Parker & Co

Employment Update

December 2011

Welcome to the latest edition of Parker & Co's Employment Update. We focus on the Government's employment law reforms, further case law on holiday pay and sick leave and an ET decision on employment status. We also review an EAT case which examined the impact of financial cost on reasonable adjustments for a disabled employee.

Employment law reform

Government announces wide ranging review of employment law

The Government has recently announced a number of changes to employment law and proposals for reform. Some of the changes and commitments result from the Resolving Workplace Disputes consultation carried out earlier this year and others announced by Vince Cable recently form part of the Government's larger plan to radically overhaul the employment law system. Detailed information and consultation documents can be found at www.bis.gov.uk.

The major changes and commitments announced include:

- Offering all parties in an employment dispute pre-claim conciliation with ACAS.
- Increasing the qualifying period for unfair dismissal from one year to two years from April 2012.
- Consultation on "protected conversations" which would allow employers to discuss with their employees issues relating to retirement or poor performance, without fear that they might be relied upon in a claim.
- Commissioning an independent review of the ET rules of procedure amid concerns that tribunals have become complex, inefficient and are no longer fit for purpose.
- Considering a "rapid resolution" scheme to offer a quicker and cheaper alternative to ETs.

Employment law reform .....continued

Potential changes to long term sickness absence management also under consideration

- Consultation on simplifying compromise agreements.
- The proposed removal of the protection for whistleblowing arising out of the EAT's decision in Parkins v Sodexho Ltd, which allows employees to claim protection where their "protected disclosure" relates to an employer's breach or likely breach of an employment contract.
- Seeking views on whether the 90-day minimum consultation period for collective redundancies should be reduced.
- Seeking views on introducing compensated "no fault" dismissal for firms with fewer than 10 employees.
- Examining ways to "slim down" and simplify dismissal processes.
- Consultation on the introduction of ET fees.
- Seeking views on proposals to simplify the Transfer of Undertakings (Protection of Employment) Regulations 2006.

We will update you once further information is available in relation to the proposed changes.

Sickness absence

An independent review of the system used to manage sickness absence has recommended establishing an Independent Assessment Service to provide an in-depth assessment of individuals' physical and/or mental function once they have been signed off work for four weeks. The Service would provide advice about how individuals might be supported to return to work. The review found that the current system encourages inactivity and fails to provide support for those who need it, at a substantial cost to businesses and made a number of recommendations.

Parker & Co

The latest on holiday pay

Further case law from the EAT and Europe on holiday rights while on long term sick leave

You may recall the case of *NHS Leeds v Larner*, from our September Update, in which the EAT held that entitlement to paid annual leave where an employee is absent for the whole of a pay year through sickness was not dependent on a request to take leave.

However, the EAT has recently made a decision to the contrary in *Fraser v Southwest London St George's Mental Health Trust*. Here, a nurse had been on long term sick leave over two leave years. While it was accepted that leave accrued during that time, the EAT held she was only entitled to payment in lieu of holiday which had accrued during the holiday year in which she was dismissed, as she had not made a request in the previous year to take or defer leave.

In September's Update we also reported that the Attorney General issued an opinion in the German case *KHS AG v Schulte* relating to holiday and long-term sick leave. The ECJ has now issued its decision, holding that an unlimited accrual of holiday does not meet the purpose of paid annual leave, which is to provide a period of rest and relaxation.

The ECJ considered the carry over period must be substantially longer than the leave year and must allow a worker the opportunity to have rest periods which may be planned in advance and available in the longer term. A carry over period of 15 months allowed by German law was reasonable.

Finally, the ECJ has confirmed in *Williams and ors v British Airways plc* that where a worker's pay varies, paid annual leave should correspond to average earnings; including certain supplements usually paid. For British Airways this means that flying allowances should be included in calculating holiday pay for pilots. However, employers should only include supplements in the calculation of average remuneration where they are regular components of pay.

Parker & Co

Employment Update | December 2011

Employment status

The ET examines the impact of FSA rules on the question of employment status for IFAs

In *Johnson-Caswell v MJB (Partnership) Ltd*, an ET held that an independent financial advisor (IFA), considered to be self-employed, was in fact an employee.

A key element indicative of employee status was the need to comply with Financial Service Authority (FSA) requirements. The ET considered that the training and supervision obligations that this involved contributed to a sufficient element of "control" by the employer.

MJB Ltd acts as an independent financial advisor and consequently must comply with FSA rules. Rather than being regulated by the FSA directly, MJB Ltd was regulated under a FSA arrangement which allows individuals or small firms working as IFAs to engage "principals" who ensure compliance with FSA rules.

The Claimant worked for MJB Ltd as an IFA under a contract which stated that he was self-employed, but which required him to comply with the directions, instructions, and training requirements of the principal.

The fact that he was controlled as a result of higher obligations imposed by the FSA did not detract from MJB Ltd's significant degree of control. It did not matter that the Claimant retained discretion over how he worked and how he was remunerated.

This case will be of particular concern to those in highly regulated sectors. The decision suggests that compliance with FSA standards means the "control" aspect of employment status is more likely to be satisfied.

The same reasoning could be applied in other highly regulated sectors, where there is a need to comply with regulations involving for example, health and safety.

