Published by Thompsons Solicitors

CONTENTS

1 WORKING TIME **2** SEX DISCRIMINATION
3 DISABILITY DISCRIMINATION **4** SEXUALITY
6 MINIMUM WAGE **8** TRANSGENDER DISCRIMINATION

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 82 SEPTEMBER 2003

Roll ups not always bad for your health

Marshalls Clay Products v Caulfield
Pearce v Huw Howatson Ltd
Clarke v Frank Staddon Ltd
Sutton v Potting Construction Ltd
Hoy v Hanlin Construction [2003] IRLR 552

What is the similarity between holidays and TUPE? Answer: the difficulty that employers and Employment Tribunals have in accepting and understanding the requirements of European Law. The annual leave provisions of the Working Time Directive are to the 21st Century what TUPE was to the 1990s.

Following our discussion of the recent cases on annual leave in July LELR issue 80, the position has now changed in England and Wales. The EAT in London has ruled on rolled up holiday pay rates in the above cases, departing from the principles set out by the Court of Session in Scotland in the case of **MPB Structures Ltd v Munro [2003] IRLR 350.**

The EAT has set out five possible contractural scenarios to cover the various situations of entitlement:

1. Contracts between the worker and the employer which are silent as to holiday pay
2. Contracts that purport to exclude any liability for, or entitlement to, holiday pay
3. Contracts where the rates are said to include holiday pay but there is no specification of an amount
4. Contracts providing for a basic wage or rate topped up by a specific sum or percentage in respect of holiday pay
5. Contracts where holiday pay is allocated to and paid during (or immediately prior to or immediately after) specific periods of holiday. The President of the EAT in his judgment in these cases holds that categories one, two and three are unlawful,. and a worker or employee is entitled to claim for paid annual leave, but that categories four and five are lawful.

The distinction between the **Marshalls Clay Products** cases and the earlier Scottish Court of Session case of **MPB Structures v Munro** is in relation to category four. Under Scottish law and the **MPB Structures** judgment, this type of contractual arrangement is not sufficient to discharge an employer's liability towards an employee or worker to paid annual leave entitlement.

The EAT has therefore held that a contractual provision for rolled up holiday pay, which identifies an express amount or percentage by way of an addition to basic pay, is not unlawful in terms of the Working Time Regulations 1998. It does not matter that, at the stage of its payment, it is not specifically appropriated to any particular period, and is not paid at the time of the leave, but merely paid wholly or partly in advance of the leave. This argument had been specifically rejected in Scotland as counterproductive to the purpose of the Regulations and the Working Time Directive itself, which was to ensure that holidays are actually taken as a matter of health and safety.

It is uncontroversial that category five is in compliance with the regulations, (most employees are paid in this way) and that the first three categories fall outside the parameters of the law and will require employers to make additional payment if challenged.

The EAT then issued guidelines as to how to pay a rolled up holiday rate and avoid a breach of regulations. *Set out in full on page 2.*

THOMPSONS SOLICITORS

Pregnancy protection

Busch v Klinkum Neustadt GmbH & Co Betriebs-kg [2003] IRLR 625

This is a decision by the European Court of Justice (ECJ) in a German case. The ECJ held that it is contrary to Article 2(1) of the Equal Treatment Directive to require an employee, who wishes to return to work before the end of parental leave, to inform her employer that she is pregnant again, even though because of her pregnancy she will be unable to carry out all of her duties and even if the employee's intention to return to work was to receive maternity allowance which was more than that for parental leave.

It also held that it is direct discrimination on grounds of sex for an employer to take an employee's pregnancy into consideration in refusing to allow her to return to work before the end of her parental leave.

Ms Busch was employed as a nurse with the Respondent clinic. She gave birth to her first child in June 2000 and took three years parental leave. However in October 2000 she became pregnant again. On 31 January 2001 she wrote to her employers requesting to return to work early and to terminate her parental leave. She did this solely so that she would receive maternity pay, which is higher than the pay for parental leave. On 9 April 2001 she returned to work and the next day she informed her employers that she was seven months pregnant. The employers rescinded the agreement to allow her to return on the basis that she had made a fraudulent misrepresentation. They further submitted that she could not remain at work as she could not have carried out her duties effectively because under German law pregnant women should not be assigned certain tasks which involved lifting and carrying and as a nurse, she would have had to do both.

