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earwiggin : employment law update

HOLIDAY PAY AND SICK LEAVE

Pereda v Madrid Movilidad SA

Hot on the heels of the Stringer judgment (see earwiggin on 16 February 2009) which found, amongst other things, that workers still accrue holiday during any absence on sick leave, the European Court of Justice has ruled that workers who fall sick whilst on a planned holiday should be allowed to reschedule their holiday to a later date.

In this case, Mr Pereda suffered an accident at work around 14 days before the start of his allocated period of 4 weeks annual leave. The injury put him out of action for the next 6 weeks which almost entirely overlapped with his planned holiday. He alleged that there had been a breach of the Working Time Directive after his request for an additional period of annual leave was refused. The ECJ agreed that his period of sickness should not have counted towards his holiday time and he should therefore been allowed to take the holiday at a later date.

The ECJ's decision will be regarded by many employers as an unwelcome development in that it is likely to increase the scope for some workers to abuse the system by claiming additional annual leave by alleging that they were ill during their holiday. Some commentators are also saying that the decision is authority for the proposition that the Directive gives workers the right to carry forward their holiday entitlement to a subsequent holiday year if they are prevented from taking it due to illness.

It remains to be seen whether the Government will amend the Working Time Regulations. In the meantime, employers may well wish to review their sickness absence policies in light of this decision.

MATERNITY/PATERNITY LEAVE

Six months of maternity leave to be transferable to fathers

The Government has announced that it intends to introduce "additional paternity leave" for fathers of babies due on or after 3 April 2011. The new right will enable a mother to end her maternity or adoption leave early and transfer to the father the remainder of her leave entitlement (up to a maximum of 6 months) and SMP entitlement (up to a maximum of 3 months).

Consultation on the measures will begin shortly. It is anticipated that the law will also bring additional protection to fathers to ensure that they do not suffer a detriment in the workplace as a result of their taking additional paternity leave.

The other Government proposal to increase statutory maternity pay from 39 to 52 weeks has been quietly shelved for the time being.

AGE DISCRIMINATION AND EARLY RETIREMENT

London Borough of Tower Hamlets v Wooster

The EAT has upheld a tribunal's decision that an employee had been directly discriminated against on grounds of his age when his employer dismissed him before his 50th birthday to ensure that he did not become entitled to enhanced early retirement terms.

Mr Wooster was employed by the London Borough of Tower Hamlets. Under the terms of his pension scheme, he would have been entitled to an early retirement pension if he had remained employed by the Council until the age of 50. The tribunal found that the decision

not to redeploy him after a redundancy situation arose shortly before his 50th birthday was primarily motivated by a wish to avoid the extra costs associated with providing early retirement benefits and that this amounted to unlawful age discrimination. The EAT dismissed the Council's appeal.

Interestingly (and perhaps negligently?) the Council failed to put forward any arguments to justify its decision (which could have potentially provided a defence to the claim for age discrimination). Therefore, it does not necessarily follow that dismissing an employee to minimise pension costs will amount to unlawful age discrimination. That said, if the only reason is to save cost, this is unlikely to provide a defence to a claim for discrimination.

COLLECTIVE REDUNDANCY CONSULTATION

Akavan v Fujitsu Siemens

The ECJ has provided some welcome guidance on the question of when the collective redundancy obligations are triggered.

Under UK legislation, employers are under an obligation to consult on a collective basis when it is proposing to make 20 or more redundancies at one establishment within a period of 90 days or less. The consultation must start "in good time" and, in any event, at least 30 days before the redundancies take effect (or at least 90 days before if more than 99 redundancies are proposed). But what is meant by "in good time"? In this case, the ECJ held that:

- the duty to collectively consult is triggered when there is a "strategic decision" or "change of activities" which compel an employer to plan or contemplate collective redundancies;
- the duty is not dependant on the employer being able to supply all the necessary information to employee representatives. In other words, a lack of information is not a good reason to delay the start of the collective consultation process.

Although this clarification from the ECJ is welcome, there will inevitably still be some uncertainty in determining at what point in its decision making process an employer will have made a "strategic decision" or there is a "change of activities".

IMMIGRATION CONTROLS

The Government has announced that, with effect from 1 January 2010, it will be introducing further measures to make it more difficult for migrant workers to enter the UK. The changes will affect Tier 2 of the points-based system (which replaced the work permit regime and is for skilled workers intending to work in the UK for longer than 12 months). In summary the changes are:

- all jobs will need to be advertised to British workers in JobCentre Plus for a period of 4 weeks (up from the current 2 weeks) before employers are able to start recruiting foreign workers; and
- the minimum level of salary that applicants will be awarded points for under the points based system will rise from £17,000 to £20,000.

In addition to the changes set out above, the Government has also made it more difficult for overseas workers to transfer to the UK base of their employer's group. The qualifying period for a worker to be eligible for an intra-company transfer will be doubled from 6 months to 12 months. These changes are in addition to the measures implemented by UKBA in April 2009 and demonstrate the Government's intent to adapt the points-based system to reflect the needs of the economy.

AVOIDING THE STATUTORY UPLIFT

Tim Arrow & Sons v Olney

And finally, an interesting case from the EAT on how the statutory uplift applies to compensation payments. Whilst decided under the now defunct statutory disciplinary regime, the uplift remains with us and therefore this case is relevant.

Mr Olney brought tribunal proceedings against his former employer for unpaid notice, redundancy pay and unfair dismissal. Just prior to the tribunal hearing, the employer paid him his notice pay and redundancy payment. The tribunal went on to uphold Mr Olney's unfair dismissal claim and awarded compensation with a 50% uplift due to the employer's failure to follow the statutory dismissal procedure. However, his compensation was reduced to take into account the sums already paid by the employer and because the ET found that he would have been dismissed due to redundancy even if the proper procedure had been followed.

Mr Olney argued that the 50% uplift should apply to all sums he received (not just those awarded by the ET). The EAT disagreed saying that an uplift can only be applied to sums actually awarded by the tribunal. A clear message here to employers - if you are bang to rights on payments owed to employees (particular culprits being holiday pay, redundancy and notice pay), you may be better off paying them rather than waiting for a tribunal to order you to pay them (with an uplift).

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