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Employment Update

July 2009

Welcome to the latest edition of Parker & Co's Employment Update. This quarter we focus on the much publicised decision of the House of Lords in the HMRC holiday pay litigation and consider a Court of Appeal case on using length of service in a redundancy selection matrix. We also review the new ACAS Code of Practice on discipline, dismissals and grievances and reflect on one of the final judgments dealing with the much maligned statutory procedures, which the Code has now replaced.

Holiday pay and sick leave

The one certainty for employers is that the practical difficulties which surround holiday entitlement during long term sickness absence will continue and we are likely to see further litigation.

Employers faced with this issue should take specific advice.

The House of Lords has now handed down judgment in ***Stringer v HMRC***. In January, the ECJ decided that paid holiday continued to accrue during sick leave and on termination a payment in lieu is due for untaken holiday. If workers are unable to take accrued leave during sickness absence, they should be allowed to carry this forward, even if they return in the next holiday year.

Their Lordships have now ruled on the enforcement mechanism, holding that an employee can bring an unlawful deduction from wages claim, potentially allowing an employee to aggregate various instances of unpaid leave occurring over a period of time.

However, their Lordships did not need to consider a number of issues which arise from the ECJ's ruling, including in what circumstances a sick employee is "unable" to take leave and whether any accrued annual leave can be extinguished at the end of a holiday year for a worker who remains on sickness absence. Currently, the Working Time Regulations do not provide for statutory leave to be carried over and may need to be amended.

In addition, a number of practical issues remain unresolved for employers, including how the ruling affects those with the benefit of permanent health insurance cover, how the time limits for bringing a claim will be interpreted and the applicable rate of pay to be used when a claim extends over a long period of time.

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Length of service in redundancy selection

The decision does not give employers free rein to routinely use length of service in redundancy selection exercises, as Employment Tribunals must still consider the fairness of the dismissal and the justification argument on an individual basis.

In ***Rolls-Royce plc v Unite the Union*** a majority of the Court of Appeal decided that using length of service as a criterion for redundancy selection was permissible.

Rolls Royce had agreed longstanding collective agreements which included a redundancy selection matrix under which each employee received one point per year of service. Concerned that this potentially discriminated against younger workers and the claims it may face if they were selected, Rolls Royce and Unite asked the High Court for a ruling.

The High Court and, following an appeal by Rolls Royce, the Court of Appeal, held that although using length of service was indirectly discriminatory, it could in this case be justified. It was recognised that rewarding loyalty and maintaining a stable workforce were legitimate aims, which were proportionately achieved as length of service did not in itself determine if an employee was selected – instead a matrix of criteria were used.

Therefore, the key for employers in selection exercises will still be the fair and consistent application of objective criteria. When selecting for redundancy, employers should only take length of service into account if other criteria are used, such as attendance, disciplinary record, performance, skills and adaptability. The impact of length of service should also be reviewed to ensure it is not distorting the outcome.

In addition, employers must consider why they are using length of service and whether they could achieve their objective in other ways. Alternatively, employers may wish to retain the option to use service as a deciding factor if scores are equal.

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Settlement negotiations and Employment Tribunal time limits

The decision will not directly affect dismissals that fall under the new ACAS code, but if a Claimant reasonably believes a procedure relating to their dismissal is ongoing, an Employment Judge may consider this as a factor when exercising discretion to extend a statutory time limit.

Under the Statutory Dismissal Procedures (repealed on 6 April this year), if an employee has a reasonable belief that a process dealing with the termination of their employment was ongoing at the expiry of the 3 month deadline for filing a claim, an automatic extension was granted. Typically, this occurs where an employee has appealed their dismissal and the process is ongoing. However, in ***Miss S C Eagles v Rugged Systems Limited***, the EAT found that settlement negotiations in relation to a compromise agreement can also trigger the extension.

Miss Eagles was made redundant. She wrote to her employer challenging their settlement offer and her treatment, threatening to bring unfair dismissal proceedings. Although she instructed solicitors to advise on the compromise agreement, Miss Eagles did not sign it and claimed unfair dismissal. The Tribunal held the claim was out of time and she was not entitled to an extension as there was no appeal process ongoing. However, on appeal the EAT decided the ET had wrongly focused on whether there was an ongoing appeal process. Instead, it should have considered if there was an ongoing procedure relating to the dismissal; this need not be an appeal process. The EAT found that an ongoing process to resolve a dispute and to compromise unfair dismissal and other proceedings would trigger the extension provided the employee had the requisite belief.

