

Headline

news from **Head  Office**

March 2010



The New Right to Request Time to Train

The Government has now announced its plans to bring in the statutory right to request time off for training. It is hoped that by encouraging investment in the skills of employees the workforce will become more productive, adaptable, innovative and motivated.

It is thought that the right to request time to train will become available to some 11 million employees in Great Britain. The new right will give employees a legal right to ask their employer to give them time away from their normal duties to undertake training that they believe will benefit both them and the business.

There are various types of training that fall under the request scheme that could include accredited programmes to award recognised qualifications or shorter unaccredited training to help them develop specific skills or knowledge. However, they must have the aim of improving the employee's effectiveness in the employer's business and the performance of the employer's business.

There is also flexibility in the way in which the training is delivered, provided it is appropriate and effective.

E.g. it could be: -

- (a) undertaken on the employer's premises or elsewhere, including at the employee's home;
- (b) undertaken by the employee while performing the duties of the employee's employment or separately;
- (c) provided or supervised by the employer or by someone else;
- (d) be undertaken without supervision;
- (e) be undertaken within or outside the United Kingdom.



There is no limit on the amount of time, study or training that can be requested per application and it could include more than one subject or goal however excessive requests may be more likely to be refused due to the practicalities involved.

Employers are expected to seriously consider their requests and respond in a reasonable time period but employers will retain the right to refuse where there are sound business reasons to do so. The procedure to follow effectively mirrors that of the procedure to follow upon receipt of flexible working requests, although there are some minor differences.

The right is to be phased in with businesses that employ 250 or more people being the first affected by this new legislation in April 2010 with businesses of all sizes being affected from April 2011. However the right to make a request will be restricted to those employees with at least 26 weeks service.

The legislation does not provide that the employer must pay for the training or for the employee's time but employers may wish to do so. We would recommend discussing a Repayment of Training Costs Agreement with us to ensure you are adequately protected in these situations and also consider ways of minimising the loss of pay to the employee, such as working the time back.

Human Resources • Health and Safety

supporting your business piece by piece

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Introduction to Head Office

Head Office provides an innovative and effective way to ensure that your business complies with the legislative requirements of both Human Resources and Health & Safety.

Keeping up with the ever changing legislations and pressures faced managing a team of staff is very expensive, particularly with the use of ad hoc employment lawyers and HR / health and safety consultants.

Head Office aims to reduce these expenditures through a monthly subscription which provides an insurance policy against the costs of an employee taking you to an employment tribunal and any award payouts. On a day to day basis, Head Office supports the business by providing updated guidance on new legislation and case law, a dedicated helpline staffed by HR legal experts and a contract / letter template builder which can be used both as a support mechanism for an existing HR team or as a part of an owner managed business where there is no dedicated HR resource.

Key benefits include:

- **A safety net with our exclusive insurance policy that covers the costs of getting to tribunal and any award up to £250,000.**
- **Minimising the risk to your cashflow (the average costs of attending a tribunal now stands at £9,500).**
- **Budgetary certainty without the need for adhoc HR consultants / employment lawyers.**
- **Improved procedures resulting in increased productivity.**
- **Easy access to commercial and practical legal advice.**
- **More time to focus on managing and growing your business.**

As part of the offer Head Office will provide an initial review of your current position with the aim of recommending the most appropriate solution for your needs.

Call us now on **0845 217 8650** to speak to one of our expert advisers.

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Dress Codes and Discrimination

Eweida v British Airways, CA

In this case British Airways was found not to have indirectly discriminated against Mrs Eweida on the grounds of her religion when they strictly applied their dress policy which forbade the wearing of visible neck adornments.

Mrs Eweida, a Christian, wished to wear a small visible cross with her uniform which was not allowed under the Company's Dress Code at the time.

The Court of Appeal rejected the argument for several reasons including that to uphold the appeal could place an impossible burden on employers to anticipate and provide for what may be parochial or even facetious beliefs in society at large by particular individuals.

