

April 2009

# Law at work



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# Features

## Coping with the cost of sickness absence: the impact of *Stringer v HMRC*

As readers will be aware, the ECJ's ruling on questions referred by the House of Lords in *Stringer v HMRC* is that workers taking sick leave are entitled to accrue paid annual leave, even where they have been absent for the whole of the working year.

The impact that this judgment will have in the UK will depend on the way in which the House of Lords interprets the Working Time Regulations 1998 (which implement European law on annual leave) – the case is due to return to the House of Lords on 30 April 2009. But whatever the outcome of this case, holiday pay is an additional cost that employers will have to bear when employees take sick leave. In the current economic climate, in particular, this is another reason for employers to consider what steps can be taken to mitigate the cost of sick leave.

### What impact will the decision have on employers in the UK?

- To give effect to the ECJ's ruling, paid annual leave accruing during sickness absence must:
  - a) be taken by the employee at the same time as his sick leave; or
  - b) be taken by the employee on his return to work; or
  - c) where the employee does not return to work at the end of a period of sickness absence, be paid to the employee in lieu.
- The WTR currently prohibits employees from carrying statutory leave entitlement over from one holiday year to the next, and the Court of Appeal has previously ruled that employees cannot take holiday at the same time as sickness absence. It is not clear how the UK Courts will apply the ECJ's ruling to the application of the WTR and an amendment to these regulations may be required. It is possible that the House of Lords will overturn the Court of Appeal's decision and permit employees to take holiday while off sick (and to allow employers to make them do so), which could solve the problem of potentially years' worth of holiday being carried forward or paid in lieu on termination.
- Public sector employees can directly enforce the ruling against public employers in the UK so these employers should probably immediately allow employees to carry over leave from one year to the next, where they have been unable to take it due to sickness absence.
- In the private sector, the prohibition on carry-over of annual leave, and the Court of Appeal's decision that employees cannot take holiday during sick leave still stand, but employers can start preparing for anticipated changes to the law (and therefore costs) in this area.

### What steps can employers take now to mitigate the cost of sick leave?

The two main active ways employers can reduce the additional cost of sick leave pending a House of Lords decision are by (1) reducing employees' contractual entitlement to sick pay and (2) reviewing the continued employment of employees on long-term sick leave.

### Considerations for employers:

#### Contractual sick pay and holiday entitlement

- Weigh up benefits of generous contractual sick pay and holiday entitlements as a recruitment tool (generally less important in the current job market) against the disadvantages.
- Generous contractual sick pay entitlements can act as a disincentive for employees to return to work; this can be a particular issue where disciplinary proceedings or attempts to manage the employee are contemplated.
- Most contractual sick pay schemes provide that employees are entitled to sick pay for certified sickness absence, and it is difficult for employers to look beyond this to determine whether or not sick pay will be paid.

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- Even where contractual sick pay entitlement is limited, employers can make additional payments on a discretionary basis. To preserve the employer's right to exercise discretion it is important that payment decisions are made on a case by case basis.
- Introducing reduced sick pay or holiday entitlement is straightforward for new recruits but contractual changes for existing employees can only be made with the employees' consent. If this is not obtained, employees can resign and claim constructive dismissal and/or claim breach of contract. Consent is likely to be easier to obtain if other benefits (e.g. bonus payments for 100% attendance) are offered. Any reduction in length of holiday must comply with the Working Time Regulations which entitle all employees to no less than 5.6 working weeks leave each year, and subject to an assessment of any disability discrimination impact.

