

January 2009

Law at work



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Taylor Wessing Breakfast Briefing:

Employee Disputes - Back to the Future

Taylor Wessing Employment Group invites you to a breakfast update on 19 March 2009 about the changes to the statutory dispute resolution procedures which come into force on 6 April 2009. Will this mean a 1980s revival? As well as examining the implications for employers, the seminar will feature a presentation on mediation by a member of the Gibbons review panel which recommended the changes. Please look out for your e-invitation to this event which will be sent to you in the near future.

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Looking ahead at 2009: Key changes in employment law

| What? | When in force? |
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| <p>Compensation levels awarded by employment tribunals will be increased to:</p> <ul style="list-style-type: none"> ■ maximum compensatory award for unfair dismissal £66,200 (currently £63,000) ■ maximum amount for a week's pay for calculating basic award or redundancy payment £350 (currently £330) ■ maximum redundancy payment £10,500 (currently £9,900) | 1 February 2009 |
| <p>The Employment Act 2008 comes into force which will:</p> <ul style="list-style-type: none"> ■ repeal the statutory dispute resolution procedures. We will be considering the implications of this legislation in the March edition of Law at Work; ■ permit a trade union to expel or exclude an individual on the basis of his or her membership or former membership of a political party (implementing the ECHR case of <i>Aslef v United Kingdom application no. 11002/05</i>) ■ increase powers for the enforcement of the national minimum wage. | 6 April 2009 |
| <p>The revised Acas Code of Practice on Disciplinary and Grievance procedures comes into force. Where there is a breach of the Code of Practice, a tribunal can increase or decrease any award made by up to 25%.</p> | 6 April 2009 |
| <p>The Government proposes to extend the right to request flexible working to parents of children up to 16 years old, following Imelda Walsh's independent review.</p> | April 2009 |
| <p>Paid holiday entitlement under the Working Time (Amendment) Regulations 2007 will increase from 24 to 28 days (for those working a five day week).</p> | 1 April 2009 |
| <p>The standard rates of statutory maternity pay, statutory paternity pay and statutory adoption pay will be increased from £117.18 to a weekly rate of the lesser of £123.06 or 90% of the person's average weekly earnings.</p> | 6 April 2009 |
| <p>The rate of statutory sick pay will increase from £75.40 to £79.15 per week.</p> | 6 April 2009 |
| <p>Under the Work and Families Act, the Government proposes to extend paid maternity leave to 12 months and allow fathers to benefit from up to 26 weeks' paid additional paternity leave if the mother of the child returns to work before the end of the maternity leave period to which she is entitled.</p> | April 2010 (or later) |

Key cases for 2009

| Case name | Summary of case | Court and hearing date |
|---|---|--|
| <i>"The Heyday challenge" or R, (on the application of the Incorporated Trustees of the National Council on Ageing) v Secretary of State for Trade and Industry</i> | <p>Age discrimination</p> <p>The Advocate General was of the opinion that a national rule, which permits employers to dismiss employees aged 65 or over for retirement could, in principle, be justified. It would be for the national courts to determine whether that rule is, in fact, objectively and reasonably justified.</p> | <p>Awaiting ECJ decision</p> <p>The AG delivered his opinion in September 2008.</p> |
| <i>Schultz-Hoff v Deutsche Rentenversicherung Bund</i> | <p>Sickness and working time</p> <p>Advocate General's opinion was that leave not taken by a worker because of illness during the leave year must be granted at a later date, or if employment has been terminated, a payment in lieu of that leave must be made.</p> | <p>ECJ judgment is expected on 20 January 2009</p> <p>The AG delivered his opinion in January 2008.</p> |
| <i>HM Revenue & Customs v Stringer and others (previously Commissioners of Inland Revenue v Ainsworth)</i> | <p>Long term sick leave and holiday</p> <p>Clarifying whether an employee on sick leave accrues paid holiday. The Advocate General decided that an employee could accrue, but not take, paid annual leave while off sick. On termination of employment they would then be entitled to compensation for annual leave which has accrued but has not been taken due to illness.</p> | <p>ECJ judgment is expected on 20 January 2009</p> <p>The AG delivered his opinion in January 2008.</p> |

Workin' 9 to 5 ... (or not)

With the UK's opt-out of the 48 hour working week under threat, changes may be afoot to the provisions of the Working Time Regulations 1998 (WTR). Removal of the opt-out is unlikely to be popular with employers but some clarification on the rest provisions in the WTR would be more than welcome, given the uncertainties that make complying with the WTR in practice a considerable challenge.