The claim came out of her wish to manifest her faith in a particular way and not the fact that she held the belief therefore the Company's Dress Code and the ban on a visible neck adornment was a proportionate means of achieving a legitimate aim.



Dansie v The Commissioner of Police for the Metropolis, EAT

This case related to a gender-specific element of a dress code regarding the hair length of male police officers and whether the particular requirements in the case amounted to discrimination.

Mr Dansie was a male officer who reported to a police training establishment sporting shoulder-length hair tied back in a bun. The dress code in question required smart dress that portrayed a favourable impression of the service and separate guidance stated that hair should be neat, and long hair securely fastened up and worn close to the head. He was told to have it cut and was threatened with disciplinary action if he did not. In the face of the threat he complied and cut his hair but then brought a tribunal claim alleging that he had been unlawfully discriminated against on the grounds of his sex in that a female colleague would not have been required to have her hair cut in the same circumstances and the threats amounted to harassment.

The Employment Appeal Tribunal upheld the tribunal's decision that there was no unlawful discrimination in this case as when considering whether a dress code is discriminatory, it is necessary to consider the policy in its entirety. Despite the fact that gender-specific provisions may result in one sex being treated less favourably than the other provided that the dress code as a whole does not treat one sex more favourably and results in equivalent standards there should be no finding of discrimination.

The police force's dress code was itself gender neutral and female police officer would have been required to comply with any provisions of the dress code which affected only women, in the same way that he was required to comply with the dress code as it affected only men. There were both subject to the same treatment.

This decision will provide comfort to employers with gender-specific dress codes or uniform policies but they are reminded to ensure that, as a whole, they are gender neutral and that enforcement will not result in one sex being treated less favourably than another. Such provisions should also be necessary, appropriate and reasonable to the employee's role within the business and fairly and consistently applied to all.

Should you have any questions about dress codes or potential discrimination in the workplace then please contact the Head Office legal advice team

Latest holiday cases on carryover of holiday



There have been two recent cases on the topic of holiday entitlements.

Loss of Entitlement at Year End

Lyons v Mitie Security, EAT

The Employment Appeals Tribunal has recently decided that an employee's right to statutory annual leave, provided for in Regulation 13 of the Working Time Regulations, could be lost at the end of the holiday year when the employer legitimately exercises its rights under the notice provisions of the same legislation.

The usual position is that leave should be taken during the holiday year, but an employer has the right to refuse leave should the needs of the business require it, provided proper notice is given. Usually this would result in alternative dates being agreed but should this happen close to the end of the holiday year where alternative dates are not possible due to reasonable and legitimate business grounds, then the employee's remaining entitlement to annual leave may be lost.

This is a strict interpretation of the legislation and as there is currently no other case law on this point whether this continues to be the case in the future remains uncertain. We would encourage all businesses to ensure their staff have the opportunity to take their leave entitlement wherever possible.

Carryover of holiday while worker is on sick leave

Shah v First West Yorkshire Ltd, ET

Following the European Court of Justice's decision in *Pereda v Madrid Movilidad SA* the Employment Tribunal in this case held that the Working Time Regulations 1998 can be interpreted to allow for statutory annual leave to be carried over into the next leave year where the employee's leave was marred by sickness.

In this case an employee had booked off four weeks of holiday but as a result of a broken ankle was signed off sick when he was due to take the holiday and did not return until the next leave year. Despite being paid for the period of booked holiday at a rate that was higher than he was entitled to under his employer's contractual sick pay scheme he asked to reclaim his holiday entitlement that was lost to sickness from the previous year. His employer refused to allow this and he lodged a claim at a tribunal under the Working Time Regulations.

The rationale of the decision was that the Working Time Directive protects workers' health and safety by ensuring they have a period of leisure each year and storing up leave from year to year is inconsistent with this. Where ill health prevents this period of leisure then that leave should be able to be taken at another time and if necessary in the following leave year. In refusing the worker time off in the following leave year First West Yorkshire Ltd was in breach of the regulations and the employee was successful in his claim.