### Reviewing employees on long term sick leave

- Previously, employees who had exhausted their contractual entitlement to sick pay could be retained for little cost. Indefinite accrual of holiday pay changes this position.
- Consider what steps can be taken to actively manage the employee's absence from an early stage. This will involve holding regular meetings with the employee as part of a capability process and seeking medical reports.
- Where it is established that an employee will not, or is unlikely to, be able to return to work, take steps to terminate the employment, rather than continuing the employment indefinitely. If entering a compromise agreement with such employees, avoid wording which would entitle the employee to be paid for "any accrued but untaken holiday entitlement" and instead specify the number of days.
- If the employee has a disability under the Disability Discrimination Act, care should be taken not to terminate employment for discriminatory reasons and reasonable adjustments to help the employee return to work or continue performing his role must be considered.
- Consider what benefits are covered under PHI insurance and whether these include paid annual leave, if not, employers could be required to make additional payments in respect of this.
- Although the situation is uncertain until the House of Lords makes its decision, consider allowing workers on long-term sick leave to take a notional period of paid annual leave in each holiday year.

### Other leave: A reminder

The ECJ's judgment only applies to statutory leave entitlement under the European Working Time Directive, which is four weeks per year for an employee working full time. In the UK, annual paid leave entitlement is now 28 days per year for fulltime workers (inclusive of eight public holidays). It appears that accrual of additional contractual entitlement to annual leave during sick leave could be excluded by employers.

Employees on maternity or paternity leave are entitled to continue to accrue annual leave entitlement. The ECJ has specifically ruled that unlike during sick leave, employees cannot take paid annual leave entitlement during maternity leave. Changes to legislation in the UK in October 2008 mean that employees can no longer be restricted to accruing their statutory entitlement to leave only during additional maternity leave and instead also accrue any additional contractual entitlement throughout.

**Gemma Parker**

*(This article first appeared in Human Resources magazine)*

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# Freedom of Information rights used to access job applicant details

All employers are already generally aware that materials generated during the recruitment process can be open to inspection or subject to an order to disclose. This has traditionally only arisen in the context of existing discrimination proceedings. However, in a Decision Notice dated 12 January 2009 (FS50184888) the Information Commissioner found that certain information contained within application forms of candidates for two Leicester City Council jobs could be disclosed to a complainant who had applied unsuccessfully for each post and who had subsequently asked the Council for information about the recruitment process.

## The background

The complainant was an existing employee of Leicester City Council. He had applied as an internal candidate for two vacancies and had been unsuccessful in his applications. He subsequently made a request under the Freedom of Information Act 2000 ("FOIA") for the following information "suitably redacted if necessary":

1. Copies of the short-listing matrix document, completed by each of the recruitment panel, indicating the successful candidates.
2. Copies of the application forms for each of the candidates who were interviewed, indicating the successful candidates.
3. Copies of the candidate assessment forms and any other interview notes completed by each of the recruitment panel for each of the candidates who were interviewed, indicating the successful candidates.
4. Copies of the two references provided for the complainant (in respect of his applications).

Under FOIA any person making a request for information of a public authority, (such as a government department, local government institution or other public body) has a right to be informed in writing by the public authority whether it holds the information requested and if so, to be provided with that information (usually within 20 days).

There are certain exemptions available under FOIA from the obligation to provide some or all of the information requested. The exemptions fall into two categories:

- Absolute exemptions – if the exemption applies, the information requested need not be provided.
- Qualified exemptions – considering whether the exemption applies depends first on balancing the benefit of the exemption against any overriding public interest in disclosure.

## The arguments

The Council initially supplied items 1 and 4 in response to the complainant's request and provided him with copies of his own application forms. Following this initial disclosure and some further consideration, the Council went on to supply item 3 in a redacted form, (to remove any personal data). The Council refused to disclose the application forms of other candidates.

The Council based its decision to refuse access to candidate application forms on an absolute exemption at section 40 of FOIA (in particular section 40(2)) in that the information supplied by candidates on their application forms constituted personal data and that to release this information, even after redaction, would breach its obligations under the Data Protection Act 1998. In making this argument the Council stated that the redacted information would still enable the identification of some or all of the applicants, (particularly in the case of the two successful candidates) and that to release this information would also amount to unfair processing as it would involve using the applicant's information in a way they would not have anticipated when they first applied for the vacancies.