In this article, we take a look at some of the 'grey' areas to watch out for.

1. When do the WTR apply?

The Regulations apply to all workers but issues are most likely to arise where workers;

- are required to spend part of their working-time "on-call";
- have a home at their workplace or who are provided with accommodation at their workplace;
- work alone;
- work long shifts, especially where this work cannot be interrupted, for example care workers or security guards;
- are engaged in night work.

2. Summary entitlements to rest under the WTR

- 11 consecutive hours in each 24-hour period;
- Uninterrupted rest period of 24 hours in each seven day period;
- Additional rest periods for young workers;
- Rest breaks of 20 minutes where the worker's daily working time is more than six hours;
- Restrictions on night work;
- Annual leave.

Some 'Grey' Areas

3. Breaks

The recent case of *Corps of Commissionaires Management Ltd v Mr D Hughes [2008] UK EAT/0196/08* confirmed that workers who work for more than six hours are entitled to one 20-minute break, and working for a further consecutive period of six hours does not entitle the worker to another break (although 11 hours of rest must still be provided in any period of 24 hours).

4. Exceptions and modifying the WTR

The entitlements to rest under the WTR do not apply to workers whose work falls into certain categories, although to comply with the WTR the employer must provide the worker with compensatory rest, or where this is not possible, provide him with appropriate protection to safeguard the worker's health and safety. Amongst others these include workers engaged in security and surveillance activities requiring a permanent presence, and where the workers activities involve the need for continuity of service or production in specified circumstances including treatment or care provided by hospitals and prisons, press and other media activities, and gas, water and electricity production and certain transport workers. For all other workers it is possible to exclude the application of some provisions of the WTR by negotiating a relevant agreement with them. Prescribed conditions must be met for negotiated agreements to be valid and workers must be given "compensatory rest" to compensate them for any changes to entitlements to rest periods and breaks.

So far, so good, but what the WTR do not do is specify what an employer needs to do to comply with the requirement for compensatory rest in practice, specifically;

- How much compensatory rest is sufficient?
- When should compensatory rest be given?
- Is the worker entitled to be paid for compensatory rest?

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How much compensatory rest?

The WTR give no guidance on how much compensatory rest should be provided but BERR guidance suggests that the compensatory rest period should be the same length as the period of rest the worker has missed, which makes logical sense.

When should the rest be given?

What is less clear is when compensatory rest should be given and whether it must be deducted from time when the worker would otherwise be working. It would seem to defeat the object of allowing exceptions from the WTR enabling employees to work longer hours than they would otherwise be able to, provided compensatory rest is given, to then require this rest to be deducted from working time. The BERR guidance supports this, providing that a worker should receive an average of 90 hours' rest a week, but without specifying when this rest should be taken. According to this, an employee working a 24-hour shift should be adequately compensated if overall he gets 90 hours of rest in a week.

However, this is a flexible interpretation of the WTR and would mean that a worker could work 78 consecutive hours, provided the remainder of the week was a rest period. This conflicts with some European judgments on the requirements under the Working Time Directive, which the WTR are intended to reflect and in June 2008 EU Ministers agreed that the Working Time Directive should be amended to provide that compensatory rest be provided within a reasonable period. We are some way from such an amendment taking effect and the current case law on this matter is conflicting, such that it continues to be a grey area.

In the first instance decision of *Browne v Medway NHS Trust ET 5001843/00* the Tribunal decided that the right to compensatory rest did not entitle the employee to paid rest periods and rest could therefore be taken in an employee's own time. But the Tribunal's comments in the Hughes case, referred to above, in respect of rest breaks, suggest a different conclusion. The security guard in this case complained that he had not been compensated for his entitlement to a 20-minute rest break. The Tribunal decided that "compensatory rest" meant something over and above the rest the employee would otherwise be entitled to between shifts. This seems to require the employer to grant the employee a compensatory rest break at the end of the shift to which it relates or at the start of the next shift. As this will often not be practical, the best approach is to provide compensatory rest as close as possible to the period when rest should have been given, and health and safety consideration should be taken into account when planning shift patterns.

