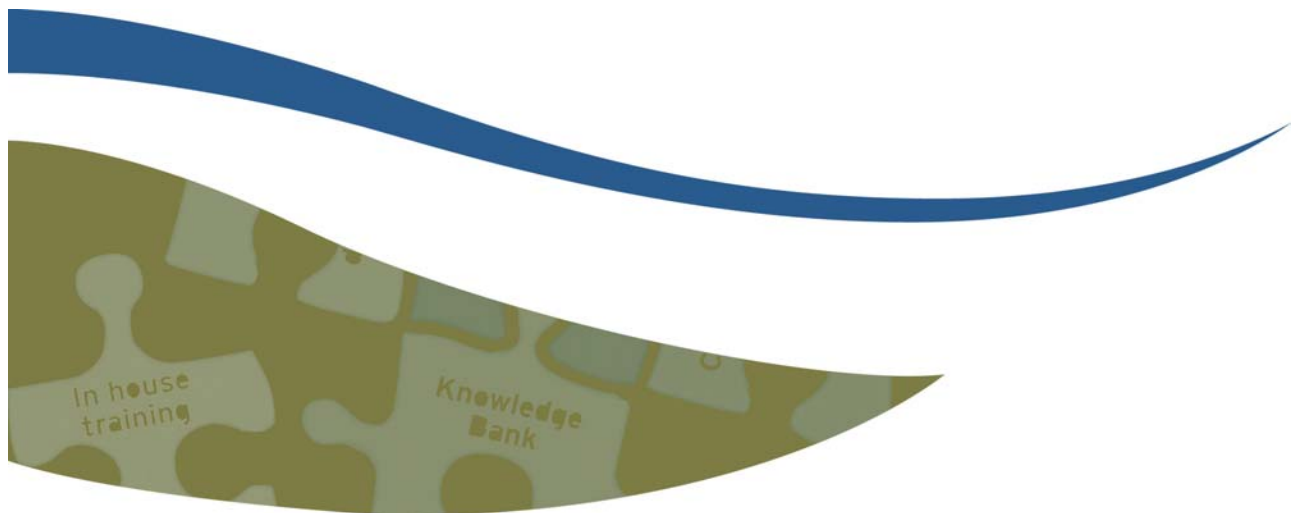


# Employment, Pensions & Incentives

Bulletin

February 2008



## Contents

Editorial.....	1
Entitlement to Holiday Pay and Long Term Sickness Absence.....	2
Additional Rights Following TUPE Transfer.....	3
Varying the Contract of Employment.....	4
Varying the Contract of Employment...5	5
Compensation Uplifts.....	6
Night Shift Bonuses.....	7

# 01

## Editorial

Welcome to the **February** edition of the Employment, Pensions & Incentives Practice Group Bulletin. In this edition we report on a number of interesting and important developments in case law. We look at the long awaited opinion of the Advocate-General of the European Court of Justice in the case of HMRC v Stringer dealing with entitlement to holiday pay during long term sickness absence. We also report on an important decision of the Court of Appeal in relation to safe guarding contractual rights following a TUPE transfer. We look at two instructive Employment Appeal Tribunal Decisions, one being the case of GAP Personal Franchises Limited v Robinson which considered the question of when and in what circumstances an employee will be deemed to have affirmed a variation to contract by continuing to work without protest and the second, Aptuit (Edinburgh) Limited v Kennedy which helps clarify the basis on which compensation can be uplifted in cases involving automatically unfair dismissal. Finally, we include an interesting example of justification of unequal pay regarding the application of a bonus scheme in the case of Chief Constable of West Midland Police v Blackburn.

As ever, we are keen to receive feed back in relation to the content of the bulletin and we are always happy to receive suggestions for subject matters for future editions. Should you require more detailed advice on any of the issues addressed in this month's bulletin, please contact a member of the Employment Team, our contact details are provided on the final page.

Finally, we remind you of our forthcoming Employment Matters Seminar which will take place in Glasgow on **10 April 2008** and Inverness on **17 April 2008**. This seminar will focus on how employers can ensure that they are meeting the legal requirements for employing foreign workers and provide practical recommendations on best practice to ensure that your recruitment policies comply with the regulations. We hope to see you there.



# 02

## Entitlement to Holiday Pay and Long Term Sickness Absence

The Advocate General has recently handed down his opinion in the case of HMRC v Stringer which deals with the question of when, and in what circumstances workers accrue entitlement to paid holiday under the Working Time Regulations whilst they are on sickness absence.