We recommend that all employers update their holiday policies to cover sickness absence during annual leave as there are obvious opportunities for employee's to exploit these rules. We would suggest that businesses apply their usual absence reporting procedures to each day of absence although some reasonable adjustments may be needed in light of practical factors.

Employers must also decide whether they will apply stricter rules regarding proof of any illnesses which coincides with annual leave than they would under their usual rules. It is common to require an employee to self certify for the first 7 days of absence and obtain medical certificates thereafter, however it would be possible to require a medical certificate from the first day of absence while on leave to prevent abuse and act as a deterrent. This may be strict on the employee as many doctors will charge for certificates issued before the 8th day.

'Fit notes' update

The Government has recently published its response to the consultation on the proposed 'fit notes' scheme that is set to replace the current sick note scheme.

It is intended that the Social Security (Medical Evidence) and the Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 will come into force on the 6th April 2010 despite the fact that many industry bodies are concerned that this will not allow employers and other involved organizations time to implement appropriate policies.

It is understood that under the new system:

- The note will list common changes which could be implemented to the employee's work environment or role to help them back to work. There will also be a comment box where doctors will be able to state more appropriate measures.
- There will be no 'fit for work' option as first proposed as the government did not feel doctors would have the appropriate knowledge about an individual's role and the risks involved to be able to assess this.
- There will be a 'you may be fit for work taking account of the following advice' option to allow the employer, in consultation with the employee, to make the decision as to whether they can accommodate any changes proposed to facilitate a return to work.



- The maximum duration a medical certificate can be issued for will reduce from six months to three months during the first six months of a health condition.
- Where changes or adjustments are not possible the existing statement will be enough evidence that an individual has a health condition preventing them from carrying out their role.

We expect the Government to issue guidance for all those involved in the new scheme to be made available shortly.

Varying an employee's contract without consent

Bateman and Others v Asda Stores Ltd, EAT

It is common that as a business develops and evolves alterations are needed to its workforce to make the most of new opportunities. Often these changes are welcomed by employees who may be promoted or want to contribute to the business's success however what happens when they refuse to change their terms and conditions?

The Employment Appeals Tribunal has recently heard a case that clarifies that an employer may reserve the right to vary employees' contracts without their consent. In order to do this an employer needs an unambiguous term allowing for the proposed variation and it must be exercised in accordance with the implied term of mutual trust and confidence.

In this case Asda proposed a new pay regime and most employees agreed, however they relied upon provision in their handbook allowing them to 'review, revise, amend or replace' the contents of



the handbook, some of which were contractual, and introduce new policies to 'reflect the changing needs of the business' to force the dissenting employees onto the new terms. The employees claimed unauthorised deductions from wages but as the terms were strong, they held extensive consultations and as reasonable notice was given the employee's claims failed, despite the fact that some suffered financial loss as a result of the change.

For clauses such as these to work in practice the variation must not be unreasonable, arbitrary or capricious, reasonable notice must be given and consultations undertaken. The terms must also be clear, concise and unambiguous. Despite this care should be taken and one of our advisors consulted prior to making changes.

Legal representation at disciplinary hearings



Court of Appeal

The Court of Appeal has recently handed down its decision in the case of G v X School which is a second authority that supports an employee's right to legal representation at a disciplinary/appeal hearing where the outcome could determine the employee's right to practice in a profession.

In this case the employee was a teaching assistant and he was accused of having had sexual contact with a 15 year-old boy. Following an investigation the Crown Prosecution Service decided not to prosecute the assistant and the governors of the school instigated their own internal disciplinary investigations. Following a disciplinary hearing they summarily dismissed the employee for breach of trust and when notifying him of his right to appeal they stated that they would be notifying the appropriate agencies. This notification would, if accepted, place his name on a 'barred' list of those unsuitable to work with children preventing future employment at other schools or organisations that work with children.