In investigating the complaint, the Information Commissioner requested further information from the Council about the following:

- **The level of seniority of the posts** - those applying for senior public posts may need to expect their appointment to be subject to a degree of scrutiny in view of the public interest in ensuring appropriate use of public money.
- **The likelihood (or not) that candidates could be identified from redacted application forms** - whether or not the forms could be redacted in such a way to prevent candidates being identified.
- **The sensitivity of the information involved** - whether any damage or distress may occur to the data subjects as a result of the disclosure of information.

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Further information provided by the Council made clear that both the vacancies were Heads of Department posts. The Council conceded that those in the public sector might have to expect that their employment may be subject to greater scrutiny than in the private sector but that this did not apply to information about unsuccessful applicants for public posts. There was a risk, in the view of the Council, that people may also be deterred from applying for jobs with the Council in the future if they thought that information submitted in their application would become publicly available. The Council also restated its view that information about applicants' education, skills, qualifications and work experience would make it possible to identify individual applicants with "relative ease".

### The Information Commissioner's decision

The Information Commissioner decided upon a number of procedural matters relating to the time the Council took to reply to the request, the format of its refusal notice and its failure to pass on details of any process for responding to complaints about their handling of the request. Of particular interest here was whether the Council was correct to rely on the exemption at section 40(2) of FOIA to withhold unredacted and redacted versions of the requested application forms.

The Information Commissioner agreed that the Council was correct to identify that the exemption under section 40(2) of FOIA was relevant to the complainant's request for the release of the application forms and that it was also correct in its decision to apply this exemption to the complete, unredacted application forms.

However, the Information Commissioner took the view that to release the information in the application forms in a redacted or summary form would not lead to unfair processing or to an unwarranted interference with the rights, freedoms or legitimate interests of the unsuccessful applicants, nor should it mean that it would be possible to identify individual applicants. Instead, the Information Commissioner considered that it would still be possible to release some information without prejudicing the exemption, instead of simply withholding all the information.

In the case of the two successful candidates, identifying their redacted forms as being those that were "*successful*" would mean that information about those candidates would be disclosed to the complainant as he could identify them. However, in the view of the Information Commissioner, the information he was recommending to be released was general in nature and the type of information that would be inferred from the person specification for the job such as their experience and qualifications (such as providing a general description of employers without naming them and giving qualifications without naming specific educational establishments). This information could be presented in summary form like the 'pen portraits' often found in conference speaker biographies. The Information Commissioner also noted that the posts at issue here were relatively senior to which the post holders may expect some scrutiny given the public interest in the spending of public funds.

Taking the above and the wishes of the complainant into account, the Information Commissioner instructed the Council to provide the complainant within 35 days of the decision with either the applicants' redacted application forms or with general summaries of the qualifications and experience of each applicant. In each case the successful applications should also be indicated.

### Implications

For public sector employers, the Information Commissioner's decision in this case may now make it easier for more speculative requests to be made of public authorities, paving the way for an increase in the overall number of requests public bodies receive for information relating to their recruitment processes for specific posts.

Private sector employers may also need to consider this decision where they pass candidate application forms to a public body or generate or hold applications on behalf of a public employer. This may occur, for example, where staff are being recruited for the delivery of a specific contract with a public sector client, (who may have a right of scrutiny or comment on candidates) or where a private company or agency is recruiting for a public sector client and passing application forms over for consideration. To the extent the forms are in the possession of or retained for the public authority they will be effectively 'held' by the authority for the purposes of FOIA and will potentially need to be made available in a redacted or summary form in response to a request for access.

The decision does not allow for whole scale disclosure of full, unredacted application forms, however, it makes clear that public employers cannot simply assume that the Data Protection Act 1998 will provide an automatic exemption under FOIA from the need to provide any information provided by other job applicants. It remains important that employers make sure that application materials including interview notes collect appropriate information and that they are aware that it may be necessary to redact, summarise and release this information to unsuccessful candidates.