Is the worker entitled to be paid for compensatory rest?

In the *Hughes* case mentioned above the EAT did not make a decision on whether the employee was entitled to payment for compensatory rest but it did comment that it was difficult to see why he should not be paid.

Many employers do pay employees for the 20-minute break they are entitled to but there is no requirement under the WTR to do so. If a worker would not have been paid for a break actually taken, then logically, it does not seem right that he should be entitled to payment for a break given to compensate him for this. Payment for 20-minute breaks might not be a costly issue but the stakes are higher when applying this principle to 11-hour rest breaks. The effect of making payment for such compensatory rest would be to pay employees who work the same number of hours different amounts, with those who work for longer periods without breaks receiving more for the equivalent number of hours than employees who work the same hours but for shorter periods, which would seem to go beyond the intention of the WTR!

Other payment issues have also arisen under the WTR in the context of "on-call" employees and National Minimum Wage ("NMW") obligations. These are considered below.

5. On-call workers

For the purposes of the WTR periods of time when an employee is "on-call" but not actively working still fall to be treated as working time. This is because of a number of European cases in which it was decided that the effect of the Working Time Directive, which is implemented in the UK by the WTR, is that if an employee is required to be on-call in the workplace rather than at home, he is working, regardless of whether he is actually performing any duties. The position is different where an employee is "on-call" but at home.

"On-call" at home

When an employee is on-call but not be required to be at or close to his workplace, time not spent working can be counted towards a period of rest. What is not clear is what compensation must be given for any interruptions to this rest. An employee who is "on-call" during his 11 hour rest period and who takes a 30 minute call during this period

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must either receive his full entitlement to rest under the WTR (if he doesn't fall within one of the exceptions) or be compensated for this loss of 30 minutes rest. But should he be compensated for the full 11 hours of rest on the basis that his entitlement under the WTR is to an uninterrupted period of rest?

There is no clear answer to this although the BERR guidance that 90 hours cumulative weekly rest is required suggests compensation for the period worked only, is sufficient. A practical approach is probably best in these circumstances. If an employee is interrupted for 10 minutes once every hour during the "on-call" period it would seem fair to compensate him with a full period of rest but if interruptions are short and/or infrequent compensation just for actual periods spent working might be more appropriate.

"On-call" at the workplace

Applying the European principles of "on-call" time spent at the employee's workplace in *McCartney v Oversley House Management EAT/0500/05* the EAT decided that Mrs McCartney was not being provided with rest breaks and rest periods or being paid the NMW.

Mrs McCartney was a manager of a development of residences for the over 60's. She was required to be "on-call" for 24 hour periods, four days a week. Her office was located within her flat which was on-site. Mrs McCartney did the majority of her work before 6pm but was required to answer calls between 6pm-8am on on-call days and did so on average once every other day.

The EAT decided that during the on-call periods Mrs McCartney was required to remain on or close to her place of work and that she was therefore working. It did not make a difference that Mrs McCartney was also at home during this time because her home was her place of work.

The EAT also decided that Mrs McCartney was being paid a salary and that the hours during which she was "on-call" should be taken into account as hours of work. As a result, Mrs McCartney's salary fell short of the NMW and her employer was in breach of its obligations.

This seems a harsh decision for employers given that the National Minimum Wage Regulations provide that workers are exempt from entitlement to the NMW when sleeping in accommodation at work. It was followed in the recent case of *Miss Hughes v Graylyns residential home EAT 0159/08* in respect of the requirements of the WTR, but in respect of minimum wage it was decided that Miss Hughes was only entitled to the minimum wage for periods of "on-call" time when she was not sleeping. No reference was made to McCartney on this point and the decisions are therefore difficult to reconcile, leaving the current position uncertain.