In December 2006 the House of Lords remitted this case to the European Court of Justice on the question of entitlement to holiday pay for those on long term sickness absence in particular, the case covered whether or not employees who are absent from work on long term sickness absence continue to accrue entitlement to paid holidays under the Working Time Regulations even while they were not in fact attending work.

Under the case's previous and perhaps better known name, (Inland Revenue Commissioners v Ainsworth) the Court of Appeal had decided that workers had no entitlement under the Working Time Regulations to paid annual leave in such circumstances.

The Advocate-General, prior to the formal ECJ ruling, has now issued his opinion stating that entitlement to paid holiday does in fact accrue whilst an employee is absent on sick leave but that workers cannot take such holidays whilst they are actually on sick leave.

The Advocate-General also stated that after termination of employment workers would be entitled to a payment in lieu of accrued but untaken holiday leave which accrued even when the worker had been on sick leave for the full holiday year.

### Recommendation

Although the formal ruling of the European Court of Justice has not yet been received, and this may be some months yet, it is normally the case that the Advocate-General's opinion is followed.

Accordingly, the likelihood is that workers will be entitled to accrue holidays during long term sickness absence and receive compensatory payments for accrued untaken holidays upon termination.

However, it is worth noting that the opinion does not entitle workers whilst still on sickness absence, to convert a period of sick leave to paid holiday when perhaps they may have exhausted entitlement to paid sick leave. It is also important to note that this case only concerns the statutory entitlement to annual leave under the Working Time Regulations and where employers offer more generous rights in addition to the statutory minimum as part of contractually agreed schemes, they will still be entitled to apply their contractually agreed scheme (although only in relation to any entitlement which is over and above the statutory minimum entitlement).



# 03

## Additional Rights Following TUPE Transfer

In the recent case of *Regent Security Services Ltd v Power* [2007] EWCA Civ 1188, the Court of Appeal held that there is nothing in the TUPE regulations which prevents a transferred employee from enforcing post-transfer variations in the contract of employment.

### Facts

Following the completion of a TUPE transfer in July 2005, P was informed (in writing) that his contractual retirement age was to change to 65 (it had been 60 before the transfer).

In September, he was notified that in fact, his employer would be relying on the pre-transfer provisions and he would be retired when he turned 60 in November of that year.

At tribunal, RSS asserted that as normal retirement age had been reached, section 109 of the Employment Act 1996 precluded P from pursuing his claim for unfair dismissal.

### Decision

The tribunal held that the purported variation of the contract of employment was rendered void by application of Regulation 12 of the TUPE Regulations.

In these circumstances, there was no jurisdiction to hear P's claim.

### Employment Appeal Tribunal

The EAT ruled that the purpose of the Regulations was to protect the position of the transferred employee. To prevent P from pursuing a tribunal claim would be to create an artificial safeguard of the contractual rights of the employer. The appeal was thus upheld.

### Court of Appeal

RSS argued that the Regulations and the Acquired Rights Directive each made provision for the transferor's right transferring to the transferee. On this basis, it was suggested that the judgement of the EAT was tantamount to a rewriting of the legislation.

The Court of Appeal rejected this submission and affirmed the idea that the remit of the Regulations is to secure the right of the transferred employee.

To prevent P from relying on the varied terms would be inconsistent with this objective – "an employee's rights on a transfer are not being safeguarded if he/she is prevented from taking the benefit of a term that was agreed with the transferee on or after the transfer".

It was further noted that there is nothing in the Regulations or Directive which prohibits an employee from obtaining new contractual rights. Accordingly, P's additional right should be distinguished from the transferred acquired right:



“The acquired right cannot be removed by his agreement on the transfer of the undertaking or by reason of it. There is, however, nothing in the EC or domestic legislation to prevent the employee from obtaining an additional right...by reason of the transfer. The transferred employee can choose between enforcing the transferred acquired right or the newly obtained right.”

## Recommendation

The individual employee now enjoys full discretion in relation to the enforcement of new contractual terms. As such, the decision is one which will almost certainly complicate attempts to harmonise post TUPE workforce conditions.

Accordingly, employer should ensure that where contracts are varied, provision is be made for the claw back of the new benefits where the employees elect to enforce those which applied previously.



# 04

## Varying the Contract of Employment

In the case of *GAP Personnel Franchises Ltd v Robinson* UKEAT 0342/07, the EAT held that a unilateral variation to a contract of employment had been affirmed by the employee's decision to continue working without protest.

### Facts

In January 2006, R commenced employment with GAP as Franchise Operations Manager. The terms and conditions of his contract of employment stipulated that he was to be provided with a company car. Fuel expenses could be claimed at 25p per mile.