Ms Busch brought proceedings for maternity pay arguing that she was not required to declare that she was pregnant and that she would have been able to carry out her duties as a nurse at the start of her maternity leave.

The ECJ held that it was sex discrimination to require a woman to give notice to her employers that she was pregnant in Ms Busch's circumstances.

This case is an excellent reminder of the scope of protection afforded to pregnant women under European law.

Rolled up holiday pay

On page 1 we reported the new EAT judgment on rolled up holiday pay and the difficulty created by the differing judgments of the EAT and the Scottish Court of Session in this area. In England and Wales rolled up holiday pay is likely to be unlawful and in breach of the Working Time Regulations unless:

1 the rolled up holiday pay is clearly incorporated into the contract of employment or work and expressly agreed

2 the allocation of the percentage or amount of holiday pay is clearly identified in the contract and preferably in the worker's pay slip

3 it is in addition to the contractual rate of pay

4 records of holiday are kept

5 reasonably practicable steps are taken to require the workers to take their holidays before the expiry of the relevant holiday year.

Disorientating decision

MacDonald v Advocate General for Scotland;
Pearce v Governing Body of Mayfield Secondary School [2003] IRLR 512

The House of Lords has held in these cases that the Sex Discrimination Act 1975 does not protect discrimination on the grounds of sexuality. Worse still is that they have also conclusively overturned the previous excellent decision of the EAT in Burton v De Vere Hotels Ltd [1996] IRLR 596 and concluded that sexual harassment is not unlawful discrimination in itself but requires a comparison with how a man was or would have been treated.

Mr Macdonald was discharged from the RAF after having admitted to being gay. Ms Pearce was driven to resign from her job as a teacher after a vicious campaign of anti-lesbian abuse from pupils after she came out. Both cases predated implementation of the Human Rights Act 1998, which therefore could not directly assist them in obtaining redress. The new Employment Equality (Sexual Orientation) Regulations 2003 do not come into force until 1 December 2003. As a result, both applicants had to seek to rely on the Sex Discrimination Act 1975 to obtain a remedy.

Conceding that the words “on the grounds of sex” in the Sex Discrimination Act 1975 did not include “on the grounds of sexual orientation”, the two Applicants broadly advanced the same argument before the House of Lords. Their case was that Mr Macdonald was discharged from the RAF for being attracted to men. A woman in the same circumstances would not be discharged for being attracted to men. A female comparator would therefore be treated more favourably because she is a woman and not a man. The fact that Mr Macdonald was gay and the comparator heterosexual was to do with motive, and was not a relevant factor in making the like-for-like comparison. In the same way, Ms Pearce’s male comparator who would be treated more favourably would be someone attracted to women and so would not be subjected to harassment.

The House of Lords conclusively rejected this argument. It found that the sexual orientation of the applicants was a relevant factor that had to be taken into account in making a like-for-like comparison. In the above examples, the *reason* for the treatment was the sexual orientation. For Mr Macdonald, therefore, his female comparator also had to be gay, otherwise the comparison would not involve comparing like with like. A gay male applicant must show that he had been treated less favourably that a lesbian comparator. That simply was not the evidence here which was that a gay female would also have been discharged. The situation was the same, in reverse, for Ms Pearce. This fundamental aspect of the case could therefore not succeed.

The case of **Burton v De Vere Hotels Ltd** has frequently been relied upon by applicants in harassment cases, such as Ms Pearce, where the harasser is not an employee of the applicant’s employer. Instead, for example, they may be an external third party. The usual vicarious liability provisions of the Sex Discrimination and Race Relations Acts do not apply because the applicant and harasser are not (even broadly) employed by the same employer. Unless the applicant’s employer can be fixed with liability, the applicant is without a remedy.

