

September 2007

Law at work



STOP PRESS

We invite you to our forthcoming [Taylor Wessing Employment Breakfast Briefing](#): "I don't know where I end and you begin" on Thursday, 4 October 2007.

We will be discussing the issue of balancing the public/private interface between an employee's personal life and their work – avoiding unlawful discrimination. If you would like to attend please email [Lucy Hall](#) at Taylor Wessing.

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Features

Statutory holiday entitlement is increasing – How far will the new rights affect your employees?

Since the Working Time Regulations were introduced in 1998 ("1998 Regulations") workers have been entitled to a minimum of four weeks' paid annual leave (inclusive of bank holidays). This means that currently, employers may require that 8 of the 20 paid days' annual leave to which full-time workers are entitled to must be taken on bank holidays.

The Working Time (Amendment) Regulations 2007 ("Regulations") will increase statutory entitlement to paid holiday in two stages:

- From 1 October 2007 workers will be entitled to an additional 0.8 week's holiday. This means an increase to 4.8 weeks (or from 20 to 24 days on a full-time basis);
- From 1 April 2009 this statutory entitlement will increase by a further 0.8 week's holiday to 5.6 weeks (28 days on a full-time basis).

The Government estimates that these changes will affect 5.9 million workers, and cost businesses £4 billion per year. Although it was perhaps intended that these 8 additional days' statutory leave represent the 8 public holidays in England and Wales, this legislation does not oblige workers to take the additional holiday on bank holidays. Employers can do this in their contracts.

How will the new law affect employers?

Employers who already meet the 2007 Regulations requirements

To provide an incentive for early compliance with the Regulations, employers that already meet the full requirements as at 1 October 2007 will be exempt from the Regulations as long as they continue to meet those requirements. These are that:

- each worker employed by a company is contractually entitled to 28 days' paid leave;
- the additional annual leave cannot be paid in lieu except on termination; and
- the additional annual leave only can be carried forward into the subsequent holiday year (as opposed to the first 20 days' leave which must be taken in the holiday year it accrues).

Any contractual holiday provided above this limit is outside the ambit of the Regulations.

In essence, this exemption applies to employers who already provide all their employees with at least 4 weeks' holiday plus 8 days bank holidays.

The increases in holiday which apply under the Regulations from 1 October 2007 and 1 April 2009 respectively will be calculated proportionally depending on when the worker's leave year starts. The Department for Business, Enterprise and Regulatory Reform (DBERR) has published a "[Holiday entitlement ready reckoner](#)" to enable the increased statutory entitlement to be calculated quickly and easily if the implementation date does not coincide with an employer's leave year.

- Leave entitlement will continue to be calculated on a pro rata basis for part-time workers regardless of whether or not they usually work on bank holidays.
- There will be no qualifying period of employment for the additional holiday entitlement (although it is subject to an employee accruing it during the first year of employment) and partial days' holiday need not be rounded up to the nearest day.
- An employer may agree to permit a worker to carry over additional leave to the following holiday year.

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- Currently employers may not make a payment in lieu of holiday entitlement except on termination of employment. The Regulations allow employers to make a payment in lieu of additional holiday entitlement (the additional 0.8 weeks) through to 1 April 2009. This is a temporary measure to help employers with transitional arrangements such as recruiting and training any additional staff to cover the increased holiday entitlement.

Payment in lieu of the 28 days' paid leave will not be allowed on or after 1 April 2009 except on termination of employment. Employers who currently permit payment in lieu of additional paid leave above the statutory minimum in the 1997 Regulations will need to review their employment contracts.

