

HR Focus

January 2010

Happy new year and welcome to this month's edition of HR Focus.

The Secretary of State for Work and Pensions has announced the proposed rates of various statutory payments for 2010.

The proposal is that the earnings threshold for statutory adoption, maternity, paternity and sick pay will rise from £95 to £97 per week. Statutory adoption, maternity and paternity pay and Maternity Allowance will all increase from £123.06 to £124.88, but statutory sick pay will remain at £79.15. It is expected that these changes will come into effect in April 2010.

The Government has also published the Employment Rights (Revision of Limits) Order 2009, which decreases the maximum compensatory award for unfair dismissal (reflecting the decrease in RPI), this will fall from £66,200 to £65,300.

The revisions made by the Order take effect when the event giving rise to the entitlement to compensation or other payment occurs on or after 1 February 2010.

The use of the same RPI formula in relation to the limit on a week's pay used to calculate redundancy payments and the unfair dismissal basic award was suspended following a one-off increase in October. The limit on weekly pay for these purposes will remain at £380 until February 2011 at the earliest.

If you have any comments, queries or questions for our question and answer feature then please email askemployment@weightmans.com. Alternatively, you can call Laura Kearsley, Editor on 0121 200 3480.

In this month's edition:

O'Neill v Buckinghamshire County Council.

Clarification of the duty on employers to undertake risk assessments for pregnant workers. Steve Peacock, partner in the Liverpool team considers the law in this area in light of the recent EAT decision in **O'Neill v Buckinghamshire County Council**.

Dansie v Metropolitan Police.

Dress codes and hair style, how far can an employer go? Kevin McKenna reports on the recent EAT decision in **Dansie v Metropolitan Police**.



Paviainen v Finnair Oyj

What rights does a pregnant employee have after she has been transferred for health and safety reasons? Tim Lang, Head of Practice Area and partner in the Midlands team considers the Advocate General's opinion on the case of **Paviainen v Finnair Oyj**.

Time off for infertility treatment

What rights do employees have when undergoing IVF treatment? Mike Berriman, Partner in the London team sets out a checklist for employers looking to draft a policy on this.

Question and answer

And finally, in our regular Question and Answer section, Mick Whiteley, Head of Employee Relations at OCS Group UK asks Lee Rogers, Associate in the Liverpool team: **"In cases where clients request that an employee be removed from their site, we are often left with no option but to dismiss by reason of SOSR. We want to be sure that we are following proper procedure in order to avoid Tribunal claims"**.

When does an employer fall under a duty to conduct a risk assessment for a pregnant worker and what are the potential consequences of breaching that duty?

Every employer is under a duty to make a suitable and sufficient assessment of the risks to health and safety to which its employees (whether pregnant or not) are exposed while at work and is required to record the findings of the assessment.

The employer should not wait until an employee becomes pregnant before it carries out this assessment.

The January 2010 EAT decision in **O'Neill v Buckinghamshire County Council** concerned a pregnant teacher alleging that the generally stressful nature of teaching involved a special risk that resulted a duty on her employer to conduct a risk assessment. Whilst the EAT rejected that argument (declining to accept "the stressful nature of teaching in general terms" was work of a kind which involved a special risk), it did set out the preconditions that must be met before an employer falls under a duty to conduct a risk assessment for a pregnant worker;

- a. The employee notifies the employer in writing that she is pregnant;
- b. The work is of a kind which could involve a risk of harm or danger to the health and safety of the expectant mother or her baby;
- c. The risk arises from either processes, working conditions or physical, chemical or biological agents in the workplace.

There is no more general obligation to carry out a risk assessment for a pregnant worker.

Madarassy v Nomura International PLC is an earlier case where the Court of Appeal considered (and rejected) Madarassy's assertions that discomfort and "radiation exposure" from sitting at a computer triggered the duty to conduct a risk assessment. Accordingly, her claim of pregnancy related sex discrimination arising out of the failure of Nomura to undertake any such assessment failed. The duty had not arisen as the work was not of a kind which could involve special risk to a new or expectant mother or her baby.

Employers should, however, be encouraged to carry out risk assessments as a matter of course. The potential 'banana skin' is that if an obligation to carry out a risk assessment does arise, and a failure to carry out that risk assessment is established, then discrimination results and proof of detriment is not necessary.

Queen Victoria Seamen's Rest Ltd v Ward is an example of an employer's course of detrimental treatment of an employee on the grounds of her pregnancy resulting in a substantial discrimination award. The treatment that led the employee to resign when she was 7 months pregnant included the facts that her employer;

1. Had not carried out a risk assessment despite being aware of a risk of violence from residents at the premises at which the employee worked and a potential risk from night working;
2. Changed its attitude towards her once she disclosed she was pregnant, in particular moving her to a wholly inappropriate work station without consultation. There was a demonstrable contrast between the support it gave her before the pregnancy and the lack of support it provided afterwards;
3. Failed to adequately investigate the employee's grievance about her treatment, in particular, failing to consider any impact her pregnancy might have had on events as they unfolded in the workplace;

The HSE has produced a useful 'Guide for New & Expectant Mothers Who Work', which includes known risks. Common risks include work-related stress, long working hours, lifting and carrying, excessive noise, handling chemicals, extremes of heat and cold, and movements and postures.

Once the employer has been notified in writing of the pregnancy, birth or the fact that the employee is breastfeeding, it is under an obligation to do all that is reasonable to remove or prevent exposure to any significant risk that has been found, and must give information to the employee about the risk and what action has been taken.

Unless the risk can be avoided through other action, the employer must temporarily alter the woman's working conditions or hours of work, if this is reasonable and would avoid the risk.