Liable for Bernard Manning

In the Burton case, the hotel owner, who employed the black female applicant waitresses, was held liable for the racist offence caused by the jokes of Bernard Manning who had been engaged to entertain the guests in the hotel restaurant. In adopting a purposive interpretation that emphasised the need to protect employees in these circumstances, the EAT in Burton concluded that the issue that had to be determined was whether the incidents were “sufficiently under the control of the employer that he could, by the application of good employment practice, have prevented the harassment.” By this route, applicants harassed by third parties could normally obtain redress against their own employers whom they argued could have

Important NMW cases

The right to be paid the National Minimum Wage (NMW) has been in force since 1 April 1999 under the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 1999.

On 1 October 2002, the NMW was increased to £4.20 per hour and the youth rate (18 to 21-year-olds) to £3.60 per hour. On the recommendation of the Low Pay Commission, the Government will increase the main rate to £4.50 and the youth rate to £3.80 from October 2003. Further increases in October 2004 to £4.85 and £4.10 have provisionally been accepted.

Workers entitled to the NMW

The definition of a "worker" who is entitled to the NMW is someone who "works under (i) a contract of employment or; (ii) any other contract, whether express or implied, to perform personally any work or service for another party except where that other party has the status of a client." There are exclusions covering, for example, family workers sharing meals and leisure activities. The following have been found to be workers entitled to the NMW:

- catering stewards regarded by the Inland Revenue as self-employed **(Hewitson & anor t/a Executive Coach & Catering Services v Inland Revenue (ET Case no.6403701/00)**
- a care worker provided with accommodation who did not share meals and leisure activities with the person she was caring for **(Annis v Bouch (ET Case no.1700401/00)**.

But a sub-postmaster, whose job in the main could be delegated, was not contracted to carry out work personally, and so was not a worker **(Commissioners of Inland Revenue v Post Office Ltd [2003] IRLR 199)**.

Void contractual terms

Under section 49 of the Act, any attempt to contract out of the NMW is void. Where an employer sought to rely on a term in a contract that new employees who failed to turn up for work in the first seven days of employment had pay docked, the tribunal held the term void insofar as it excluded the application of the NMW **(Carter v Vive-Kananda & Anor t/a Strathmore Care Group (ET Case no. 3204318/99).**

Enforcement notices

The Inland Revenue is the main enforcement agency of the NMW and has powers to demand records, enter premises and interview employers. The Court of Appeal held in **Inland Revenue Wales & Midlands v Bebb Travel plc [2002] IRLR 783** that an enforcement notice could only relate to current, and not former workers – that loophole is due to be closed by the provisions of the National Minimum Wage (Enforcement) Bill.

Where the enforcement notice requires wages to be paid that are actually incorrect, the employment tribunal can, and should, award the corrected sum **(Inland Revenue v St Herman's Estates [2002] IRLR 783).**

Detriment and dismissal

Under section 23(1), a worker has the right not to be subjected to any detriment by any act or failure to act for specified reasons relating to the NMW. To dismiss a worker because she has asserted her right to the NMW will be automatically unfair. Examples of detriment and dismissal cases include:

- where an employer faced huge financial difficulties, a tribunal concluded that a dismissal was because of those difficulties rather than because the applicant had asserted her right to be paid the NMW **(Roberts v Branford t/a Super Anglia Cars: ET Case no.1202308/99)**
- Where an employer told a worker that she could only continue to work and receive the NMW if her hours were reduced, there was a dismissal that was automatically unfair **(Durr v Gibson: ET Case no.2402474/99)**
- Where there was a connection between the implementation of the NMW and a company's wish to increase productivity, a performance-related dismissal was still fair because the introduction of the NMW was neither the sole nor the principal reason for the dismissal **(Bopari v Grasshopper Babywear (Wolverhampton) Ltd: ET Case no.5200810/00).**

Pre-operative protection

In the February edition of LELR we reported on the EAT decision in Croft v Consignia plc [2002] IRLR 851. The case involves the use of female toilets by a male to female pre-operative transsexual. The EAT had decided that an employer is required to assign persons to the use of such toilet facilities as are consistent with what the employer knows or believes to be the legal sex of the person concerned. The EAT held that a pre-operative male to female transsexual is still legally a man. Therefore Ms Croft's treatment as far as the use of toilet facilities, was not less favourable treatment but represented similar treatment to her colleagues who were also prohibited from using toilets reserved for the opposite sex.