*Sally Annereau*

# Case law update

## Loss of final salary pension continues beyond loss of earnings

### ***Roberts v Aegon UK Corporate Services Ltd UKEAT/0277/08***

#### **Why care?**

The law on compensatory awards for unfair dismissal at s123 ERA 1996 states "*...the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*" Such awards may include amounts to reflect loss of actual and future pay and benefits. Employees are under a duty to mitigate their loss by seeking new work and any earnings beyond the period of notice are deducted when calculating the award due, although if the employee then loses that second job then their first former employer may remain liable for ongoing losses.

In this case the EAT found that loss of pension rights could continue beyond loss of earnings and the Tribunal was entitled to differentiate between a final salary pension scheme and a money purchase scheme. Whereas employment with a subsequent employer generally brought to an end any possible loss of earnings claim, this was not the case for continuing pension loss as it was a unique type of benefit. This was so even where the new job had a more favourable remuneration package overall.

#### **The case**

Following R's redundancy dismissal from A on 15 January 2007, she obtained employment on the same day with Just Retirement Limited (JRL) which had a better remuneration package but the pension scheme was less favourable as it was a money purchase scheme. The employment with JRL ended in September 2007, after health problems and a dispute, which was settled by way of compromise agreement. The Tribunal in February 2008 upheld R's unfair dismissal claim against her first employer. At a remedies hearing she was awarded no compensation for future loss of earnings as her employment with JRL had broken the chain of causation. In making an award for ongoing pensions losses it decided that it was likely that R would find another job within six months on the same basis that she had been paid by A but that it was more likely that any pension arrangements would involve a money purchase scheme (supported by an employment expert who gave oral evidence to the ET).

The ET held that (i) future loss of earnings from a job subsequent to a dismissal could not fairly be attributed to the unfair dismissal of a Respondent; (ii) there is continuing pensions loss even when the Claimant obtains permanent employment that pays the same or more; (iii) the loss of benefit of a final salary pension scheme is a unique type of benefit that she did not retain at JRL and she would be unlikely to find employment with that benefit. However, in assessing compensation in a just and equitable manner credit should be given for any benefits that the Claimant has received or is likely to receive from a money purchase scheme or a salary increase.

The ET concluded that any pension loss subsequent to the termination by JRL was attributable to and in consequence of the original unfair dismissal by JRL.

The case before the EAT was an appeal from a remedies decision held in February 2008 in which the Tribunal had awarded compensation for unfair redundancy dismissal of over £38,000. After a Tribunal review this was reduced by about £1,000.

The question for the EAT was whether it should apply the same approach to pension loss as for loss of earnings and not separate the two components, given that comparing the better remuneration at JRL with its less favourable pension arrangements, R was still better off with the package being offered by JRL.

The EAT agreed with the ET that:

1. it was entitled to form the view that the loss of the final salary pension scheme was a very significant factor and that its loss could not be quantified in purely monetary terms.

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2. from the authorities it is clear that a fresh employment doesn't by itself stop the clock running as far as losses flowing from the original dismissal and a tribunal is obliged to carry out a proper comparison of the two employments financial terms and in other benefits; and
3. with a final salary scheme the risk is very much on the employer and the reverse is true for a money purchase scheme and that it was in particular that element of risk the Tribunal must have had in mind.

## What to take away?

Assessing future pensions loss under a compensatory award where an employee is a member of a final salary pension scheme could be costly. As the EAT recognised, it is becoming rare for employees to find new employment with a final salary pension scheme and that tribunals should consider this when assessing compensation. This decision indicates that ongoing pension loss may be assessed separately from loss of earnings even if either an employee's overall package in new employment following dismissal is the same or greater, or the line of causation has been broken so far as a future loss of earnings is concerned.

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## Non-competing former employee entitled to exercise share options

### ***Gregory Morgan Plumbly v Beatthatquote.com Ltd [2009] EWHC 321 (QB)***

#### Why care?

Share options can be a valuable tool for companies, enabling them to recruit and retain key employees in return for a share of the business which is realised when the option is exercised.