Current contractual annual entitlement to holidays	Action required by employer prior to 1 October 2007	Action required by employer prior to 1 April 2009
4 weeks or more plus 8 bank holidays for each worker	Likely to be fully compliant with new Regulations – check contracts.	Likely to be fully compliant with new Regulations – check contracts.
Statutory minimum of 4 weeks including bank holidays (20 days for full time workers)	Increase holiday entitlement to 4.8 weeks (or 24 days for full time workers)Employer to consider whether additional leave be taken as bank holidays or at some other specified time	Increase holiday entitlement to 5.6 weeks (or 28 days for full time workers)Employer to consider whether additional leave be taken as bank holidays or at some other specified time

Consider current contractual wording

Employment contracts commonly stipulate the number of days' holiday an employee is entitled to take plus bank holidays, e.g. "20 days holiday plus bank holidays". However, a clause may provide for "statutory holiday entitlement plus bank holidays". Assuming they are currently entitled under such a clause to 20 days plus bank holidays, workers might argue that, from October, they are entitled to 24 days plus bank holidays. Employers should verify the situation. If there is any ambiguity they should consider seeking agreement from workers to amend their contracts to this effect after consultation and clarify in the contract that the additional days are to be taken on bank holidays.

Next steps for employers

- Check whether current entitlement to paid leave exempts an employer from the Regulations, but note that in order to be exempted each employee employed by a particular organisation must currently be entitled to 28 days' paid leave or pro rata equivalent to qualify.
- If the Regulations apply, consider whether to stipulate that the additional holiday entitlement is taken on bank holidays. This is perfectly legitimate.
- Notify employees of the statutory changes by 1 November 2007 with a written statement containing details of this change to their employment particulars.
- Check whether payment in lieu of untaken holiday above the current statutory minimum of 4 weeks is permitted. After 1 April 2009 this will not be permitted for the first 28 days' paid annual leave (although carry-over of the additional leave is permitted).
- Ensure that existing contractual wording does not award bank holidays on top of the new additional statutory entitlement. If there is ambiguity, seek employees' consent to amend the contractual wording.

By Kathryn Clapp

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Features

Recruitment: Cyber vetting – How to do it safely

There are now some 15 million users of Facebook and MySpace in the UK alone according to some reports. Most are young; many are professional. One headhunter, for instance, has found the names of 3,000 employees of a single large accounting firm listed on such social sites. For the users, of course, the sites are places to trumpet achievements (real or imagined), hunt for pals and climb onto soapboxes. However, they can also be places where users let their guard down and let slip questionable details – which makes the sites extremely valuable as a research tool for employers.

A survey in March this year by Viadeo, a business social network, showed that one in five employers now cyber-vets job candidates by searching websites. And Poolia, a recruitment consultancy whose clients 'Google' the names of applicants, claims: "By flicking between message boards you can piece together titbits of gossip you might not hear even at the Christmas party".

Employers need to use this information with care, of course, to avoid any hint of discrimination in their decision-making. But it is clear that they can and do use it. In Viadeo's research 59% of the 600 employers questioned say it influences their recruitment decision, and a quarter admit to rejecting candidates because of dubious "netreps" (internet reputations). Employers give a variety of reasons for trawling the sites:

- "His MySpace website showed a negative side to him including excessive alcohol abuse and disrespect for his job".
- "We found the candidate was on the local police wanted list".
- "We found that the candidate was personally into some activities which did not fit ethically into my company".

One City boss admits: "In the past, I've simply Googled candidates whereas now I type their name into MySpace as well. I've found some interesting things on that site. One candidate declared in his personal profile that he was against religion and anyone who believed in it. Working in such a diverse company as I do, I dropped his application like a hot potato. Funnily enough, he wasn't so quick to admit to the same thing on his CV".

In another instance, a computer company ran the name of an applicant for a high-profile job as a programmer through the Google search engine, only to find she had taken part in topless modelling contests.

Although such personal information should not affect the candidate's ability to do the job, if, for example, you tracked a candidate's online profile back to a gambling site would you feel comfortable about hiring him/her as a chief financial officer of charge of a multi-million pound corporation?

However, employers need to be careful as employees have rights even before they commence employment. A job applicant can bring a claim against a potential employer for unlawful discrimination in the arrangements made for recruitment and also as a result of a refusal or deliberate failure to offer employment. Discrimination claims that could result from cyber-vetting candidates may cover, for example, race, religious belief, sex, sexual orientation, age, and disability.