Reform of On-Call provisions

In June 2008 EU Ministers agreed that some changes to the EU Working Time Directive would be introduced. One of these is to differentiate between active "on-call" time and inactive "on-call" time so that inactive time is neither a rest period or working time. However, the European Parliament has not yet accepted the proposed amendments so we are some way from any changes being made to the WTR to clarify the position.

6. Conclusion

Where employees working arrangements are different to the standard '9 to 5', particular attention should be paid to the requirements of the WTR

Uncertainties in the legislation mean that a pragmatic approach to interpreting the requirements of the WTR is often necessary. The most important thing for employers is to identify at an early stage where issues might arise, particular in relation to workers with atypical work patterns, so that steps can be taken to address these.

Reasons to take notice of WTR requirements

- Time consuming and costly to deal with complaints from workers, even where low value. Complaints are often raised in conjunction with other issues;
- Employees who raise complaints asserting a statutory right have extra protection from unfair dismissal. Dismissal made in connection with this will be unfair, no qualifying period of service is required for employee to establish a claim, and compensation is uncapped;
- Implications under the NMW legislation;
- Protecting employer reputation and following best practice;
- may be health and safety implications of breaches;
- criminal sanctions for some breaches.

Gemma Parker

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Case law update

Homophobic banter can discriminate against heterosexuals

Mr S English v Thomas Sanderson Ltd [2008] EWCA Civ 1421

Why care?

This was an appeal from the EAT's decision which we reported in the [March 2008](#) edition of Law at work which had held that the Employment Equality (Sexual Orientation) Regulations 2003 (the "Regulations") do not prohibit homophobic banter against a heterosexual man who is known to be heterosexual. The issue in the appeal was whether someone who is teased by "homophobic banter" is or maybe harassed within the meaning of Regulation 5 of the Regulations when (a) he is not gay, (b) he is not perceived or assumed to be gay by his fellow workers, and (c) accepts that they do not believe him to be gay. The Court of Appeal held, by a majority, that in this case Mr English was protected by the harassment provisions of the Regulations.

The case

Mr English was engaged by the Respondents under an Agency Agreement between October 1996 and August 2005. In November 2005 he presented a claim in the Employment Tribunal complaining of harassment contrary to the Sexual Orientation Regulations.

The Claimant submitted that he had, for many years, been subjected to sexual innuendo by four work colleagues to the effect that he was homosexual. This course of conduct apparently originated from a manager who learnt that the Claimant had (a) attended a boarding school; and (b) lived in Brighton.

A preliminary issue arose about the fact that the Claimant was not homosexual, nor was he mistakenly or genuinely thought to be so by his "tormentors". The Respondent therefore contended that, as a matter of law, the Claimant's case did not fall within the scope of the legislation.

The EAT had dismissed Mr English's appeal and held that although he had been harassed based on his colleagues' view that he had some of (what they thought of as) the characteristics of a homosexual male, they did not believe him to be gay.

The decision

The Court of Appeal acknowledged that this was a "difficult and unusual case" but found in favour of Mr English. The fact that he was not gay and his tormentors knew it had just as much to do with sexual orientation as if he were gay. The calculated insult to his dignity and consequently intolerable working environment were sufficient to bring his case within Regulation 5. What was required was that his (or someone else's) sexual orientation, whether real or supposed, should have been the basis of harassment directed at him or her. The repeated and offensive use of the word "faggot" was conduct that was clearly "on grounds of sexual orientation" and it was therefore irrelevant that Mr English was not actually gay.

Mr English's appeal was supported by the Equality and Human Rights Commission and the case will now be remitted for a full hearing.

What to take away?

Essentially "homophobic banter" directed at an employee could be harassment under the Regulations even where;

- The victim was not gay;
- His tormentors did not believe him to be gay; and
- He knew that his tormentors did not believe him to be gay. The repeated and offensive use of the word "faggot" amounts to conduct "on grounds of sexual orientation" within the meaning of the Regulations, regardless of the victim's true sexual orientation or his tormentors' perception of it.

