

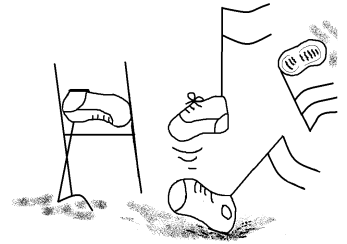


# Moon & Co

Solicitors

## Employment Newsletter

Highlights Spring 2010



“Fit notes all the rage”

With spring finally here and a new government in place employers may be looking to take on more staff. So it is a good time to have a quick look at some employment law cases. I like to provide reviews on subjects that have a practical relevance for many SMEs and to share thoughts about where problems can arise. If you have any questions or suggestions about what is here or what you have heard elsewhere do e-mail me or give me a call.

### Sick of Holidays

Yet another decision has been given about employees rights in relation to holiday and sick pay. This time the European Court of Justice in a Spanish case has made it clear that if someone is sick while they are off ill this time does **not** count towards their minimum statutory holiday entitlement under the Working Time Directive.

The Employment Tribunal (“ET”) looked at how this works with the Working Time Regulations in the UK and what happens if the holiday year runs out during the sick leave. The ET said the Working Time regulations should be interpreted in the same way as the European directive. In *Shah v First West Yorkshire Ltd* Mr Shah broke his ankle and missed his holiday. During his time off ill he was paid for a period at holiday pay rates (higher than his sick pay). Having had to miss his holiday he asked to take the time at a later date even though he didn’t get back to work until the next holiday year had started. His employer said that by law he couldn’t carry holiday from one year to the next (as it generally states in the Working Time Regulations). The tribunal said that they had to take account of the Working Time Directive and therefore the UK regulations should allow a sick employee who misses his holiday to carry it over to the next year. They emphasised that the legislation was intended to give employees a clear period of leisure each year to help protect their health and safety. Therefore if there was insufficient time for the employee to take holiday before the end of the year because of sickness he could carry it over.

This does present some problems and issues. It appears that it doesn’t matter whether the employee becomes sick before the holiday or during it. This could create some questions about whether the employee is really sick at all. Generally it is thought that employees must comply with an employer’s sick notice provisions. However if the sickness started during the holiday, particularly, if for example the employee is abroad on holiday at the time, there could be difficulties.

Further in the case of Mr S he received holiday pay during his absence and accepted he would have to take account of his during any holiday carried over but if there was a dispute about this, problems could occur. It is certainly thought that an employee can designate a period of sick leave as annual leave. However it is less likely that an employer can say that an employee is on holiday if he is off sick. An employer might want to do if the employee is away from work on full contractual sick pay.

Despite all the answers we have had to holiday questions over the last few months yet more remain to be answered and the Working Time Regulations themselves may also be amended in due course.

### **No time for holidays**

Payment for holidays was raised in another case where an employee requested leave near to the end of the holiday year. This is particularly relevant at the moment as many holiday years end in April. The terms of this employee's contract required him to give 4 weeks notice of when he wanted to take leave. His request was not made in time and the employer refused to pay him in lieu or to allow the time to be carried over. The Employment Tribunal considered Mr Lyons claim but decided that the Working Time Regulations included notice provisions and allowed employers to modify them. If the employee didn't comply with these provisions then he could lose his holiday.

Whilst this fits with the regulations it seems possible this is not consistent with the Working Time Directive and so the position may change in the future. Further even if the employee gives sufficient notice there is provision under the Working Time Regulations for the employer to refuse the request perhaps because of staffing levels. Whether this could justify an employee losing their holiday entitlement is less clear.

### **Statutory Compensation Rates; what goes up sometimes comes down.**

The annual review of Employment Tribunal award limits came into effect on 1 February. However this year because of the decrease by 1.4% in the Retail Price Index between September 2008 and September 2009 some of the figures have gone down. The key facts are

- for the basic award or a redundancy payment a "week's pay" remains £380 after its rise in October 2009
- the maximum compensatory award for straightforward unfair dismissal falls from £66,200 to £65,300

### **Other Employment Related Payments**

From April 2010

- Statutory adoption, maternity and paternity pay and maternity allowance will all rise from £123.06 to £124.88,
- Statutory sick pay will remain at £79.15.

### **Fit for Work from 6 April 2010**

For years employees who have been off sick have collected a sick note from their GP. This old hand written form of sick note (if the employer could read it) told an employer what was wrong with the employee and how long they might be off work. The note could only say if the employee was or wasn't fit to work.

Times have changed and doctors think that work is often a good thing for employees. Many medical conditions improve over time and a gradual return to work can further aid recovery. Long term sick leave can also be difficult for employees both financially and psychologically. Facing a return to a pressured full time job after weeks or months of absence can make the best employee feel unable to cope. From the employers point of view getting employees back as soon as possible can help reduce

pressure on other employees and make the most of the absent employees skill and experience.

The new note (which doctors can now type) will say whether an employee is “not fit to work” or “may be fit to work with suitable support from the employer”. The medic will still say what is wrong with the employee but add how this may affect their work. If the doctor believes the employee may be fit to return to some work they can add information about what may assist the employee to do so. Specific tick boxes focus on four common helpful possible options

- phased return to work,
- altered hours,
- amended duties
- workplace adaptations.

These may be simple things such as agreeing a change in hours for a few weeks or modifying the work to remove a physically difficult or stressful part of the work for a short time. The doctor can add extra written comments which may give more detailed information or suggestions.

With simple and hopefully practical advice employees and employers can then openly talk about how usually temporary adaptations can help the employee back to work as soon as they are fit to be there.

There is no obligation on the employer as this stage to allow the employee to return if there are no practical ways of making the changes necessary. However the employer must be careful. The employer’s obligations under the Disability Discrimination Act still apply. Refusing to make reasonable adjustments if the employee qualifies as disabled would be disability discrimination and could lead to a claim in the Employment Tribunal. Subject to this if the changes can’t be made the employee will remain off sick until the end of the fit note period unless they agree a new review date or date for the return to normal working.

Employees will, as before, have to obtain a “fit note” after 7 days of illness and Statutory Sick Pay rules haven’t changed. During first 6 months of illness the fit note can last up to 3 months. The doctor will state whether or not he wants the employee to go back to see him at the end of the statement period. If they do ask to see the employee again and decide they can go back as normal they won’t issue another statement. If employer and employee agree an employee should come back as normal before the end of the note that’s fine and he need not go back to the doctor.

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**Thanks for visiting our web site to see the rest of the article. I hope you have found the information interesting and useful. Do have a look around the rest of the site and give us a call or an e-mail to let us know how you are doing.**

**Take care**

*Kirsten.*

This newsletter 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 [kirsten@moon-and-co.co.uk](mailto:kirsten@moon-and-co.co.uk).