Steve Peacock, Partner, steve.peacock@weightmans.com

Dansie v Metropolitan Police

Mr Dansie, a long-haired trainee police constable, has become the latest in a long line of Claimants to fail in bringing a successful sex discrimination claim based on Appearance or Dress Codes.



Before starting training in 2008 he inquired whether his hair length would be acceptable, and he was told that it would comply with the police dress code. When he reported for training, his shoulder length hair was slicked back on his head and tied in a bun. Having commenced the training programme, the employee was told to have his hair cut. He was threatened with disciplinary action if he did not comply. He claimed that he had been unlawfully discriminated against on grounds of his sex in that he had been less favourably treated and suffered detriment and/or harassment.

The tribunal rejected the claim and the decision was upheld by the EAT. The court made two key points; that a difference in treatment between the sexes on one particular aspect of the Dress Code is not necessarily more favourable treatment of a member of one sex compared with a member of the other sex; and in order to determine whether an employer treats members of one sex less favourably than the other it is necessary to consider the Dress Code as a whole, even though a single provision of the Code may upset the balance of treating the sexes equally. A code which applies a conventional standard of appearance is not in and of itself discriminatory; looking at the Code as a whole, neither sex must be treated less favourably as a result of its enforcement.

Apart from the EAT's appreciation of conventional appearance, this case demonstrates that since Miss Schmidt's refusal to wear overalls in a bookshop in the '70s, Mrs Cootes' objection to wearing polyester in John Lewis in the '80s, Mr Taylor's long hair at the deli counter in Sainsbury's in the '90s and Mr Thompson's dislike of a collar and tie at the Jobcentre in the 00's, Dress Code cases are developing some uniformity.

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Paviainen v Finnair Oyj

The Advocate General has just given his opinion in the European case of **Paviainen v Finnair Oyj (C-471/08)**, which concerns the rights of pregnant employees after they have been transferred for health and safety reasons.

Ms Parvianen worked as an air stewardess for Finnair but was temporarily transferred to other duties during her pregnancy, to minimise her exposure to health risks. It was accepted by both parties that this was the correct course of action. Ms Parvianen brought a claim, however, because the salary she received in her new duties was around a third less than her salary as an air stewardess, which she felt was discriminatory.

Although the full court has yet to publish its findings, the Advocate General has stated that he is of the belief that a pregnant worker is not entitled to retain her original salary after a transfer for health and safety reasons. All an employer needs to do to comply with the Pregnant Workers Directive is ensure that the employee receives a payment that is at least equivalent to the pay received by men and women carrying out equivalent work.

We will produce a further update when the full court has issued its opinion.

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Time off for infertility treatment

This subject is topical because of the Employment Appeal Tribunal's decision in **Sahota v Home Office and Pitkin (UK EAT/0342/09)** which was handed down at the end of last year.

Broadly speaking the EAT decided that less favourable treatment of employees who are undergoing in vitro fertilisation (IVF) treatment, but are not pregnant, is not automatically directly discriminatory on the grounds of sex.

The EAT followed European Court of Justice decision in **Mayr v Backerei und Konditorei Gerhard Flockner OHG** to the effect that a woman is not pregnant if treatment has begun but ova have not yet been implanted or because an implantation has failed even if further treatment or implantation is contemplated. The protection afforded to a pregnant woman is therefore for a limited period only, the time between ova being collected and the "imminent" implantation of the fertilised ova.

In deciding whether, and if so in what terms to implement a work place policy on this subject, the usual drivers and considerations apply, such as the avoidance of inconsistent treatment of different employees. As a check list, employers should consider including:

- A clear policy statement demonstrating the employer's understanding of infertility treatment and the personal and work place issues arising from it.
- The employer's position on confidentiality, identifying in particular, circumstances in which it may be necessary to explain absences to managers or key colleagues.
- The availability of counselling support.
- A reminder of the general requirement that colleagues treat each other with dignity and respect at all times and the consequences and disciplinary terms if an employee is found to have engaged in bullying or harassment.
- The employer's position in relation to time off which does not fall into the category of a medical appointment or for which an employee requests and takes a proportion of her annual leave.
- The availability, if at all, of flexible working arrangements during periods of infertility investigation or treatment.

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In cases where clients request that an employee be removed from their site, we are often left with no option but to dismiss by reason of SOSR. We want to be sure that we are following proper procedure in order to avoid Tribunal claims.

Mick Whiteley, Head of Employee Relations at OCS Group UK.

To show an Employment Tribunal that an employee's dismissal was fair in these circumstances, employers must be seen to be doing everything possible to avoid dismissal – this should always be the last resort.

The first step should always be to appeal against the client's decision in an attempt to amicably resolve the situation. If, for example, the employee has been issued with a final written warning for his conduct, the client may be more lenient and willing to give them a second chance.

If the client is adamant however, it is vital to get a copy of their request, and your appeal, in writing. Should the matter progress to a Tribunal hearing, this will be an important part of your evidence to show that you had no option but to remove them from the site. It is also important to consult with the employee throughout, and inform them as soon as dismissal becomes a possibility.

A full and detailed search for suitable alternative vacancies within your organisation should begin immediately. Again, a 'paper trail' of this should be kept. It is good practice to meet with the employee to offer them any vacancies you have at that time – don't discount availability in other parts of the country.

If, after you have carried out the procedure outlined above you have not been able to persuade the client to take the employee back and nor have you been able to identify any alternative employment and you are considering dismissing the employee, it is important to explain the reasons for the dismissal (disclosing a copy of the client's request), and reiterate that you have done all you could to avoid dismissal. You should carefully consider anything the employee has to say and offer them a right of appeal if you decide to dismiss.

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