The Court of Appeal have dismissed Ms Croft's appeal against the EAT decision **(Croft v Royal Mail [2003] IRLR 592 EWCA Civ 1045)**. However the Court of Appeal's reason for finding against Ms Croft is different to the EAT. The EAT's reasoning was straightforward – that legally a pre-operative male to female transsexual was a man and therefore there was no discrimination in preventing Ms Croft from using a female toilet. The Court of Appeal approached the issues by considering section 82 of the Sex Discrimination Act 1975 as amended, which provides that the category of persons who are not to be discriminated against on grounds of gender reassignment includes persons at all stages of gender reassignment under medical supervision. The Court of Appeal accepted that this includes pre-operative transsexuals. However it did not follow that, when considering less favourable treatment on grounds of gender reassignment, that all such persons are immediately entitled to be treated as members of the sex to which they aspire. Thus the court said that merely being a pre-operative male to female transsexual would not enable a person to use a female toilet. On the other hand, permanently refusing someone the use of female toilets, even though they have not undergone the final operation could amount to discrimination. The court said that employers must consider all the circumstances of each individual case and make a judgment as to when a pre-operative male to female transsexual can use the female toilet. Employers should have regard to their other employees and also the circumstance of the transsexual person and at what stage she has reached in the medical treatment including her own assessment and presentation. However, the employer is not bound by the transsexual's own self-definition – but it is one of the considerations that should be taken into account.

In Ms Croft's case the court said that the circumstances dictated that, for a period of time, Ms Croft should not be entitled to use the female toilet and that the unisex disabled toilet was sufficient for her to use. The time had not yet come when she was entitled to use the female toilet facilities.

Although Ms Croft lost her appeal, the Court of Appeal adopted a more realistic attitude than the EAT's blanket approach that all pre-operative male to female transsexuals, whatever their circumstances, must be treated as men. The Court of Appeal has left it open, in some circumstances, for pre-operative male to female transsexuals to use female facilities. It will require employers to consider all the circumstances, rather than use the crude distinction of pre- and post-operative.

THOMPSONS IS THE LARGEST SPECIALISED PERSONAL INJURY AND EMPLOYMENT RIGHTS LAW FIRM IN THE UK WITH AN UNRIVALLED NETWORK OF OFFICES AND FORMIDABLE RESOURCES.

HEAD OFFICE	020 7290 0000
BELFAST	028 9089 0400
BIRMINGHAM	0121 2621 200
BRISTOL	0117 3042400
CARDIFF	029 2044 5300
EDINBURGH	0131 2254 297
GLASGOW	0141 2218 840
HARROW	020 8872 8600
ILFORD	020 8709 6200
LEEDS	0113 2056300
LIVERPOOL	0151 2241 600
MANCHESTER	0161 8193 500
MIDDLESBROUGH	01642 773 220
NEWCASTLE	0191 2690 400
NOTTINGHAM	0115 9897200
PLYMOUTH	01752 253 085
SHEFFIELD	0114 2703300
STOKE	01782 406 200

CONTRIBUTORS TO THIS ISSUE
RICHARD ARTHUR
NICOLA DANDRIDGE
RAKESH PATEL
MARY STACEY
EDITOR **MARY STACEY**
PRODUCTION **NICK WRIGHT**
PRINTED BY **TALISMAN PRINT SERVICES**

LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS. THIS PUBLICATION IS NOT INTENDED AS LEGAL ADVICE ON PARTICULAR CASES

VISIT US AT: **www.thompsons.law.co.uk**
OR
CONTACT US AT: **info@thompsons.law.co.uk**

19926/0903/1097