

## *Battens Employment Law Update*

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### **Forthcoming Changes to the Legislation**

#### **Fit Notes**

6 April 2010 is the date for implementation of the new Fit Notes, which allow a doctor to indicate whether the employee is fit for work and suggest actions that an employer could take to facilitate an individual's return. The Government has now issued guidance on this which can be found at [dwp.gov.uk](http://dwp.gov.uk) and includes a sample of the form.

*Comment:* The concern with the new Fit Note is that this will create more claims based on the argument that employers have not carried out steps they should have carried out in respect of their employees upon the doctor's recommendation. The Government say that this is not the intention at all and it is always the employer's decision as to whether they can implement the

doctor's suggestions. However, those of us familiar with the reality of the workplace are concerned that this will cause further argument about getting people back to work and could lead to more constructive dismissal claims.

#### **Transfer of Maternity Leave to Partner**

From 6 April 2010, up to 6 months of maternity leave will be transferrable to the father (in the legislation it actually says partner) in the second 6 months of a child's life. This move will be effective for children born on or after 3rd April 2011. The Government are due to be putting out guidance on this quite radical change to the system but so far no guidance has been forthcoming.

Practically speaking, this is likely to cause a fair amount of disagreement between partners as to who stays at home.

#### **Agency Workers Regulations**

The Agency Workers Regulations are due to come into force on 1st October 2011. So hirers and employment agencies can breathe a sigh of relief that they still have 18 months to come to terms with the new rules.

In summary, there is a 12 week qualifying period for most of the new rights and it is likely that hirers will switch towards greater use of short term agency working – ie assignments lasting less than 12 weeks in an attempt to reduce costs. Hirers may also decide to use more self employed individuals working through their own limited liability Company or those working through employment businesses on managed service

#### **Equality Bill**

Whether this is enacted or not may depend on the outcome of the General Election. If enacted, it will consolidate an existing equality legislation, outlaw pay secrecy clauses, and give Tribunals the power in discrimination claims to make recommendations which apply to the whole workforce and not just the successful Claimant, create a single public sector equality duty and enable employers to take positive action when selecting between two equally qualified candidates.

Some of these aspects will have more of a practical effect than others – the ability to give recommendations which apply to the whole workforce could be quite far reaching and the consolidation aspects are likely to give rise to arguments on interpretation of the legislation which is likely to be particularly noticeable in the area of disability discrimination.

contracts. Employers may also ask existing staff to work longer hours or set up internal pools of 'agency' workers.

Some employers are choosing to review their arrangements relating to agency workers in advance of the Regulations, either to take the sort of steps set out above or to improve the lot of agency workers in advance of next October. For example, Asda working with the union Unite, have launched a joint initiative to end differential treatment across the supermarket's 29 meat and poultry suppliers who have 6000 agency workers.

A key part of this initiative is to make sure agency workers are on the same rate of pay as directly employed staff and the second key objective is to increase direct employment, ending the semi-permanent status of many agency workers with the intention being that agency workers will over the long term be used mainly to deal with seasonal fluctuations.

Whichever approach businesses decide to take, it is worth giving this some thought in advance of the impending changes and planning accordingly.



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## Case Report Summaries

### Employee Legally Entitled to Legal Representation in Misconduct Hearing

*Governors of X School v R, Court of Appeal*

This case concerned a music teaching assistant who was alleged to have had an inappropriate relationship with a 15 year old boy. No criminal proceedings were brought but the School instigated disciplinary proceedings. The Disciplinary Panel found that there had been inappropriate conduct which amounted to an abuse of trust and that the conduct amounted to gross misconduct. They decided that the employee should be summarily dismissed. The Panel also concluded that the employee's behaviour demonstrated that the employee was unsuitable to work with children and accordingly reported his dismissal to the Secretary of State to determine whether to place the employee on the "barred" list to prevent him from working with children in the future.

The employee requested the right to legal representation at the appeal stage of the process but this request was refused. The Employee appealed to the High Court, seeking judicial review based on Article 6 of the European Convention of Human Rights.

Article 6 (1) of the European Convention of Human Rights provides that an individual has the right to a fair hearing in the determination of his or her civil rights and obligations or of any criminal charge against him or her. This is supplemented by Article 6 (3) which provides that in the case of criminal charges, an individual has the right amongst other things, to legal assistance. These protections are primarily concerned with procedures in the Courts but may also bind public authority employers who are required by the Human Rights Act 1998 to observe convention obligations.

The case went through the High Court to the Court of Appeal. The Court of Appeal agreed with the High Court that given the substantial influence the outcome of the Disciplinary Hearing would have on the employee's ability to practice their profession and the seriousness of the allegation, that in this case the employee was entitled to legal representation at the Appeal Hearing.

*Comment:* This case is not intended to create a hard and fast rule that public authority employers must permit legal representation at internal hearings. Entitlement to legal representation will depend on all of the facts, including the effect on the employee's ability to practice their profession and the influence of the disciplinary decision on the subsequent barring procedure.

At the same time, public authority employers should be aware that if at the end of the disciplinary process, this is likely to effect the employee's ability to practice their profession in general and involve reporting on to statutory barring lists, it would be difficult to refute the argument that legal representation should be permitted.

### **Workers on Sick Leave May Carry Over Holiday into Next Year**

In *Shah v First West Yorkshire Ltd* at the Leeds Employment Tribunal, the Employment Tribunal found that the Working Time Regulations 1998 are capable of being interpreted in accordance with the EU Working Time Directive so as to allow annual leave not taken as a result of sickness to be carried over into the following leave year.

This seems to contradict the decision of the House of Lords in the case of *Stringer v HM Revenue & Customs* where the House of Lords agreed that the UK Working Time Regulations expressly prohibited carry forward of statutory holiday for workers on long term sick leave.



The reason the Employment Tribunal felt able to make a different decision was on the basis of an intervening case; *Attridge Law LLP v Coleman*. This was a decision of the Employment Appeal Tribunal which effectively said that Courts and Tribunals can go beyond the strict limits of statutory construction in order to interpret national legislation to give effect to EU law. In other words, to give a purposive approach to EU legislation. This goes with another recent ECJ case which suggests that when EU law conflicts with laws of member states, the ECJ can make decisions on the basis that the correct European law should be

implemented. This is a very controversial area and the case of *Shah* only at Employment Tribunal level. Watch this space!

## Court of Appeal Upholds Tribunal Decision to Extend Time Where Delay in Bringing a Claim was Due to the Claimant's Impaired State of Mind

*Chief Constable of Lincolnshire Police v Caston, Court of Appeal*

In this case, a police officer suffered a mental breakdown in 2006 amid alleged bullying at work. She took numerous periods of sick leave and eventually filed a grievance which was rejected and the decision received on 10th November 2007. She initially told her Solicitors, she had decided not to return to work on approximately 30th December 2007. However, this was a mistake brought about by her mental state.

This mistake led her solicitors to believe that the time limit for bringing an Employment Tribunal claim expired on 28th March 2008 and a claim for disability discrimination was submitted against the police force on that date.

However, it became apparent that she had made her decision much earlier in the course of cross-examination and that the 3 month time limit for bringing a claim for disability discrimination had expired on 11th February 2008.

The Tribunal Judge, however, found that the confusion over the dates had been due to the Claimant's impaired state of mind and therefore exercised his discretion to extend time for submission of the Claim in accordance with paragraph 3 (2) of Schedule 3 to the DDA on the basis that this was just and equitable to do so. The EAT and subsequently the Court of Appeal agreed.

*Comment:* This decision is no surprise on the basis that the Court were satisfied that the reason for the mix-up was due to this lady's mental breakdown.

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