GAP reserved the right to make "reasonable changes" to any of the terms and conditions of employment. Any such change would take effect only on provision of written notification.

R presented his first month's claim form at the end of February and was then informed that company policy dictated that those using company cars would be reimbursed at the lower rate of 15p per mile. Only those using their own cars would be eligible to claim the full 25p.

R subsequently submitted expense forms claiming 15p per mile until he left GAP's employment in July 2006. In October, he raised a grievance under the modified procedure and then brought tribunal claims for breach of contract and unlawful deductions from wages.

### Decision

The tribunal concluded that the variation, having been presented as a "fait accompli", was not one to which R had acceded. His claim for unlawful deduction was thus upheld and £2049 awarded as unpaid expenses.

### Employment Appeal Tribunal

The EAT held that in the absence of written notification, there had been no variation of R's contractual entitlement to an allowance of 25p per mile.

Refusal to pay the first month's claim at the full rate thus constituted a breach of contract and unlawful deduction.

GAP's decision to continue paying at the lower rate was interpreted as a unilateral variation of the contract but, crucially, the EAT ruled that R's affirmation was not precluded by its presentation as a *fait accompli* or by the failure to provide written notification. In continuing to work without protest, R was deemed to have affirmed the variation by acquiescence. GAP's appeal was allowed in part and the case was remitted to the tribunal.

### Recommendation

GAP's inability to defeat R's claims at first instance was largely attributable to its failure to issue the requisite written notification.

Accordingly, where a contract of employment allows the employer to make changes to the terms and conditions, it is important that the relevant clause is complied with in full. The employee's tacit acceptance (or acquiescence) should never be regarded as a reliable means of ratifying a variation.



# 05

## Compensation Uplifts

In *Aptuit (Edinburgh) Ltd v Kennedy* [2007] UKEAT 157/06, the EAT ruled that an employment tribunal had erred by allowing its assessment of the appropriate level of compensation uplift to be influenced by factors which did not relate to the failure to follow the statutory dismissal and disciplinary procedures.

### Facts

A Ltd, part of a multi-national business engaged in the supply of clinical products, proposed redundancies at its factory in Bathgate.

In November 2004, K was informed that her job was at risk. Written confirmation (containing no reference to her right of appeal) was subsequently provided.

K attended a meeting with the general manager and HR representative on 29 November. She was made redundant on 31 March and presented a tribunal claim for unfair dismissal shortly thereafter.

### Decision

The tribunal ruled that A Ltd's failure to offer an appeal (as required by the standard dismissal and disciplinary procedure) was sufficient to render the dismissal automatically unfair in terms of section 98(1) of the Employment Rights Act 1996.

Application of section 31 of the Employment Act 2002 required an uplift of between 10 and 50% of the compensatory award. In view of the lack of consultation and the "shoddy" treatment of a long-standing employee, 40% was considered appropriate.

### Employment Appeal Tribunal

The EAT ruled that where section 31 is activated, an uplift of 10% must be made to the compensatory award. Any further increase is discretionary and must be just and equitable in the circumstances underpinning the failure to adhere to the terms of the statutory procedure.

In failing to recognise the discretionary element of the uplift and in taking account of factors wholly irrelevant to the non-completion of the statutory procedure (e.g. the shoddy treatment), the tribunal had misinterpreted the application of section 31 to a successful claim under section 98(1) of the ERA 1996:

"The tribunal took irrelevant matters into account here in respect that they were, apparently, influenced in arriving at 40% by the fact that the failures (i.e. not just the failure to complete the statutory procedure but the other failures identified by them) were "serious", that the respondents were a large organisation, that there appeared to have been "no consultation whatsoever" and that they had treated this "longstanding" employee in a "shoddy" manner. These matters should not have influenced the decision to uplift at all since they did not relate to any failure to complete the statutory procedure."

### Recommendation

The EAT's decision appears to be one which benefits the employer : suddenly, uplift in compensation is an issue to be determined only with regard to matters which relate directly to the failure to follow the statutory procedure; size and resources of the employer and the manner in which the dismissal is handled now appear to be irrelevant.

It is, however, submitted that the judgment will struggle to withstand scrutiny – in spite of the EAT's tacit assertion to the contrary, there is nothing in the statutory wording which limits the "just and equitable" test in the way described.

With this in mind, the prudent employer should take steps to ensure that all dismissals are effected in accordance with the statutory procedure.