For example, if an employer rejects an applicant with an online alter ego "the Lurve Leopard" due to the photos posted on his website which indicated his sexual orientation, the "Lurve Leopard" would have a discrimination claim on the grounds of his sexual orientation if the facts support the analysis.

So how can both sides best protect their interests in the new online personal marketing arena?

For employees, it makes sense to review all their online profiles in the light of the new interest from employers – either a current employer or a potential one. Indeed, several start-up businesses – among them [Reputation Defender](#), and [Namyz](#) – now offer direct and personal help in managing online identities. Therefore, the more conscious among us can use the web as an additional opportunity to market themselves. Candidates should remember that the rise of search engines also means that deleting information from web pages is not always effective. Potential employers are "never more than a few clicks away".

For employers and HR specialists, the rules are not clear because the risks of cyber-profiling have not yet been tested in the courts. In practice, too, it might be difficult to prove that an individual was rejected or dismissed because of a netrep. If in doubt, meet the candidate anyway. What looks at first like a doubtful netrep might turn out merely to be evidence of a helpful sense of fun or a streak of useful creativity.

In our technology rich world cyber vetting is simply another way of recruiting and underlines the importance of following a number of rules at each stage of the recruitment process to guard your organisation against claims, The key rules are:

Preparation

- Train staff involved in the recruitment process in equal opportunities, and ensure this is regularly updated. Follow any relevant equal opportunities or recruitment policy and document decisions to deviate from this policy.
- Create a job description and a person specification for the role to avoid the risk of subjective decisions being made about candidates, this should create a "level playing field" and assist in resisting any allegations made by applicants of unlawful discrimination. Job requirements should be justifiable by reference to the job in question and not indirectly discriminate against any candidates, particularly in relation to working hours or times, travel, age ranges or dress. Also consider whether the job needs to be full-time or whether it is open to part-time, home working, flexible working or a job share.

Advertising

- Consider where the job will be advertised. The publications and mediums used should reach the widest range of applicants and consideration should be given to targeting different communities, ages and sexes. Take care with words too. Inappropriate wording could give rise to a claim or be used as evidence of a discriminatory culture.

Application and Selection

- Ideally, use a standard application form for all candidates. Include an equal opportunities monitoring form (which will be separated from the application before the short-listing stage). Process the forms, and all other records of the recruitment, in accordance with the Data Protection Act 1998 (DPA) and the Information Commissioner's Employment Practices Code.
- Make sure that any shortlisting criteria are not indirectly discriminatory. Imposing an age limit, for instance, may discriminate against women who have taken time out of work to raise children.
- Consider whether any aptitude, psychometric or other tests are required or desirable for the job; whether they invade a candidate's privacy; and how the results will be stored. Employers should take care that such tests are not indirectly discriminatory. Tell candidates about the test in advance and ask if they will need reasonable adjustments under the Disability Discrimination Act 1995 to complete the interview process and any aptitude tests.

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Interviews

- Ideally ask all candidates the same questions and have their answers scored consistently by members of an interview panel. Take and keep notes of the answers and the interview panel's impressions.
- Do not ask about candidates' personal lives unless they are directly relevant to the job. Similarly, any questions about a candidate's medical history, or a requirement to undergo a medical examination, must be linked to either the employer's general policy or the job's specific needs. If a panel member asks an inappropriate question the Chair should intervene and tell the candidate he or she does not need to answer it.
- Give the candidates feedback if they ask for it, in accordance with any relevant policy. Failure to give feedback can give rise to an implication that the reason for rejection is discriminatory.

Offers

- Make any job offer in writing and include a time limit for acceptance. Any offer should state that it is subject to contract and overrides any oral representations.
- Make the offer also subject to the candidate providing proof of permission to work in the UK. Under the Asylum and Immigration Act 1996 (as amended) an employer is guilty of a criminal offence if he or she knowingly employs someone who does not have permission to work in the UK. It will not be discriminatory if an employer asks the same of all candidates.
- Consider whether it is relevant to make the offer subject to the candidate confirming that he or she has no restrictions preventing them from working in the role, proof of relevant qualifications, and also, for instance, a Criminal Records Bureau check or testing for alcohol/drugs.