As the Procedures aim to "encourage conciliation, agreement, compromise and settlement, rather than to precipitate the issue of proceedings", limiting the extension to cases where an appeal process is ongoing would be contrary to this aim.

The decision will mainly apply to situations where an employee was dismissed on or before 5 April, or in cases where a step 1 letter was sent or the employer met with the employee to inform them about the possibility of a dismissal before 6 April.

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Discipline, dismissals & grievances – the new ACAS code

Under the new regime, principles of fairness and reasonableness regulate how employers are to discipline and dismiss employees and address their grievances. In practice you still should follow a standardised procedure in most cases; to do otherwise will open the door to an employee arguing that the process was unfair.

Three months ago, the unloved statutory disciplinary and grievance procedures were abolished (see our November 2008 update). Employers rejoiced at the thought of not having to follow the minimum legal procedures when disciplining and dismissing employees and investigating their grievances. However, as usual it is not so simple! There has not been a day-to-day sea-change for employers; the changes are more significant for the technical issues that they pose to lawyers.

You should also take heed of the ACAS Code of Practice on Disciplinary and Grievance Procedures (view the ACAS code). Although it does not have binding legal status it is a benchmark for employers and the ET.

Here are some of the practical considerations of the new regime to bear in mind:

→ The ACAS code still recommends the three step disciplinary and grievance procedure (letter, meeting, appeal). The ET may increase or reduce compensation by up to 25% if the employer or employee fail to follow the ACAS code.

→ You should conduct disciplinary and grievance matters transparently and use appropriate processes. You still need to adhere to your own internal procedures carefully to avoid any inference of unfairness. An ET will expect compelling reasons to justify any failure to comply with your own procedures or ACAS's recommendations.

→ Although redundancy dismissals are no longer subject to a statutory dismissal process, you still need to demonstrate that a fair selection and consultation process was carried out.

→ Employees now do not need to send you a written grievance before issuing an ET claim. However, they can be criticised by an ET for not trying to resolve matters internally.

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News in brief & what's coming up

Statutory Redundancy Pay: The weekly limit of salary used to calculate statutory redundancy pay will be increased from £350 to £380 with effect from 1 October 2009. This limit will also apply to other payments such the basic award for unfair dismissal. However, this increase will replace the next annual uplift due in February 2010 and therefore no further rise will be seen until February 2011.

Maternity and Paternity Rights: Plans to increase paid maternity leave and extend paternity rights have been put on hold given the current economic climate. The changes will now be implemented in April 2010 and will increase paid maternity leave to 12 months and allow fathers to take up to 26 weeks paid paternity leave during a mother's additional maternity leave, if she returns to work.

Termination Date: In ***Radecki v Kirklees Metropolitan Borough Council*** the Court of Appeal held the effective date of termination can be the date of an act demonstrating a clear intention to terminate. Mr Radecki was suspended with pay, but his disciplinary hearing was postponed while a compromise agreement was negotiated. An unsigned draft provided that his employment would "terminate by mutual consent on 31 October 2006". Although the agreement was not finalised, Mr Radecki was removed from the payroll on this date. The Court held there was no consensual termination, but the fact Mr Radecki knew he would not be paid from 31 October was sufficient to show his employment had been terminated. While this case was decided in the employer's favour, it is important that wherever possible clear written notice of termination is provided to employees.

National Minimum Wage: From 1 October 2009, the adult national minimum wage will be increased from £5.73 to £5.80. From October 2010 the adult rate will be extended to include 21 year olds.

April 2009 changes – a reminder

→ The Statutory Dismissal, Disciplinary and Grievance Procedures were replaced by the ACAS Code of Practice.

→ The right to request flexible working was extended to employees with children under 17.

→ Statutory sick pay increased to £79.15 per week, and maternity, adoption and paternity pay rose to £123.06 per week.

→ Minimum statutory holiday increased from 4.8 to 5.6 weeks per annum.

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Contact us

If you have any questions arising from the articles or on other areas of employment law, please call or email us and we will be happy to discuss them with you.

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