



# Moon & Co

Solicitors

## Employment Newsletter

Highlights March 2009



### Soggy Thoughts

From the soggy conditions of our last newsletter to the coldest winter for several years. This seems to reflect the financial climate so we had better hope for an early spring and hot summer. Here are some thoughts for March

### He's not an employee

It may be tempting in the current climate to try to avoid taking on employees and just get some casual help from someone who is self employed. After all they can't then sue you for unfair dismissal if you end the contract. However bear in mind the following

Even if someone isn't an employee they may not be truly self employed either. Someone in this situation is likely to be classed as a worker in legal terms. Though workers can't claim for unfair dismissal they are protected by much employment legislation such as anti discrimination laws. They are also entitled to benefits such as paid holidays.

A worker is someone who isn't an employee or running their own business but provides services personally. Parties have therefore been tempted to include a clause in a contract saying the worker can provide a substitute to do the work thereby not "providing the services personally". Some time ago the courts concluded that if the parties included such a clause to deceive a third party it was sham and the person in question was still a worker. Now they have confirmed that a sham could also occur where the parties simply don't intend the provision to apply whether or not they set out to deceive someone else. In that case the Employment Appeal Tribunal decided that a bricklayer who could find someone else to lay his bricks when necessary was still a worker and entitled to holiday pay. With paid holiday entitlement set to rise again from April 2009 this could be expensive.

### When is Time, Working Time?

Many employees are getting longer and more permanent breaks than they want at the moment but those still in work have certain rights. One case has helped employers but another has caused potential headaches. At a care home an employee living in a flat at the home was on call every night. In practice she only "worked" for around 8 hours a week. However she claimed the minimum wage for all on call time and demanded rest breaks after being on call for 6 hours. The judge said it might lead to absurdities but

- she was entitled to a rest break after 6 hours even if this meant she had to be woken up to be told she was on her break and
- to be paid the minimum wage whilst she was on call and awake even if she wasn't working.

The National Minimum Wage Act specifies that an employee doesn't have to be paid the minimum wage when by arrangement he sleeps at or near a place of work and during the hours he is permitted to sleep. There is an exception that he must be paid the minimum wage for the hours he is then actually awake for the purpose of working. However this case may now have raised issues about what amounts to being awake and working. What if the employee is awake but has not been called out. E.g. the employee suffers from insomnia. Employers should ensure that clear records are kept when an employee is called out. Further it is essential that employers should make it clear in writing when an employee is entitled to sleep during a shift and provide proper sleeping facilities or there will be little doubt that they will be entitled to be paid at least the national minimum wage for the whole shift.

Another has been more helpful to employers on the issue of rest breaks

- an employee is only entitled to a rest break after he has worked more than six hours but is not entitled to a further break if he works for twelve hours (but beware of the right to overnight breaks)

- if a rest break cannot be taken at the correct time, a proper compensatory rest break must be offered not just the break between shifts
- a claim to the employment tribunal relating to a rest break must be brought within 3 months (6 months if the statutory grievance applies).
- Even if there is a breach compensation is in the discretion of the tribunal and therefore depending on the circumstances the employee may not get any compensation particularly if he has suffered no financial loss.

## Sick of Holidays

There has been a long ongoing saga about employees' rights to holiday pay when they are off sick. When an employee is only off for a week or so there is no problem but what if the employee is off for months and it extends beyond the end of a holiday year. As you know employees can't carry over their right to statutory holiday from one year to another. This is because ensuring employees take a break from work is seen as a health & safety issue.

The courts in the UK had held that employees who are away ill accrued their leave but had no right to take it when on sick leave and were not entitled to be paid in lieu of untaken holiday at the end of the holiday year. Now the European Court of Justice have considered the matter further and taken a different view. They have directed that an employee on sick leave for the whole of an annual leave year is entitled paid annual leave even though they are not actually at work. It is then down to the national courts to decide whether the paid leave can be taken *during* that year, or whether it should be carried over to another year, but the employee is entitled to be paid at some point. The House of Lords must now give its final judgement in this case but will clearly have to follow the ECJ's decision which will be unpopular with employers.

## Snippets

The annual increase in Employment Tribunal award limits came in on 1 February 2009. The key increases are

- For the basic award or a redundancy payment a "week's pay" goes up from £330 to and £350
- The maximum compensatory award for straightforward unfair dismissal rises from £63,000 to £66,200
- The maximum statutory redundancy payment rise from £9,900 to £10,500

## New ACAS Code on Disciplinary and Grievance Procedures

The new Acas Code of Practice on Disciplinary and Grievance Procedures has been published and comes into effect on 6th April 2009, when the statutory dismissal and grievance procedures are abolished. An unreasonable failure by an employer to follow the Code will result in a tribunal having the power to increase any award by up to 25%. Further practical advice in the next newsletter.

Welcome to our e-newsletter which looks at new cases and employment related matters, which are likely to be of interest to many. However specialist advice should be obtained before taking or refraining from taking action based on comments in this newsletter, which is only intended as a brief note. For more information or if you have specific concerns phone me on **01233 714055** or e-mail.

**E-mail me [kirsten@moon-and-co.co.uk](mailto:kirsten@moon-and-co.co.uk) to cancel at any time.**

[www.moon-and-co.co.uk](http://www.moon-and-co.co.uk)

**Partners:** Kirsten B. F. Moon, Kevin G Moon. Regulated by the Solicitors Regulation Authority

30 MOON & CO Applewood House, The Hill, Charing, Kent TN27 0LU  
 Telephone: +44(0)1233 714055 The Partners: Kirsten B F Moon; Kevin G Moon  
 This firm is regulated by the Solicitors Regulations Authority

This e-mail and any attachments are confidential and may contain information that is privileged. If you are not the named recipient, or responsible for delivering the message to the named recipient, you must not

disclose, distribute, forward, copy, store or use this e-mail or its attachments in any form. If you have received this communication in error, please accept our apologies and promptly inform the sender by e-mail or by telephoning the above number. Please also immediately delete this message and any attachments from your systems. Thank you.

Although this e-mail and its attachments may have been checked by an up-to-date virus-checking program before transmission, it is your responsibility as recipient to ensure they are actually virus free when received