By Camilla Marriott

This article previously appeared in a similar form in the *Employment Law Journal*.

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Case law update

Employer dismissing at behest of third party must consider injustice to employee

David Greenwood v Whiteghyll Plastics Limited UK/EAT/0219/07

Why care?

It is increasingly common for employers to second or supply workers to third parties on the basis that such third parties can refuse to allow those employees onto their premises and can require the employer to remove them. It may be possible for an employer to redeploy them elsewhere but often this is not the case. This decision indicates the issues that an employer must take into account when deciding to dismiss in these circumstances – and also what the tribunal should consider when making its decision.

The case

The employer carried out store fit-outs for Morrisons after it took over Safeways. The claimant worked on-site at Morrisons and had been working nights. The contract had been going well until, seemingly out of the blue, three complaints were made about the claimant's work and Morrisons barred him from their premises and said that he was not a suitable representative. This was particularly puzzling to the claimant as his work had been signed off as satisfactory by the Morrisons supervisor. The complaints only arose when the day-shift started work. The employer was unable to redeploy the Claimant elsewhere and so his employment was terminated for "some other substantial reason".

The tribunal found that Morrisons held "the whip hand" in the relationship with the employer and that Whiteghyll had little choice in the matter. The tribunal found that there was no slack in the employer's organisation and that an effort had been made to look for alternative work. It also noted that the employer had recently laid off nine people from its factory. There were some procedural flaws, but these had been corrected at the appeal stage.

The claimant's representative argued on the basis of the case of *Dobie v Burns* [1984] ECR 812 that the tribunal had failed to consider the issue of the injustice that might be caused to the employee and that it moved straight from the circumstances surrounding dismissal to the conclusion that the dismissal was fair.

The EAT agreed and found that there was no evidence that the tribunal had thought about whether or not the employer had considered this point which was described as "a very important factor" by Sir John Donaldson MR in *Dobie*. The EAT noted that there was nothing in the documents which indicated that the employer had considered the issue of injustice to the employee in deciding to dismiss, although it did concede that even if that point had been considered, the decision may not have changed.

The case was remitted to a different tribunal.

What to take away

It would be wise for employers who are forced to consider the termination of employment in these circumstances to expressly consider the issue of the injustice that such dismissal might cause to the employee and to note this in the written record of its deliberations – although experience indicates that this is highly unlikely to change the actual outcome.

An employer can fairly dismiss an employee for illness, even where the employer has contributed to or caused the employee's illness

Suzanne McAdie v Royal Bank of Scotland [2007] EWCA Civ 906

Why care?

This case supports the principle that when considering whether or not an employee has been unfairly dismissed, the tribunal should consider what the employer knew or believed at the time of the dismissal and assess its conduct on that basis, rather than allowing itself to be swayed by sympathy for the former employee arising from how he or she has been treated prior to dismissal.

The case

By the time of her dismissal, the claimant had worked for the respondent for 21 years. Prior to her dismissal, she had been asked to move branches temporarily to provide maternity cover and had been very reluctant to do so. She raised various grievances which were dealt with by the bank. The bank dealt with the grievances poorly; there were considerable delays, notes were incomplete, managers considering the various stages of the grievances did not consider the correct issues and there was at least one very heated phone conversation with a senior manager which left the claimant very upset. She went on sick leave from 10 September 2003. She was eventually terminated by reason of capability on 22 December 2004.

Evidence adduced before the tribunal included evidence that Ms McAdie herself had stated towards the end of her employment that there was nothing that the bank could do that would allow her to return to work, and that what she was seeking was compensation. This was backed up by medical evidence, which indicated that her condition could only be helped if there was a satisfactory resolution of the issues, which, according to the doctor, seemed impossible.

