



## STATUTORY HOLIDAY - CAN ENTITLEMENT BE LOST?

The recent decisions in the cases *Stringer and Others v HM Revenues & Customs* and *Pereda v Madrid Movilidad* (see October 2009 newsletter) have clarified situations where an employer must allow a worker to carry over statutory holiday entitlement to the following annual leave year. This can occur where a worker has not been able to take annual leave because they were on sick leave. However, the recent Employment Appeal Tribunal (EAT) decision in *Lyons v MITIE Security* has concluded that the right to statutory holiday is not 'inalienable'.

The EAT considered the conditions for giving notice of a holiday request contained in Regulation 15 of the Working Time Regulations 1998. Under the Regulations a worker has a statutory entitlement to 5.6 weeks paid holiday and can choose when to take this holiday. Employers and workers can agree when the holiday will be taken or notice must be given in accordance with the Regulations. This requirement to give notice also applies to employers who can specify on notice that some holiday must be taken or not taken at certain times, perhaps to allow for a shutdown or busy period. The notice provisions in the Regulations can also be varied by contract even if this means that the employee would have to give more notice.

Under the Regulations the notice given by the employee must :

- specify the days which are to be taken as holiday, and
- be at least twice long as the amount of holiday to be taken.

A period of two weeks holiday would therefore need notice to be given at least 4 weeks before the intended start date.

As the right to statutory holiday was subject to this notice mechanism the EAT concluded that while an employer must not refuse leave unreasonably or capriciously, there could be circumstances where an employee was unable to take their statutory leave at the end of the leave year. The summary of the case also indicates that the entitlement to statutory holiday could also be subject to fairly operated contractual notice requirements.

## NEW DISCLOSURE OF WHISTLEBLOWING CLAIMS

Last year the Government consulted on the proposal to allow Employment Tribunals to forward details of protected disclosures in alleged 'whistleblowing' claims to relevant regulators. Whistle blowing claims can arise where someone who has made a protected disclosure, generally about illegal or underhand practices, under the Public Interest Disclosure Act 1998 and been dismissed or suffered some other detriment as a result. The response to the consultation was favourable and the following changes are expected to come into effect from the 6<sup>th</sup> April 2010.

- Claimants in Employment Tribunal cases will be able to tick a box on the claim form and consent to the disclosure being passed on.
- Only the relevant part of the claim form will be passed on.
- The Claimant and Respondent will receive written confirmation of who the disclosure has been sent to.



## Disability Discrimination Update

Two recent Employment Appeal Tribunal (EAT) decisions have looked at fundamental aspects of disability discrimination claims. Disabled workers and employees have protection against dismissal and less favourable treatment under the Disability Discrimination Act 1995 (DDA). The Act also requires employers to make reasonable adjustments where the disabled person is put at a substantial disadvantage compared to a non-disabled person.

A person will be disabled for the purposes of the Act if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out day to day activities.

In the first case *Patel v (1) Oldham MBC (2) Governing Body of Rushcroft Primary School* the requirement for an impairment to be 'long-term' was looked at. For the purposes of the Act an impairment is long-term if it lasts for, or is expected to last for, at least 12 months or for the rest of a person's life. Mrs Patel had suffered from two different consecutive conditions but neither of these was considered to have been 'long-term' by the Employment Tribunal.

The EAT concluded that where a condition develops or is likely to develop from a different condition then the duration of that condition can be combined with the duration of the effects of the original condition in deciding if the impairment is long term.

If an employee is disabled, their employer will be under a duty to make reasonable adjustment to prevent them being at a disadvantage because of their disability. In the case of *Garrett v Lidl* the EAT found on the particular facts of the case that moving the employee to a different location could be a reasonable adjustment. The employer had attempted to assist the employee by making various adjustments over a period of years. Finally, the proposal was made to move her to another location as it was considered safer than the store that she had been working at. The employee objected but then did move to the other store and brought a claim for failure to make reasonable adjustments at the store she had previously worked at.

Her claim was unsuccessful and while the EAT agreed that employers should try to make adjustments at the employee's current working place, moving them to another workplace could be a reasonable adjustment. The decision did draw on the fact that the employee had a mobility clause in her contract of employment, had worked at other stores in the past and the change of workplace did not increase her travel to work significantly.

These decisions both highlight the importance of looking in detail at all the circumstances before making any decisions in connection with disability to avoid reaching conclusions that may not be compliant with the provisions of the DDA.

## Sex Discrimination and IVF

Pregnant workers are protected from discrimination and dismissal for a reason connected to the pregnancy during the 'protected period' and are also entitled to other maternity rights such as time off for antenatal appointments and maternity leave. A woman who is undergoing IVF treatment does not have the protection offered to pregnant women under the Employment Rights Act until the fertilised ova have been implanted. However, while less favourable treatment on account of gender specific illness does not necessarily amount to sex discrimination and can be viewed as sickness absence there are certain limited situations where such treatment may be discriminatory.

This position has been confirmed in the case of *Sahota v Home Office and Pipkin* in which Mrs Sahota brought a number of claims of sex discrimination arising out of alleged detriments because she was undergoing IVF. In this case the EAT upheld the Employment Tribunal's finding that there had been no discrimination and concluded that just because an act occurs in a context, or in connection with, a protected characteristic this does not necessarily mean that the act was done on the grounds of that characteristic.

The EAT also went on to consider and restate the European Court of Justice's decision on when a woman undergoing IVF would be afforded additional protection. This will occur:

- When a fertilised ova has been implanted - in which case she will be regarded as pregnant.
- In the period between follicular puncture and 'immediate' implantation - in which case less favourable treatment could amount to sex discrimination.

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