

HR Focus

July 2010

Hello and welcome to this month's edition of HR Focus.

Work from home, save the planet?

Earlier this week, Transport Minister, Norman Baker called for employers to allow their employees to work from home one day per fortnight in a bid to cut traffic congestion and its environmental impact.

His ambitious plan is to do away with the "rush hour" and the strain it puts on the country's transport networks. Getting employers on board is only part of the plan, public transport operators are being encouraged to be more flexible with their season ticket type offerings as well.

In this month's edition:

Career breaks and annual leave accrual – another blow for employers?

Tim Lang, Head of Practice Area considers the impact of recent case law on annual leave accrual on the situation where an employee takes extended leave or a career break.

Fit note update

Four months in to the fit note regime, Steve Peacock, Partner in the Liverpool team considers their success so far and the tricky issues.

Northamptonshire County Council v Entwhistle

Lee Rogers, Associate in the Liverpool team considers the recent decision in this case on time limits for unfair dismissal claims.

Termination payments in the NHS

Chloe Brittain, solicitor in the Manchester team writes for HR Magazine on the recent case of *Gibb v Maidstone & Tunbridge Wells NHS Trust*

Newsletter



And finally in our Q&A section

Paul McFarlane, Partner in the London team considers the difficult issues in victimisation claims and clarifies some of the confusion around this concept.

Questions or comments? Email askemployment@weightmans.com or call Laura Kearsley, the editor on 0121 200 3480, we'd love to hear from you!

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Career Breaks: They are good for the soul but potentially painful to the employer's pocket

Imagine your surprise when your star employee rewards all the hard work you went through to enable him to take a six-month career break when he, upon his return, uses his recharged battery to demand that he would like the annual leave that accrued during his break.

Following the cases of **Stringer and Pereda** the common-sense position that when extended unpaid leave is awarded as a break from the rigours of work in the busy 21st Century then annual leave will not accrue over the period of leave has been called into question.

The ECJ has appeared to have reached the conclusion that to qualify for annual leave a worker need not actually have worked during the period in question. Provided the worker has entered 'into a contract of employment', that is, that he is still under a contract of employment throughout his career break then annual leave may well continue to accrue during the entire period of the break.

The Working Time Directive's purpose was, of course, driven by health and safety considerations. The ECJ's apparent view, therefore, that workers do not actually have had to have worked during the period in question is seemingly at odds with the Directive's principle purpose given that **Stringer and Pereda** are likely, should they remain in force, to discourage employers from allowing employees to take career breaks.

There have been few reported cases in this area. One, however, is **Curr v Mark's & Spencer Plc (2003) IRLR 74**. In this case, the Court of Appeal looked at whether the Claimant's contract of employment continued during a career break. The decision of the Court was that it is necessary to scrutinise the detail of the career break and, in this case, found there was no arrangement to preserve continuity of employment for the period of the career break. The Court expressed the appropriate test to be:

'There must be mutual recognition by the arrangement that the ex-employee, though absent from work, nevertheless continues in the employment of the employer.' In this case, Ms Curr had been required to resign, lost her staff benefits and the break was unpaid.



To minimise the risk of a successful claim, therefore, employers must ensure when granting career breaks that it is made clear in writing that there will not be continuity of employment during the career break, that the break is unpaid and further that there is no obligation for any employee to return to work at the end of the career break. All cases will be considered on their facts and the above only minimises the risk that the employee will be entitled to his statutory right to annual leave whilst away on a career break.

Stringer and Pereda will, of course, be far more likely to apply to cases of shorter absences, such as unpaid leave and suspensions.

Tim Lang, Head of Practice Area – Employment, tim.lang@weightmans.com

The ‘fit note’ 4 months on

On 6 April 2009, the old doctor’s certificate was replaced with a new ‘statement of fitness to work’ or ‘fit note’. How has the fit–note system worked so far and what are the on–going implications for employment practice? Has the intention to encourage employees to come back to work in some capacity, with appropriate support, rather than stay off work because they are unable to carry out their full range of work activities, materialised?

Good management remains central to effective absence management. The option now available to the doctor of declaring the employee fit to work with the facility to suggest changes that would assist a return, has proved popular. The new form lists four typical examples of modifications that could be appropriate, which the doctor can tick – a phased return, amended duties, altered hours and workplace adaptations – and a space in which the doctor can add comments. The focus on what the employee can do rather than what they cannot do is a welcome cultural shift. The emphasis on how a return to work could be facilitated must be the correct approach, although the perception amongst many employees that it is inappropriate to return to work unless 100% fit remains a feature in many cases.

To what extent is the information on the form binding on the employer? It is not; it is intended as advice to the employee and is not a substitute for consultation between employer and employee. If, after consultation, it is not reasonably practicable for the employer to provide the appropriate support to enable the employee to return, the ‘fit note’ reverts to being a ‘sick note.’

It is important to consider the ‘duty to make reasonable adjustments’ under s4A DDA where the employee’s condition may qualify as a disability. The new ‘fit note’ does not affect an individual’s rights or an employer’s obligations under the DDA. A failure to make the recommended changes could provide evidence that the employer had failed to make reasonable adjustments under s4A.

When the period of incapacity is over, the employee does not need to be declared as being fit to work. Indeed, this is no longer an option. If no further statement has been provided, the employer can expect the employee to return to work. An employee who feels ready to return to work before the end of the certified period is entitled to do so without a further visit to a doctor, but should agree this with the employer.