# 06

## Night Shift Bonuses

In *Chief Constable of West Midlands Police v Blackburn* UKEAT 007/07, the EAT ruled that a bonus scheme designed to benefit nightworking was objectively justified notwithstanding its disparate adverse effect on women.

### Facts

Constables within the West Midlands Police Force (WMP) worked a rotating shift pattern.

Only those with childcare responsibilities or medical conditions were excused from night shift.

Following the announcement of an agreement struck by the Police Negotiating Board, WMP decided that “24/7 working” would be a factor in determining eligibility for participation in the Special Priority Payment (SPP) scheme.

The result was that only those officers whose “published rostered working patterns involve either a shift pattern or regular working hours covering a bandwidth of at least four hours between midnight and 6am over a cyclical period” could benefit.

### Decision

B and M, excused from “24/7 working” on account of their childcare responsibilities, claimed that WMP had discriminated against them by excluding them from the SPP scheme. Proceedings were brought under the Equal Pay Act 1971.

The tribunal concluded that the structure of the scheme (specifically the way in which night working was to be rewarded) had a disparate adverse effect on women.

The aim itself was deemed to be legitimate but the tribunal suggested that it could have been achieved by less discriminatory means. As such, the genuine material factor (i.e. the desire to reward nightworking) was not objectively justified and the claims were sustained.

### Employment Appeal Tribunal

The EAT found that the tribunal had failed to take into consideration the fact that the purpose of the scheme could not be achieved if those not working nights were treated as if they did.

The suggestion that WMP could afford to pay the bonus to those not working on a “24/7” basis did not constitute a valid rebuttal to the genuine material defence:

“The payment of money to compensate for the economic disadvantages suffered by those who have child care responsibilities is not what the Equal Pay Act requires. Nor is the assessment of the employer’s ability to pay sums of this kind a task which Parliament could conceivably have expected Tribunals to do.”

On this basis, the appeal was upheld.

### Recommendation

Before implementing a bonus scheme applicable only to a certain class of worker a careful assessment should of course be carried out to consider disparate impact. However, if there is disparate impact that is not necessarily the end of the matter and if a genuine material factor exists, as exemplified in this case, the disparate impact can be justified.



## contacts:

**Saria Akhter**

t: 0141 227 9378 e: [saria.akhter@harpermacleod.co.uk](mailto:saria.akhter@harpermacleod.co.uk)

**Shareen Auckbarallee**

t: 0141 227 9515 e: [shareen.auckbarallee@harpermacleod.co.uk](mailto:shareen.auckbarallee@harpermacleod.co.uk)

**Bruce Caldwell**

t: 0141 227 9339 e: [bruce.caldow@harpermacleod.co.uk](mailto:bruce.caldow@harpermacleod.co.uk)

**Paul McMahon**

t: 0141 227 9408 e: [paul.mcmahon@harpermacleod.co.uk](mailto:paul.mcmahon@harpermacleod.co.uk)

**Claire McManus**

t: 0141 227 9342 e: [claire.mcmanus@harpermacleod.co.uk](mailto:claire.mcmanus@harpermacleod.co.uk)

**Graham Millar**

t: 0141 221 8888 e: [graham.millar@harpermacleod.co.uk](mailto:graham.millar@harpermacleod.co.uk)

**Rod McKenzie**

t: 0141 227 9335 e: [rod@harpermacleod.co.uk](mailto:rod@harpermacleod.co.uk)

**The Ca'd'oro, 45 Gordon Street, Glasgow G1 3PE. T: 0141 221 8888 F: 0141 226 4198**

**8 Melville Street, Edinburgh, EH3 7PS. T: 0131 247 2500 F: 0131 247 2501**

**Cradlehall Business Park, Inverness, IV2 5JH. T: 01463 798777 F: 01463 798787**

**e-mail:** [info@harpermacleod.co.uk](mailto:info@harpermacleod.co.uk) **web:** [www.harpermacleod.co.uk](http://www.harpermacleod.co.uk)

Glasgow Edinburgh Inverness

Regulated by The Law Society of Scotland. A list of the members of Harper Macleod LLP is open to inspection at the above office. The

Harper Macleod LLP is a limited liability partnership registered in Scotland.

Registered number: S0300331. Registered office: The Ca'd'oro 45 Gordon Street Glasgow G1 3PE

This Bulletin provides only a brief summary on selected areas and readers should not apply any of the information in it without first taking legal advice on the issue concerned. If you have any questions arising from this bulletin or would like to see a particular topic covered, or would like legal advice on any other matter, please do not hesitate to contact us.

©Harper Macleod