However, disputes can arise where the exercise of an option is connected with the termination of employment and the relationship between the parties breaks down.

In *Tesco Stores Limited v Pook [2003] EWHC 823*, the High Court ruled that an employee dismissed for gross misconduct was unable to exercise his option on the basis that an option agreement contains an implied term prohibiting exercise where the employee has repudiated the employment contract. Therefore, an employer can successfully defend an action brought by an employee or former employee to enforce the exercise of a share option if the employer can prove that the claimant fundamentally breached the terms of employment prior to giving notice to exercise.

This may be relatively straightforward where an employee has been dismissed for gross misconduct but will otherwise be considered by the court on the particular facts of the case, as seen here.

#### The case

Mr Plumbly was a key initial employee at Beatthatquote.com (BTQ), a start-up website comparison business. Pursuant to Mr Plumbly's terms of employment, BTQ granted him a share option for 10% of the ordinary shares of the company which could be exercised at a nominal price between the first and third anniversaries of the grant provided that Mr Plumbly was in full-time employment with BTQ.

Mr Plumbly exercised his option on the first anniversary of the grant with the intention of subsequently resigning due to the deterioration in the relationship between himself and the founding director of BTQ. He then resigned three weeks after giving notice to exercise. BTQ refused to allot the shares under the option agreement to Mr Plumbly and he brought a claim against BTQ for breach of contract. BTQ defended the action on the basis that Mr Plumbly had fundamentally breached the terms of his employment and owed fiduciary duties to BTQ (meaning that he owed the company a higher duty of care and undivided loyalty than that of a mere employee), and was not entitled to exercise the option as per *Tesco v Pook*.

Prior to Mr Plumbly's employment with BTQ, he had set up and managed a buy-to-let property investment website (AABTL). Although Mr Plumbly's employment contract contained a non-competition clause it had been agreed in a side letter that Mr Plumbly could continue running AABTL provided that it did not compete directly with BTQ. BTQ alleged that the AABTL website directly competed with the business of BTQ because it contained a link to a third

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party company which provided free mortgage quotes and mortgage quotes were part of BTQ's business. BTQ further argued that Mr Plumbly had carried out AABTL work during working hours at BTQ and divulged BTQ's confidential information.

The High Court considered the evidence of both parties and while it accepted that the non-competition clause was a fundamental term of the contract it did not agree that AABTL was in competition with BTQ. The High Court held that competition broadly meant two or more parties striving for custom for the same object. In this case, there was little chance of any one internet search obtaining links to both sites.

Mr Plumbly was an employee, but not a director, of BTQ and the Judge held he was not subject to any fiduciary duties. The court found in favour of Mr Plumbly and awarded him damages on the basis that the claimant was entitled to choose the most advantageous remedy and that the shares themselves would be disadvantageous to Mr Plumbly as they would lock him into a position as a minority shareholder at BTQ.

## What to take away?

The root of the problem in this case was that the provisions of the share option agreement allowed Mr Plumbly to exercise his share option before an exit event and the articles of association did not contain any transfer provisions relating to employee shareholders leaving employment. In the absence of such provisions, BTQ was forced to argue on the much weaker grounds of breach of contract by Mr Plumbly. The case shows the value of agreeing what will happen to shares and share options at the end of the employment relationship before entering into such arrangements.

The case also demonstrates that where an employee successfully brings a claim concerning the exercise of an option, the remedy awarded is likely to be a payment of damages equal to the value of the share option instead of the shares. Employers should therefore consider the cash flow consequences of having to make such a payment when conducting the dispute, particularly where the share option represents a significant percentage of the business, when deciding the level of options to grant.

