Bargate Murray

EMPLOYMENT LAW REVIEW OF 2009

Philip Henson, Partner in the City of London law firm **Bargate Murray,** discusses the most important employment law cases, legislation and statistics of 2009.

Review of 2009

Welcome to the Bargate Murray Employment law review 2009, in which we discuss the most important employment law cases, legislation, and consultations of last year.

We have also included some procedural tips on what to do (and importantly what to avoid doing!) in the employment tribunal; and also some trends which will be of increasing importance to you, and your business, in 2010.

Employment Tribunal Statistics 2008/2009

In September 2009 the Employment Tribunal Service published statistics which showed that Employment Tribunals accepted 151,000 claims in 2008/9. As expected in a recession there was a marked increase in unfair dismissal (up 29 %), breach of contract (up 31%) and redundancy pay claims (up 48 %). In other areas the number of claims actually fell: equal pay (down 27%) and sex discrimination (down 31%).

The highest compensation award (£1,353,432[1]) was awarded in a race discrimination case, with a loss of earnings element.

Case Law Review

Discrimination - Employment Equality (Religion or Belief) Regulations 2003

2009 brought a raft of cases interpreting the discrimination provisions of the Employment Equality (Religion or Belief) Regulations 2003 ("the Religion or Belief Regulations"). In this review we explain the three most important cases which cross over several professions: a relationship counsellor, a registrar, and a widely publicised case concerning a head of sustainability at a publicly listed company.

[1] There is no statutory cap on compensation awards in employment tribunals.

McFarlane v Relate[2]

In November the Employment Appeal Tribunal (EAT) handed down the much anticipated judgment of McFarlane v Relate.

Mr. McFarlane is a Christian and the former elder of a large multicultural church in Bristol, and was employed as a relationship counsellor by Relate, the well known relationship counseling organization. Mr. McFarlane believed that it follows from biblical teaching that same-sex sexual activity is sinful and that he should do nothing which endorses such activity. Mr. McFarlane expressed his concerns with his supervisor, and then agreed to assist a lesbian couple. At a later date he raised the possibility of his being exempted from any obligation to work with same-sex couples where sexual issues were involved. Mr. McFarlane was subsequently summarily dismissed. He issued a claim against Relate for unfair dismissal; wrongful dismissal; discrimination (both direct and indirect) and harassment contrary to the Religion or Belief Regulations.

The EAT took into consideration the Equal Opportunities Policy ("the Policy") of Relate and also the Code of Ethics ("the Code") and principles of good practice of the British Association for Sexual and Relationship Therapy. In accordance with the Code and the Policy, Relate offers its services to same-sex couples in precisely the same way as to heterosexual couples, and counsellors employed by it will in the ordinary course of events sometimes have same-sex couples assigned to them to counsel.

The EAT held that there was no direct discrimination, as the employee had not been dismissed because he was a Christian. He had been dismissed because he had manifested his beliefs in a way that was contrary to his employer's principles. Further, there was no indirect discrimination, as Relate was justified in requiring its employees to commit to following its policy of providing services in a non-discriminatory manner.

This case highlights the benefit of having a comprehensive equal opportunities policy.

Lillian Ladele v London Borough of Islington

The core question in this case was whether the London Borough of Islington ("the Council") was entitled to compel a registrar (Ms Lillian Ladele) to register civil partnerships, even though she objected to officiating at such registrations on the grounds of her religious beliefs.

At the original hearing the Employment Tribunal held that the Council could not compel Ms Ladele, and concluded that the Council had been guilty of direct and indirect discrimination, and harassment, against Ms Ladele contrary to the Religion or Belief Regulations. The Employment Appeal Tribunal ("the EAT") reversed that decision, holding that there had been no breach of the Regulations, and that the Council had been entitled to act as they did. The matter was then considered in the Court of Appeal in December 2009.

[2] McFarlane v Relate Avon Ltd – UKEAT00106/09/DA

The Court of Appeal[3] dismissed Ms Ladele's appeal and upheld the Employment Appeal Tribunals decision that the Council had neither directly or indirectly discriminated against her, nor unlawfully harassed her on the grounds of her religious belief, when it took disciplinary action against her for refusing to abide by its policy that all registrars carry out civil partnership ceremonies.

The Court accepted that the Council had no alternative but to require Ms Ladele to perform civil partnership duties, as they would otherwise be in breach of their own legal obligations.