One aspect of the new ‘fit note’ that has proved helpful to employers is the requirement on the doctor to specify the employee’s condition ‘as precisely as the doctor’s knowledge of the patient’s condition at the time of assessment permits’. Where the doctor considers that the employee may be fit for work, they must state the



reasons for that advice and, where appropriate, the arrangements which the employee might make, with the employer's agreement, to return to work.

The rules on SSP have not changed. However, does the employer have to restore the employee's full pay even if they return on reduced hours? There is no statutory authority either permitting or preventing an employer from reducing pay in these circumstances. Accordingly, the first 'port of call' is to consider the relevant terms of the Contract of Employment. If that does not assist, the employer has a discretion on whether to pay just for the hours done or whether to restore full pay in consideration of the fact the employee is making the effort to return to work. A benevolent approach may help an employee's rehabilitation.

Disagreements between GPs (usually sympathetic to the patient) and Occupational Health Advisers (usually instructed by the employer) will remain on occasions. If there is conflicting evidence, the employer is entitled to rely on one opinion rather than the other provided that falls within the bands of reasonableness.

And what about the GPs? After all, they are arguably the most affected by the change since it involves them assuming an occupational health role, whether they want it or not and in circumstances where they may not have that specialist training. The consensus of opinion with GPs we have spoken to is that they will usually look to use the new system in a way that is most supportive to the patient and avoid conflict where the patient insists they are not fit for work. Accordingly, it seems the Occupational Health advisers will not be short of work just yet.

Time will tell whether 'fit notes' will facilitate improved discussion between employer and employee to the extent that it leads to a culture in which rehabilitation becomes a real alternative to long-term absence. For all parties to the employment relationship that can only ever be a good thing.

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Northamptonshire County Council v Entwhistle

In this case, the EAT has highlighted the legal position relating to whether it is reasonably practicable for an employee to present a claim for unfair dismissal after the normal three month deadline has expired.

Mr Entwhistle was dismissed by the Council and his internal appeal was subsequently rejected. In a letter from the Council confirming the decision, he was mistakenly advised that the time limit for claiming unfair dismissal ran from the date of the rejection of his appeal.

He then instructed solicitors who, failing to notice the error in the Council's letter, presented a claim to an employment tribunal two weeks late.

Overtaking the Tribunal's decision to accept the claim, the EAT held that it had been reasonably practicable for the claim to be presented in time and should therefore not be accepted.

This reinforces the decision in **Dedman v British Building and Engineering Appliances (1974)** that where the claimant's skilled advisers are at fault for failing to submit the claim in time, the tribunal will usually consider that it was reasonably practicable for the claim to have been presented in time.

NHS Trust not entitled to withhold compensation offered to Trust CEO following C-difficile outbreak

<http://www.hrmagazine.co.uk/news/search/1013676/NHS-Trust-not-entitled-withhold-compensation-offered-Trust-CEO-following-C-difficile-outbreak/>

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‘Victimisation’ is a term that is often misunderstood by employees and employers alike. What does it mean and what steps can employers take to prevent it occurring? Paul McFarlane, a Partner in our London team explains.

To be ‘victimised’ has a special meaning in law. It is where a person (A) treats another person (B) less favourably because A knows or suspects that B has done or intends to do one of the ‘protected acts’.

‘What are the ‘protected acts’?

A ‘protected act’ is only one of the following:

- making an allegation of discrimination;
- bringing a complaint of discrimination before an Employment Tribunal (‘ET’);
- giving evidence or information connected with discrimination proceedings; or
- do anything else, or by reference to, discrimination legislation.

The important point to note here is that the less favourable treatment must relate to the fact that the complainant has either:

- made an allegation/brought proceedings complaining that s/he has suffered discrimination; or
- given evidence or information in support of someone who has complained that they have suffered discrimination.

Even if the allegation of discrimination etc. by B was false provided it was made in good faith i.e. B honestly and genuinely believed it to be true, B should not be subjected to victimisation.

Examples of matters that are not acts of ‘victimisation’

- a manager holds a ‘grudge’ against an employee (unrelated to their sex, race etc.) and as a consequence denies him promotion;
- an employee raises a grievance alleging being sexually harassed by a colleague which she knows to be false. She is disciplined for this by her employer.

Practical steps to prevent successful allegations of victimisation

Measures employers can put in place to limit the chances of successful victimisation claims, include:

- limiting to only those who 'need to know' the number of persons who have sight/knowledge of grievances/ET claims alleging discrimination i.e. the person investigating the grievance, witnesses to such complaints and where an ET claim has been made, those in HR/Legal responsible for providing instructions to your lawyers;
- grievance witness(es) conversations with investigators should be treated as confidential and should not be discussed with colleagues;
- where practical, try to avoid managers who are the subject of complaints of discrimination by an employee, being the decision maker in relation to other employment issues affecting the complainant/witnesses supporting the complainant e.g. disciplinary, promotion, transfer etc;
- document the reason(s) for employment decisions affecting an employee who has done a protected act e.g. discipline, promotion etc;
- avoid any internal publication e.g. letters to staff, blogs on the intranet, which either directly or indirectly comments on the merits of ET cases against the employer, **unless** there has been a clear finding by an ET that a complaint of discrimination was made in 'bad faith'.

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