



# Newsletter

Spring 2008

## *In this issue...*

Health & Safety  
Illegal Working Fines Introduced  
Corporate Manslaughter  
Statutory Sick Pay  
Case Round Ups

## **Change to Maternity Benefits**

As a result of a judicial review of the Sex Discrimination Act women with an expected week of childbirth or adoptive parents with a matching date of the 5 October 2008 or later will be entitled to non contractual pay/benefits not only during the ordinary maternity leave period but also throughout the additional maternity leave period i.e. for up to 52 weeks.

## **Information and Consultation**

From the 1 April 2008 businesses with fifty or more Employees will come under the information and consultation provisions.

This means that if there is a request in writing on behalf of at least ten percent of the workforce to negotiate an agreement in respect of information and consultation the employer must as soon as is reasonably practicable make arrangements for the employees to elect or appoint negotiating representatives, inform the employees in writing of the names of the representatives and begin negotiations with the representatives on an agreement.

If your Company has fifty plus employees and you receive such a request or as the employer you wish to instigate the provisions please contact *The AP Partnership* for further advice.

## ***Failure to Adopt a Flexible Approach to a Grievance Procedure***

An employee raised a grievance following a number of hostile meetings proposing changes to their contract of employment which subsequently adversely affected their health.

The employer had a two stage grievance procedure, the first stage requiring the employee to address the grievance with their line manager and the second stage the grievance being assessed by an independent panel chaired by an appointed arbitrator.

The employees request to proceed to the second stage of the procedure was rejected and they were invited to attend a further meeting with their line manager.

The employee was upset, stressed and not sleeping and provided the employer with a sick note for one month. The sick note advised unfit for work due to occupational stress and stated they could not attend confrontational meetings.

The employee's representative met with the employer requesting that the grievance be allowed to proceed to stage two. The representative was advised that the employee should continue to try to resolve the issue with their line manager. The employee resigned claiming an irretrievable breakdown in the employment relationship and subsequently brought a successful claim for constructive unfair dismissal. The employer appealed.

The EAT upheld the Tribunal's finding of constructive unfair dismissal on the grounds that the Employer had undermined trust and confidence in the employment relationship, by failing to adopt a flexible approach to the grievance procedure.

The EAT concluded that although the recommendation was not unreasonable, on the facts of the case, it was a contributing factor to the undermining of trust and confidence given that consulting with the employee's line manager (the root of their grievance) was detrimental to their health.

### Points to note:

- By applying the grievance procedure too strictly the employer had not been reasonable and undermined the trust in the employment relationship.
- A more flexible approach should have been taken in view of the detrimental impact it was having on the employees health.
- The employers insistence on keeping to the procedure aggravated the employees health.

The Employer should have therefore considered:

- Modifying a procedure where to have no flexibility would potentially have a detrimental effect on the employment relationship.
- What steps were necessary to ensure the procedure is reasonable on the facts of the particular grievance being raised.

## SSP

For SSP purposes you cannot insist upon notification:

- In person;
- Earlier than the first qualifying day (QD) in a spell of sickness (remember the first qualifying day is not the first day of absence and relates to the qualifying days you have set in your organisation);
- By a fixed time on that QD so as long as notification is received by the end of that day it is acceptable;
- More than once a week during the absence;
- On a special form; and
- On a medical certificate.

Criterion three above therefore rules out denying SSP on the basis of failing to meet the 9.00 am deadline. However, there is no reason why you cannot insist upon stricter rules in relation to your occupational sickness scheme, Specific OSP rules must be made clear to employees as part of their terms and conditions, or other documentation provided on engagement. If employees fail to meet your notification criteria you would then be able to refuse payment of OSP, but not SSP.

SSP can be withheld for late notification. The use of the word 'notification' is important here. Notification and evidence are not the same thing. In order to receive SSP the employee has to supply evidence of incapacity, this can be on an official SC2 self-certificate, or one of your own design, for days four to seven of the absence (as a Period of Incapacity for Work (PIW) is not formed until they have been incapacitated from working for four or more consecutive days).

An employee is statutorily entitled to SSP, so that OSP paid in excess of SSP entitlement is always a top up. Should you therefore withhold OSP under stricter notification rules it is the top up OSP portion that would be withheld.

## CASE ROUNDUP

### Redundancy – Alternative Employment

#### *Ralph Martindale & Co Limited v Harris*

Due to significant decline in orders, Ralph Martindale (RM) was required to reorganise the Company and remove a layer of management.

Harris, Group Development Executive, and Ensor, Managing Director of RM England, were informed that their roles were at risk. Both applied for the new alternative role of Director and General Manager. The vacancy was advertised and a third internal candidate applied.

The role was awarded to Ensor on the basis that he had a "less insular management style". Harris claimed his redundancy was unfair as the selection process for the alternative role was not objective.