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## Hot topics

### Tribunal statistics reveal more litigious workforce

The 2007-2008 Employment Tribunal and EAT statistics have been announced by the Tribunals Service, showing 189,303 tribunal claims were received that year – a 43% increase in claims against the 2006-2007 figures. This rise can be attributed in part to large numbers of claims relating to working time, equal pay and trade union membership, the last of which experienced a 174% rise in claims.

For the first time, the figures include awards made for age, sexual orientation and religion and belief discrimination. Although discrimination awards are uncapped and include amounts for injury to feelings, the actual figures remain relatively low, with the largest award under these three heads being a sexual orientation case in which the claimant received £22,850. The largest award overall was a disability discrimination case which resulted in compensation of £227,208, whilst the potential risk of costs is reflected in the case in which costs were awarded of £177,775. The EAT also saw an increase in appeals, with 8% more cases going to a full hearing than in the previous year.

Provisional tribunal statistics for the period from April 2008 to February 2009 have also been published, showing numbers of claims received and the outcome of those claims heard during that period. Although not yet in their final form, the figures suggest that there has been an overall decrease in claims from the previous year but a substantial increase in more "normal" claims for unfair dismissal, redundancy payments and failure to inform and consult on redundancy. We believe this reflects the economic environment and a workforce more prone to bring claims than previously.

### Consultation begins on changes to employment agency laws

The Government has launched a consultation process on changes to the Conduct of Employment Agencies and Employment Businesses Regulations 2003, which set minimum standards for employment agencies. The aim behind the amended Regulations is stated to be to reduce the regulatory burden on businesses whilst protecting vulnerable workers from unfair practices.

The consultation includes:

- abuse of workers in payment of upfront fees to entertainment or modelling agencies
- agencies which force temporary workers to be employed by umbrella companies to be allowed an opt-out of the protection afforded by the Regulations
- exempting post-graduate medical deaneries (which train doctors and dentists) from employment agency legislation; and
- reducing the regulatory burden by measures such as not requiring employment agencies to make suitability-for-work checks when placing workers in permanent employment, agreeing terms and requirements for advertisements.

Responses to the consultation must be received by 11 June 2009 and further information (and how to take part in the consultation) can be found [here](#).

### EU minimum rights for pregnant workers may increase

DBERR has announced consultation plans in the light of the European Commission's proposal that the minimum levels of maternity leave and pay laid down in the Pregnant Workers Directive should be increased. Under the proposed changes, new mothers would be entitled to receive at least 18 weeks' (up from 14) leave at full pay (subject to a cap at least equal to sick pay) and would be required to take at least 6 (up from 2) weeks' compulsory maternity leave following the birth of a child.

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DBERR believes that the changes, if accepted in amendments to the Directive, would not have a substantial impact in the UK where the law is already more generous than the EU minimum in a number of respects. At present UK employees are entitled to six weeks' leave at 90% of salary, followed by 33 weeks at £123.06 per week, and only 1% of mothers take less than six weeks' maternity leave.

The consultation documents are available at [here](#) and consultation closes on 22 June 2009.

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### Practice leaders:

#### Employment

Sean Nesbitt +44 (0)20 7300 4294 [s.nesbitt@taylorwessing.com](mailto:s.nesbitt@taylorwessing.com)

#### Pensions

Carolyn Saunders +44 (0)20 7300 4752 [c.saunders@taylorwessing.com](mailto:c.saunders@taylorwessing.com)

#### Employee incentives

Ann Casey +44 (0)20 7300 4750 [a.casey@taylorwessing.com](mailto:a.casey@taylorwessing.com)

#### Immigration

Charlie Pring +44 (0)20 7300 4256 [c.pring@taylorwessing.com](mailto:c.pring@taylorwessing.com)

Vikki Wiberg +44 (0)20 7300 4738 [v.wiberg@taylorwessing.com](mailto:v.wiberg@taylorwessing.com)

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### For events and seminars, please contact:

Lucy Hall +44 (0)20 7300 4082 [events@taylorwessing.com](mailto:events@taylorwessing.com)

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