Ms McAdie initially submitted an unfair dismissal and sex discrimination claim. The tribunal found that she had been unfairly dismissed but reduced compensation by 50% and it dismissed the claim for sex discrimination. The bank appealed to the EAT, which allowed its appeal. Ms McAdie appealed to the Court of Appeal, which found itself unable to change or improve on the EAT's reasoning.

The EAT noted that there would be cases where the employer may be responsible for an employee's incapacity and that this would be relevant to whether or not dismissal for that incapacity is fair. The EAT noted that in such circumstances the employer may be required to tolerate a longer period of sickness absence than is usual or to find alternative employment. However, the fact that an employer may have caused the illness should not preclude that employer for ever from terminating the employee by reason of capability. The tribunal should consider the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal – a definitive decision on culpability or causation may not be necessary.

The tribunal was not wrong in principle for being prepared to take into account the fact that the bank was culpably responsible for the claimant's ill-health – where it went wrong was in failing to focus on the statutory question of whether it was reasonable for the bank in the circumstances to terminate by reason of capability, rather than on the bank's responsibility for that illness.

The tribunal found that "no reasonable employer would have dismissed in these circumstances because no reasonable employer would have found themselves in these circumstances", which the EAT found to be a misdirection. The EAT said "We have considered whether this may not be a case where the tribunal surrendered to the temptation of a pithy phrase and in so doing misrepresented what were in fact its real reasons." The EAT found though that this reasoning ran through the tribunal's judgment.

A significant factor in the EAT's reasoning (and therefore in the Court of Appeal's reasoning) was that Ms McAdie herself had stated that there was nothing the bank could do to induce her to come back to work and she wanted compensation – they had in effect reached the end of the road.

What to take away

On the face of it a comforting decision for employers, at least in respect of unfair dismissal claims, although there may well be personal injury claims that could be made. However, where the employer's own behaviour has made the employee ill, and if the employee has not rejected the idea of any kind of resolution, such an employer should consider (as suggested by the EAT) allowing a longer period of sick leave, or other possible solutions – and might well be required to do so anyway because of disability discrimination considerations (which does not seem to be something that was raised by this employee).

Hot topics

Sections of the Companies Act 2006 come into force

On 1 October provisions of the Companies Act 2006 come into force which will provide a statutory list of duties directors owe to companies. This marks a departure from past practice where the general duties of directors arose from case law. In addition the Act also makes some significant changes to directors' duties. If you would like our briefing materials please email [Sian Love](mailto:Sian.Love).

Latest on the Heyday challenge on age discrimination

Following our reports in February and June, the parties in this case have now agreed the wording of the referral of the case to the European Court of Justice, challenging the legality of compulsory retirement at 65 years on the basis that this conflicts with EU legislation. A decision is not likely for over a year. In the meantime, a Southampton tribunal has refused a request by a Claimant (who had brought a claim of unfair dismissal and unlawful age discrimination on the grounds that she had been retired when she reached 65) to stay proceedings pending the outcome of the Heyday challenge, but many tribunals are likely to await the Heyday result.

New Commission for Equality and Human Rights (CEHR)

From 1 October the CEHR will replace the Equal Opportunities Commission, Commission for Racial Equality and the Disability Rights Commission. The new body will be responsible for new laws relating to all forms of unlawful discrimination, not just those currently covered by the three separate bodies. This means that discrimination on the grounds of age, sexual orientation and religion or belief will also be covered.

Data Protection update

Manual filing systems in existence before 24 October 1998 will be required to comply fully with the Data Protection 1998 by 24 October 2007.

Large rise in Equal Pay claims 2006/7

The Tribunals Service has released statistics to show that there was a 15% rise in employment tribunal claims between 2005/6 and 2006/7 to a new high of 132,577 claims. This can largely be attributed to a 155% rise in equal pay claims and a 100% rise in sex discrimination claims many of them relating to public sector employees.

Contacts

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