The Tribunal upheld Harris' complaint. Although there is no requirement to consult with employees on the criteria for the alternative role, the selection process should be reasonable. The decision to appoint Ensor was based on an entirely subjective view, and there was no job description for the new role.

The Tribunal also held that the role should not have been opened to other applicants prior to RM establishing that the redundant applicants were not suitable. RM's procedure was not "current industrial relations practice".

The EAT agreed with the Tribunal and held that entirely subjective criteria are not appropriate when selecting for alternative employment. It confirmed that the Tribunal was entitled to form its own view of the overall fairness. The Tribunal is the "industrial jury" and is entitled to make up its own mind about what constitutes "good industrial practice" based on its own experience.

This case highlights the importance of ensuring that the selection process for alternative roles in a redundancy is not an afterthought.

Shortcuts should not be taken as these may result in the redundancy being held to be unfair. Employers must offer alternative opportunities for redundant employees prior to opening up these roles to wider applicants.

Selection criteria should be as objective as possible and applied in a fair manner. To establish relevant criteria for alternative roles, it is recommended that employers draft a job description.

### Redundancy – Protective Awards

#### *Evans & Or v Permacell Finesse Limited*

Permacell Finesse (PF) announced around 77 potential redundancies. As a result, PF was obliged to collectively consult for a minimum of 30 days.

The Company made no provision for the election of employee representatives and was therefore unable to consult with them. Several employees brought claims for a protective award for PF's failure to collectively consult.

The EAT uplifted the protective award made by the Tribunal from 30 to 90 days. The EAT reiterated previous decisions stating that the protective award is punitive, rather than compensatory, in nature. The starting point for the calculation is 90 days, even if the minimum consultation period is 30 days. The award should be 90 days unless there are existing mitigating or other circumstances which would make it fair to consider a reduction.

The case is a reminder to employers of the potentially substantial protective awards that can be incurred as a result of failing to collectively consult, even where the obligation to consult is for a minimum of 30 days. Affected employees can be awarded up to 90 days' pay, which is not subject to any statutory cap.

# CORPORATE MANSLAUGHTER

The Corporate Manslaughter Law came into force on the 6 April 2008 and is going to be one of the biggest changes to Health & Safety Legislation in 2008.

There are a number of changes from where we are now and these are:

- From the start of the incident the Police will be in charge of the investigation. *(This used to be left to the HSE)*
- The Police have the power to question under caution all employees. *(The HSE can question employees under caution)*
- The Police in the more serious cases have the power to arrest. *(The HSE did not have this power they had to get the police involved)*
- The Police have the power to, with a search warrant, look over your premises. *(The HSE were normally confined to where the accident took places)*
- The Police have the power to remove anything they feel is relevant to the incident, from documentation, computers, and equipment and to cordon off areas of your premises until they feel their investigations are completed. A Company needs to be aware of this fact because it could stop the business for a number of days. *(The HSE do have the power to remove documentation and articles.)*
- Cases that happen after the 6 April 2008 will almost certainly carry a higher sentence depending on the circumstances. *(The HSE did have custodial power through the courts but the feeling has always been up to now of leniency which is likely to change)*

The above six points are where the law changes and will make the biggest impact. However you can prepare now, by making sure all your Health & Safety is up to date. Make sure you have a Health & Safety Policy, Health & Safety Manual, Risk Assessments, Safe Systems of Work and all work raised by your Risk Assessments completed. In other words "put things right before something goes wrong"

An area that all companies need to focus on is transportation. All company cars, vans, heavy goods vehicles and employee owned vehicles that they use for Company use is one area where Corporate Manslaughter could apply.

For example if the Company pressurise employees to work excessive hours while driving on the roads without the opportunity of having the correct breaks if the Employee has a serious accident the Company could be liable.

Another area will be where a Supervisor, Manager, Senior Manager or Director who regularly condone an employee doing excessive hours which results in a fatality or where the employer was found to be pushing the employee to do excessive hours which results in a fatality.

## Compulsory Retirement at a proportionate means of achieving a legitimate aim

### Palacios de la villa v Corteiel Services SA

The European Court of Justice (ECJ) has held that collective agreements providing compulsory retirement at the age of 65 was a proportionate means of achieving a legitimate aim. This is significant within the UK given the Heyday challenge on the governments default retirement age.

In this case social policy reasons were sufficient justification for a compulsory retirement age. However, in Spain the compulsory retirement age is also based on the employee's entitlement to pension when they retire and not solely on their age.

## Payout or secretary told she was too young or old

A 20-year old woman has become the first person to win a discrimination claim for being too young. Megan Thomas told the London Central Employment Tribunal that she had been dismissed from her job as a membership secretary at a London club after being told that she was too young to deal with its members.

