Fit for Work service will provide free occupational health assessments for employees who are absent on ill-health grounds with a view to assisting them to return to work sooner. There will be a phased roll out of this referral service in 2015. The Government is expected to announce the timetable shortly.

How it will work in practice?

Once an employee has reached, or is expected to reach, four weeks of sickness absence their GP will refer them, provided they consent, for an occupational health assessment. The employer can also make a referral after four weeks' absence.

Once referred an occupational health assessment will then take place; it is anticipated that this will usually be over the telephone. The assessment will seek to identify all issues that might be preventing the employee from returning to work. An employer may be contacted as part of this assessment. A Return to Work Plan will then be produced with advice and information on how the employee can get the appropriate support, and recommendations agreed with the employee to help them to return to work more quickly. The Plan will only be shared with the employer if the employee consents.

Tax relief on medical treatment

As part of this new regime with effect from 1 January 2015 there is no charge to income tax or national insurance contributions (NICs) on payments of up to £500 made by an employer to fund the cost of medical treatment either recommended by a Fit for Work healthcare professional or the employer's own occupational health service. This £500 exemption is per employee, per tax year. Payments over the £500 limit will continue to be subject to tax and NICs on the excess.

Fit for Work Certification

In many cases an employee will self certify their absence from work for a period of up to seven days, thereafter it is usual for an employer to request certification (i.e. a fit note) from the employee's GP not least so as to provide evidence that they are unfit to work for the purposes of claiming statutory sick pay. Under the new Fit for Work regime it is intended that where an employee has been issued with a Return to Work Plan which has been shared with the employer that this will be sufficient information for the employer to determine fitness for work for statutory sick pay purposes and that the employer should therefore refrain from requesting fit notes from the individual's GP. However the employer will still require a fit note to cover the period between a referral to the Fit for Work Service and the production of a Return to Work Plan. It is anticipated that a two week fit note will be sufficient to cover this period.

In circumstances where an employee does not consent to their Return to Work Plan being shared then an employer can ask for the individual to produce a fit note from their GP.

Employer action points

Employers should give some thought to:

- Whether they need to revise their current sickness absence policies to reflect the new Fit for Work regime e.g. the policy on requesting Fit Note evidence?
- Whether they should have a policy of actively making a referral under the Fit for Work regime if an employee is not referred by their own GP after four week's absence?
- Who will be designated point of contact for the Return to Work case managers?
- Whether to make use of the employer's own occupational health service rather than the Fit for Work Service on the basis that their own occupational health providers may have a better understanding of the working environment, the employee's role and the impact of their condition on their ability to perform it. If so how will this issue be managed with the employee?

It will not be mandatory for an employer to follow the recommendations set out in a Return to Work Plan. An employer may take the view that the recommendations are ill-informed on the grounds that there has been insufficient employer input. Similarly, an employer may conclude that the suggested interventions or adjustments are unreasonable and/or unaffordable. Employers remain free to manage ill-health absence as they consider appropriate in the circumstances.

Where an employer fails to comply with recommendations in a Return to Work Plan this may potentially have an impact on the fairness of any subsequent dismissal based on ill-health capability grounds. The employee might seek to argue that it was not reasonable for the employer to dismiss having failed to follow the recommendations of the Fit for Work Service. Similarly, an employee whose absence is caused by a disability may seek to argue that

failure to implement the interventions/adjustments set out in the Return to Work Plan amount to a failure to make a reasonable adjustment for the purposes of the Equality Act 2010. It remains to be seen whether claims will be made on this basis and the approach that the Tribunals will take. The Department for Work & Pensions guidance on Fit for Work can be found here.

Territorial jurisdiction: Australia based employee can bring an unfair dismissal claim

The issue of when an individual who has been working outside the UK can bring an unfair dismissal claim in the Tribunal continues to be the subject of judicial scrutiny. A recent case highlights that the fact that the employee was moved overseas at their request will not preclude them from bringing an unfair dismissal claim if their work was for the benefit of a business conducted in Great Britain.

C was jointly employed by R1 and R2 whose offices were in London. Some ten months after C started employment her family decided to relocate back to Melbourne so her employers agreed to her request to carry out her role remotely from Australia using her laptop. C relocated to Australia and continued to work until her resignation. Whilst she was working remotely in Australia C dealt with her own tax affairs and accounted for tax to the Australian authorities. She paid no tax or national insurance contributions in the UK. C returned to London for two weeks to assist with the annual audit which was conducted from R1 and R2's London office. She also travelled to London twice each year to attend the AGM day and an annual away day.

Whilst she was employed C raised a grievance from Australia this which was heard in London as was her appeal. Following her resignation C claimed constructive unfair dismissal. Did the Employment Tribunal have jurisdiction to hear the claim?

The Tribunal held that it did not because the connection between C's employment and Great Britain and British employment law could not be described as "especially strong".

The Employment Appeal Tribunal however did not share that view. It considered that all of the work done by C from her computer in Melbourne had been for the benefit of the employers' London operations. C worked as a virtual employee for the benefit of a business carried on in London. Accordingly she was an 'expatriate employee' with a sufficiently strong connection with Great Britain and British employment law to give the Tribunal jurisdiction to hear her complaint. A relevant factor supporting this conclusion was the fact that C's grievance was handled in London under the terms of the employers' Employee Handbook.

The EAT rejected the argument that the fact that C had elected to move to Australia and paid Australian tax and pension arrangements meant that there was an insufficiently strong connection with Great Britain. C's situation was no different from an employee posted to work abroad at the employer's request.

[Lodge v Dignity and Choice in Dying and Others]

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