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This case appears to suggest that any unlawful discriminatory act of harassment in the work place could apply to someone who does not actually display the particular characteristic that constitutes the harassment. This could apply to age discrimination for example, where an individual is harassed about being older or younger than he actually is, even where a perpetrator is aware of the person's actual age.

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Revocation of a work permit due to non-compliance with its terms

R. (on the application of Ochieng) v Secretary of State for the Home Department Queen's Bench Division (Administrative Court), 17 December 2008

Why care

In previous editions of **Law at work** we have updated you about the wholesale change to the UK immigration system in November 2008 through the introduction of the Points Based System. This has led to increased duties and obligations on employers of non-EU migrant workers and an increase in the number of unannounced visits from the Home Office to check company compliance with the rules.

The case

In this case a college applied for judicial review of a decision by the Secretary of State to revoke a work permit granted to one of its employees. They had applied for a work permit extension which led to a visit from a compliance officer. During the course of the visit the officer established that before the extension application was made the college had ceased trading under the same name, had paid the employee half of the declared salary and he had worked half the hours the work permit stated. The Secretary of State wrote to the college asking for an explanation and, when an appropriate explanation was not provided, revoked the permit.

The decision

The college applied to court for this to be overturned on the basis that the Secretary of State should have worked with them to help remedy the discrepancies. The court held that there was no failure by the Secretary of State to comply with its own guidance - it had given the college a chance to demonstrate compliance and the college had failed to do so.

What to take away?

In light of the changes to the immigration system, more companies can expect visits from the Home Office and more work permits may be revoked. It is important to ensure your company has complied with the terms of any work permits it holds, and updates the Home Office with any changes made, to avoid fines and revocation of the permit.

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Hot topics

Regulator issues statement reminding employers of their statutory duty to consult with employees

The Pensions Regulator has recently issued a statement in response to new proposals to give the Pensions Regulator the power to impose a financial penalty for breaches of the employer consultation requirements. The Department for Work and Pensions (DWP) has recently commenced consultation on this issue.

By way of background, since April 2006, and as reported in the [February 2006](#) edition of Law of Work, employers have had a duty to consult affected members (or their representatives) before making certain specified changes to future pension arrangements (benefits already accrued cannot be changed without member consent). Affected members are defined in legislation as the active or prospective members of the scheme to whom the proposed change relates.

In its recent Statement, the Pensions Regulator reiterates the existing obligation on employers to consult, as they believe it is important to allow employees to provide their views on proposed changes to pension schemes before any final decisions are made as to whether or not to implement the changes. Consultation enables affected members to understand the implications for them and why the proposal has been made. However, employers should not make the employees feel that the proposals will be implemented irrespective of how they respond to the consultation. Furthermore, employees who do not agree to the proposals should not be treated any differently than those who have agreed to them. Any employee who does feel they have been unfairly treated during a consultation period may consider taking the matter to an employment tribunal.

Employers must allow an appropriate time period for carrying out the consultation. In any event, the consultation period must not be less than 60 days. They must also allow an appropriate time period for consideration of the responses received before making any final decisions.

The Pensions Regulator realises that it is not always practical to consult, for example, when restructuring is taking place and employees' jobs are at risk if the process is delayed. In such cases they still urge the employer to provide as much information as possible to affected members, even if only on a confidential or restricted basis.

Consultation on disability discrimination law amendment in light of Malcolm decision

We reported the House of Lords' decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm 2008 IRLR 700* in the [July 2008](#) edition of Law at Work [insert link] which appeared to make it harder for disabled employees to show that they had been discriminated against for a reason related to their disability (disability related discrimination).

In the context of preparing for the proposed Equality Bill, the Government has been considering whether it needs to take a different approach following that judgment. Last month it published a consultation on 'Improving Protection from Disability Discrimination', which seeks views on how the forthcoming Equality Bill should address disability discrimination in the light of this and whether it should replace disability-related discrimination with the concept of indirect discrimination, which is used for other protected characteristics, such as sex and age. So, indirect disability discrimination will occur where a provision, criterion or practice (PCP), which is applied to all, puts or would put persons having a disability at a particular disadvantage when compared to others, unless the employer can show that the PCP was objectively justified. This consultation has been seeking views on the proposal.

Contacts

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