

Employment Round-up 2009 and looking ahead to 2010

The year 2009 has been a difficult one for employers and employees as the recession has hit and businesses have had to make redundancies and implement other cost-cutting measures. In addition, there have been some significant developments in employment law. However, the good news is that 2010 looks like it will be a relatively quiet year in terms of new legislation. Hopefully this will ease some of the pressures on employers and employees alike.

Key developments from 2009

Statutory Dispute Resolution Procedures

Probably the most significant event in 2009 was the repeal of the much maligned Statutory Dispute Resolution Procedures in April. Most employers and lawyers agreed that the prescriptive nature of the procedures created more problems than it solved and welcomed their repeal. The adjustment of up to 50% on Tribunal awards was also subject to much criticism. The procedures have been replaced with an ACAS Code of Practice which sets out how grievances, disciplinary issues and dismissals should be dealt with. The extent to which the ACAS Code of Practice is followed can be taken into account by the Tribunal in determining the extent to which the action taken by the employer is fair.

The key practical consequence of the ACAS Code of Practice is that most claims will now be filed with the Tribunal within 3 months of the relevant dismissal or act complained of rather than 6 months as was often the case under the statutory procedures. Importantly, employees are no longer prevented from issuing a claim for constructive dismissal if they have failed to follow a grievance procedure. Failure by either party to follow the Code of Practice can result in an adjustment to awards but the maximum adjustment has been reduced to 25%.

Rise in unfair dismissal and redundancy related claims

The Employment Tribunals Service reported a rise in the number of claims for unfair dismissal and redundancy related claims during the period April 2008 - March 2009. The increase in claims of this nature highlights the importance of dealing carefully with the fall out of the recession.

Sick leave and annual leave

There have been two decisions on the much debated inter-play between annual and sick leave. The House of Lords in HMRC v Stringer has confirmed the decision of the ECJ that workers continue to accrue statutory annual leave whilst they are on sick leave. Workers are entitled to take statutory annual leave whilst on sick leave (and will be entitled to be paid) even when they have exhausted their entitlement to statutory and contractual sick pay. A failure to pay holiday pay will amount to an unlawful deduction from wages which gives employees the scope to claim for lost holidays in a number of preceding holiday years. Employers must either allow workers who are on sick leave to take paid holiday or allow them to carry it over. In Pereda v Madrid Movilidad the ECJ held that where pre-arranged holiday coincides with a period of sick leave, a worker must have the option to designate an



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alternative period as holiday. The decision gives public sector workers in the UK this right. Private sector employees will have to wait for an amendment to the Working Time Regulations to take advantage of this decision. While a worker may be allowed to take holiday during sick leave, if they don't want to, it must be granted at a different time.

Increases in Vento bands for awards in respect of injury to feelings

In November inflationary rises to the Vento bands were confirmed. In discrimination claims Claimants can claim an award for injury to feelings. There are three bands available to reflect the seriousness of the discriminatory act complained of. The upper limit of the lower band has been increased from £5000 to £6000; the middle band is now £6,000 to £18,000 (formerly £15,000) and the higher band is now £18,000 to £30,000 (formerly £25,000).

Blacklisting of trade union members

Earlier this year the Information Commissioner took action against the Consulting Association who had been blacklisting trade union members working in the construction industry for some 30 years. The action was taken on the basis that blacklisting was in breach of data protection principles. As a result legislation outlawing blacklisting of trade union members is expected between January and April 2010.

Looking ahead to 2010

Time off to train

In April 2010 employees who work in businesses that employ 250 people or more will have a new statutory right to request time off for training. From April 2011 this will be extended to all employees whatever the size of the business which they work in. The right is similar to the right to request flexible working. The request does not have to be granted but the employer has an obligation to seriously consider it. The aim is to enable employees to acquire skills that will make them more effective at work and therefore should be a positive thing for employers. There is no obligation on the employer to pay for training.

The Department for Business, Innovation and Skills will publish guidance for employers in January 2010 which will be available at www.businesslink.gov.uk

The Equality Bill

The Equality Bill is due to be enacted in October 2010. However, if there is a change of Government following the expected General Election, this may mean that the Bill does not become law.

If it does, it will consolidate existing discrimination law and will add to it, for example, by outlawing associative discrimination and discrimination based on perception. It will outlaw pay secrecy clauses and introduce provisions about gender pay discrimination. It will also give Tribunals the power to make recommendations which apply to the whole workforce not just in relation to the particular case it is dealing with.



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"Fit" notes to replace sick notes

In Spring 2010 sick notes will be phased out and "fit" notes will be introduced. The aim is to facilitate people back into work more quickly and easily. The note will indicate whether the employee is fit for work and suggest actions that could be taken to facilitate a return to work. It is part of the Government's initiative to deal with long-term sickness absence and to get people off benefits and back into work. This is a positive development for employers. Often managing employee sickness absence is an extremely difficult area. Frequently employers find themselves in a situation where there is little information about what is actually wrong with an employee, when they are likely to return and what can be done to facilitate a return and employees often are resistant to engaging in dialogue with employers regarding their absence. The end result is often that a lot of management time is spent trying to get to the bottom of the reasons behind the absence with varying results. The fit note should help reduce the frequency and duration of sickness absences and help employers manage sickness absence more effectively.

Draft Agency Workers Regulations

The Government has recently finished consulting on the Draft Agency Workers Regulations. The Regulations will implement a European Directive which requires that the basic working and employment conditions for assigned temporary workers that are no less favourable than if they had been recruited direct by the hirer. This will cover remuneration, paid holiday, working hours, overtime, maternity and anti-discrimination provisions and, arguably, pension contributions. The Regulations will provide for equal access for temporary workers to facilities and permanent employment, and an improvement in access to some facilities for those workers between assignments.

Although the Regulations will not come into force until October 2011, in early 2010 the Government plans to set up a working group of representative stakeholders to look at the practical implications of the Regulations, especially for small and medium-sized businesses. It will consider ways of keeping duplication to a minimum, the development of standard templates and what the guidance should cover. This should allow businesses to prepare for the implications of what are significant changes. The protection afforded by the Regulations only takes effect at the end of a 12 week qualifying period. This may have the effect that agency workers find themselves on shorter assignments. The Regulations place most of the burden on employment agencies. This may increase the cost to businesses of using agency workers and therefore may result in reduced demand for agency staff. On the other hand one of the key benefits to businesses of using temporary workers is that they fulfill a manpower need without using employees with all the rights and liabilities that attach to that status and that may be worth paying a premium for.

If you would like to discuss any of the issues raised in this round-up or have any questions then please contact **Jennifer Platt** or **Fiona Chadwick** in the Employment Team on **0161 832 3434** or email jenniferplatt@kuits.com or fionachadwick@kuits.com.

With all good wishes for the Holiday Season and a prosperous New Year.
Kuits Employment Team



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