The Tribunal found that she was unfairly discriminated against on the ground of age under the Employment Equality (Age) Regulations 2006 – a piece of law originally intended to protect older workers. The Tribunal is expected to award Ms Thomas compensation of about £2,000.

In a statement Ms Thomas, said that her £19,000-a-year job at Eight involved organising poker nights and wine-tasting events for members, as well as handling subscriptions and general office work. But, just four months after starting the job, she was dismissed.

She said "I was upset to lose my job. I had never lost a job before. It was humiliating, especially because I was told I was too young and if they had met me a few years later there may not have been a problem.

They also said that I was deceitful, sly and lacked integrity, which was hurtful and untrue."

Four days after her dismissal, she found another, better-paid job as an office manager in the City. As a result, the Tribunal awarded compensation only for injury to feelings and unpaid notice moneys.

This is the first time that a Tribunal has ruled that age discrimination adversely affects the young as well as the old and the ruling will help to end discrimination against young people in the workplace.

Employers therefore will now have to look at the rights of young workers more carefully than in the past.

## Health & Safety

As an owner or senior person running a business does the two words above cause you to worry. The first thing that goes through your mind is MONEY, how much. Well a competent Health & Safety person takes pride in coming up with solutions that are cost effective. It is very easy to spend a fortune solving a health and safety issue but a good Health and Safety Consultant needs often to think outside the box for a solution that keeps everybody safe and is cost-effective.

The fear of Health & Safety can put employers off doing anything which is probably the most risky thing an employer can do. Our advice is to confront Health & Safety head on. The most important thing is to make sure you have a detailed set of Risk Assessments along with a Health and Safety Policy. As a result of the Risk Assessments your Health & Safety Consultant needs to sometimes come up with unique solutions.

From both of the above documents a Health & Safety Manual can be produced. The manual can then be issued to all staff and signed for to confirm they have all received it. The form they sign needs to include the fact that they are able to read the manual. If they are unable to read it, then an alternative solution is to have another employee read it to them explaining anything they do not understand, after which they sign to say they understand everything.

The above steps will put a business on the road to becoming Health & Safety compliant. *The AP Partnership* can do all the above for you along with our Consultant being your Competent Health & Safety Person and available via our advice line for ongoing queries.

### TRAINING COURSES 2008

Half Day Employment Law and Health and Safety Seminar  
14 May 2008  
(Peterborough)

Half Day Employment Law and Health and Safety Seminar  
20 May 2008  
(South Mimms)

The above two courses offer one place to full Employment Law Service clients free of charge.

### OPEN COURSES 2008

One Day Employment Law and Health and Safety Seminar  
9 October 2008  
(Peterborough)

Managing Disciplinary and Grievance Problems  
Date to be confirmed

For further information please contact Joan Bonner on 01733 891081

## ACAS statistics reveal that most Tribunal cases are made by men

New ACAS Chair Ed Sweeney has blamed male "belligerence" for why more men pursue Employment Tribunal claims than women. "I think men tend to be more belligerent than women and women tend to be more compliant, they are into group working rather than men".

The conciliation service last month exposed that men are 9% more likely to consider making a Tribunal claim than women, based on 830,000 calls to its helpline in 2006-7.

Mr Sweeney, who took over as the ACAS Chair in October, said the statistics reflect a general trend that most Tribunal cases are made by men (if you take out sex discrimination claims).

In 2006-7 ACAS averted 16,000 Tribunal claims – saving business £120M by persuading them that prevention is better than cure, according to Mr Sweeney.

*The AP Partnership Ltd* agrees with this. Clients need to take advice as early as possible in how to handle situations, disputes or problems with staff. Just pick up the telephone and talk to your Consultant before taking action.

## ILLEGAL WORKING FINES INTRODUCED:

On 29 February 2008 new measures came into force to deal with illegal migrants working in the UK. These new measures are contained in the Immigration, Asylum and Nationality Act 2006 and include:

- Employers who employ illegal migrant workers could face a fine of up to £10,000 per illegal worker.
- Employers who knowingly employ illegal migrant workers could face a maximum two-year prison sentence and/or an unlimited fine.
- Employers also have a responsibility to check the ongoing entitlement of migrant workers who have a time-limited visa (such as a working holiday visa) to ensure that their employees' immigration status remains valid.

This could save you time and money in the future.

Most Tribunals can be averted simply by management handling issues effectively as they arise. Bespoke training courses can also help Managers to be aware of what could be an issue and what procedures should be used to avert them.



*The employment law specialists*

*The AP Partnership Ltd  
Borough House  
Newark Road  
Peterborough PE1 5YJ  
Tel: 01733 891081  
Fax: 01733 557542*

*Email: mail@apppartnership.co.uk  
www.apppartnership.co.uk*