Parker & Co

Disability discrimination – expensive adjustments

The EAT reviews the scope of the reasonable adjustments duty where cost is a factor – but employers must consider carefully on a case by case basis

In *Cordell v Foreign and Commonwealth Office* the EAT has held that FCO's refusal to provide a team of "lipspeakers" to support the Claimant, a deaf employee, did not amount to direct discrimination or a failure to make reasonable adjustments.

Following an assessment by the FCO, it concluded that there was uncertainty as to whether the necessary support could be found and that in any event such support was simply too expensive and did not therefore constitute a reasonable adjustment.

The ET agreed pointing out that the estimated cost of £249,500 a year was five times the Claimant's salary, amounted to nearly the cost of running the entire embassy and was a large amount of the FCO's disability budget.

The EAT upheld the ET's decision, holding that it was entitled to take into account the FCO's budget, pointing out that no organisation (even the Government) has infinite resources.

The Claimant also argued that she had suffered direct discrimination, alleging that there was no material difference between her position and those who were in receipt of the FCO's continuity of education allowance, which covered the school fees of the children of employees posted abroad, in that both require financial support to work abroad.

The EAT rejected this argument and considered that the reason the Claimant was not appointed was the cost of providing the necessary support, together with the uncertainty over whether it would be available. It accepted that these were reasons related to disability, but that it was not the disability itself which was the reason. Further, those receiving the FCO's continuity of education allowance could not be said to be in the same 'relevant circumstances'. Had the Claimant had school-age children, she would also have qualified for the allowance.

Parker & Co

Employment Update | **December 2011**

News in brief & what's coming up

Recent changes:

→ A reminder that from 1 October 2011, agency workers are entitled to equal rights in relation to pay and conditions following a 12 week qualifying period.

Mitigation: The EAT has held, in *Debique v Ministry of Defence* that if an employee fails to accept a reasonable offer of new employment with their employer in circumstances where there has been a dispute, that employee may have failed in his/her duty to mitigate their loss. The Claimant was a soldier and single mother facing childcare difficulties. After a dispute the Claimant resigned. Although the Claimant was successful in bringing claims for indirect sex and race discrimination, she was only awarded damages for injury to feelings on the basis that she had failed to mitigate her loss by refusing a new posting offered by the MOD during her notice period which would have addressed her childcare difficulties.

References: A reference may appear unfair but this does not necessarily mean it is negligent. The Court of Appeal in *Jackson v Liverpool City Council* considered a reference to be true and accurate regardless of the fact it referred to matters which were untested and unproven. LCC suggested in one of its references for the Claimant that there had been some record keeping issues but LCC also stated that these had not been investigated before the Claimant left.

Retracting a dismissal: In *CF Capital plc v Willoughby*, the Claimant's manager informed her that in order to avoid redundancies, the company was considering asking employees to become self employed. The Claimant expressed an interest, asking to see written terms. In response, she received an agency agreement stating that her employment would terminate that month and she would then become self-employed. The Claimant advised the company that she did not accept the agency agreement and argued that she had been unfairly and wrongfully dismissed. The company considered she had resigned. The Court of Appeal held that the company's assertion that it had made a mistake in sending a unambiguous letter of dismissal did not prevent dismissal from taking effect. It was not possible for the employer to unilaterally withdraw the notice of dismissal.

Legal expenses insurance: The High Court has held in *Brown Quinn v Equity Syndicate Management* that an individual, covered by a Before the Event Insurance policy, can reject a panel solicitor and insist on his own choice of solicitor. However, the individual cannot necessarily insist that the insurers pay that solicitors' hourly rate. Equally however, the insurer cannot insist on only paying its panel rate. The hourly rate payable by the insurer will be assessed by the courts as a reasonable hourly rate having regard to a number of factors, including the insurer's standard panel rates. In cases of particular complexity, involving certain categories of Defendants (such as public bodies or banks) and claims requiring senior and specialist fee-earners, the panel rate will be less important when assessing a "reasonable" recoverable hourly rate from the insurers.

Unfair dismissal compensation cap: In calculating the compensatory award for unfair dismissal the ET carries out a "gross-up" calculation in order to allow for taxation. In *Hardie Grant London Ltd v Aspden* the question was whether this calculation should occur before or after the statutory cap on compensation is applied. The EAT held that compensation should be grossed-up before the cap is applied. This resulted in the Claimant having her compensation for unfair dismissal reduced from £87,166.67 to £65,300 (the cap at the time).

Social networking: ACAS has produced some guidance on social networking policies for the workplace. Social networking/social media can take many forms which include the use of Facebook, smart phones, blogging and tweeting. The use of such media can create problems in the workplace. The ACAS guidance helps employers address potential issues which can arise in the workplace, such as dealing with the impact of social networking on performance, data protection issues and defamation. The guidance is available on the ACAS website - www.acas.org.uk.

Parker & Co

Employment Update | **December 2011**

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.

Helen Parker	020 7614 4031	Email Helen
Richard Woolmer	020 7614 4035	Email Richard
Jackie Feser	020 7614 4038	Email Jackie
Charlotte Schmidt	020 7614 4033	Email Charlotte
Rebecca Jackson	020 7614 4032	Email Rebecca
Zander Bell	020 7614 4034	Email Zander

Parker & Co Solicitors

28 Austin Friars, London, EC2N 2QQ

Tel: 020 7614 4030 | **Fax**: 020 7614 4040 | **Email**: info@parkerandcosolicitors.com

---