The employee, prior to the internal appeal, that was suspended pending the outcome of this case, brought judicial review proceedings, challenging the governors' decisions not to allow him legal representation at a disciplinary or appeal hearing. He argued, referring to a previous case of Kulkarni v Milton Keynes Hospital NHS Trust, that Article 6 of the European Convention of Human Rights, gave him protection and the right to representation.

In summary Article 6 of the ECHR states that "In the determination of his civil rights and obligations ... against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..., Everyone

charged with a criminal offence shall be presumed innocent until proved guilty... , Everyone charged with a criminal offence has the following minimum rights:..., to defend himself in person or through legal assistance of his own choosing..."

In making their decision the Court of Appeal held that the right to practise a profession was a "civil right or obligation" and therefore protected under Article 6. Being placed on a barred list would fundamentally limit the employee's ability to practise his profession and the school's internal process would have a "substantial influence or effect" on the decision to place him on a barred list. The employee was therefore entitled to legal representation at the disciplinary and appeal hearings.

This area remains relatively new and there is little case law to detail the situations that would entitle an employee to legal representation, however consideration should be given to this matter where the internal procedures may result in a person being barred from working in their chosen profession if found guilty of an allegation at a disciplinary.

Please contact our legal advisors on 0845 217 8650 to discuss any concerns you may have regarding legal representation at disciplinary hearings.

How to advertise so you are not discriminatory



It has recently been reported that a vexatious litigant has made thousands of pounds through claiming age discrimination against companies advertising for a "school leaver" or "graduate".

Another claimant was successful in receiving over £100,000 in 2008 as a result of similar claims. In today's litigious environment it is essential when advertising a new opportunity within your establishment that you are not found to be discriminatory in any way. As the above examples show there are individuals out there making a profit by taking advantage of simple mistakes in advertisements.

In the above cases it was argued that the Claimants needed to show that they had a genuine interest in the position and that they were not merely attempting to take advantage of the system. Despite a few of these cases being thrown out by the Employment Tribunal there are a number of companies who paid a settlement figure to the Claimants in order to avoid the claim going to an Employment Tribunal.

For the most part there are branches of age discrimination; direct and indirect. Direct discrimination is where an Employer treats one Employee differently to another purely as a result their age. Indirect discrimination arises where an Employer applies a provision, criterion or practice to a group of Employees of different ages but could put certain Employees at a disadvantage. The above cases are examples of this, where Employers advertise for "graduates" it could be taken as a criterion that puts older applicants at a disadvantage.

The following is a guideline as to what needs to be considered when drafting an advertisement to avoid being discriminatory in respect of age.

1. Age or date of births should not be requested as part of the application process (this information should only be included in diversity monitoring forms).
2. References to age or number of years' experience should be avoided.
3. Avoid requests for information such as qualification requirements which might be indirectly discriminatory.
4. If such requests are necessary, you must be able to show why they are necessary and show that they are justified.
5. Ensure that any advertisement is placed where it can reach the wider audience and will not only be seen by a certain age group.

If you have any queries relating to any of the articles in this magazine, please contact our legal advisors on 0845 217 8650



QUICK GUIDE

Statutory rates of payment

Parental payments (from 6th April 2010)		
Type of payment	Current rate (previous limit)	Max period
Statutory maternity pay (higher rate)	90% of normal weekly earnings	6 weeks
Statutory maternity pay (basic rate)	£124.88 (£123.06) a week, or 90% of normal weekly earnings if lower	33 weeks
Maternity allowance	£124.88 (£123.06) a week, or 90% of normal weekly earnings if lower	39 weeks
Statutory paternity pay	£124.88 (£123.06) a week, or 90% of normal weekly earnings if lower	2 weeks
Statutory adoption pay	£124.88 (£123.06) a week, or 90% of normal weekly earnings if lower	39 weeks

Sickness payments (from 6th April 2010)		
Type of payment	Current rate remains at	Max period
Statutory sick pay (standard rate)	£79.15 a week	28 weeks in any 3 years

Earnings threshold for statutory calculations	
Type of payment	Current rate (previous limit)
Earnings threshold for SMP, SPP, SAP, SSP	£97 (£95) a week

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