Nicholson v Grainger Plc and others

In one of the most widely published employment cases of 2009 Mr. Tim Nicholson, the Head of Sustainability at Grainger Plc, argued that his dismissal amounted to unlawful discrimination because of his strongly held beliefs about climate change. He also argued that those beliefs were both protected under the Religion or Belief Regulations, and also as protected disclosures.

Mr. Nicholson gave evidence that his views on climate change were not merely opinion they impacted on his choice of home, how he travels and what he eats and drinks.

At a Pre-Hearing Review in March 2009[4], a Tribunal decided that Mr. Nicolson's beliefs were covered by the Religion or Belief Regulations. In forming that view the Tribunal said that the beliefs gave rise to a moral order similar to those '*derived from the major world religions that eschew certain types of meat, promote sexual abstinence and make a virtue of poverty*'.

Grainger Plc subsequently appealed that decision to the Employment Appeal Tribunal ("EAT") In that decision, handed down in November 2009[5], the honourable Justice Burton held that a belief in man-made climate change, and the alleged resulting moral imperatives, is capable of being a '*philosophical belief*' for the purpose of the Religion or Belief Regulations. Justice Burton stated:

"In my judgment, if a person can establish that he holds a philosophical belief which is based on science, as opposed, for example, to religion, then there is no reason to disqualify it from protection by the Regulations".

This case will crop up again in 2010 as Mr Nicholson has not won his case; he has jumped over the necessary procedural hurdles to enable his claim to progress to a full hearing.
It is widely expected that discrimination claims under the Religion or Belief Regulations will increase in 2010. Many commentators have argued that the floodgates may open.

[3] Ladele v London Borough of Islington [2009] EWCA Civ 1357
[4] Nicholson v Grainger Plc and others ET 2203367/08
[5] Appeal No. UKEAT/0219/09/ZT

Continuity of service preserved in a "pre pack" purchase

In July 2009 the Court of Appeal's published the much anticipated judgement of Oakland v Wellswood (Yorkshire) Ltd[6]. The case was originally brought under the Transfer of Undertakings (Protection of Employment) Regulations 2006 "(TUPE"), and left several unanswered questions about whether the purchaser in a pre-pack administration can avoid the automatic transfer of employees pursuant to TUPE. However, the appeal was brought under the Employment Rights Act 1996.

The Court held that continuity of employment was preserved by section 218 of the Employment Rights Act 1996 when an employee of a company in administration was employed by the buyer following a pre-pack sale.

Age discrimination

2010 is tipped to be the year that age discrimination claims will rise as the President of Employment Tribunals has issued a direction ordering that the stay on all claims arising out of compulsory retirement should be lifted following the High Court's ruling in R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills[7] that the forced retirement age of 65 is lawful, provided that they follow the statutory procedure.

Dismissal to prevent access to enhanced pension justified

In Woodcock v Cumbria Primary Care Trust[8] an employment tribunal held that a redundant chief executive, dismissed without proper consultation so that notice expired before he qualified for enhanced pension payments, was not directly discriminated against on grounds of his age because the less favourable treatment was justified. The employer's failure to consult properly before serving notice had been a proportionate means of achieving a legitimate aim. The aim had been to bring about the redundancy dismissal before the cost of providing enhanced payments had been triggered.

Disability Discrimination

In 2009 employment lawyers were keeping a watchful eye across other practice areas for disability discrimination cases relating to "*reasonable adjustments*", as they are often quoted as examples in the Employment Tribunal; the House of Lords' decision in the housing case of London Borough of Lewisham v Malcolm[9] being the best known example.

Reasonable adjustments - Goods and services

The case of Royal Bank of Scotland Group Plc v Allen[10], considered by the Court of Appeal in November last year, is particularly important as it is believed to be the first time a compulsory building alteration injunction has been granted against a service provider.

[6] [2009] EWCA Civ 1094
[7] [2009] EWHC 2336 (Admin)
[8] ET/2506917/08
[9] [2008] UKHL 43
[10] [2009] EWCA Civ 1213

Due to the far reaching implications, and costs involved, it is worth considering the facts in detail.

The Claimant, 18 year old David Allen, suffers from Duchenne Muscular Dystrophy[11] and uses an electric wheelchair. He opened a bank account with the Royal Bank of Scotland ("the Bank") at its main branch in the centre of Sheffield; a 19th century listed building. Access to all of the entrances is gained by flights of stone steps, and is, therefore, inaccessible to wheelchair users.

Mr Allen's mother subsequently complained and the Bank suggested that Mr Allen use the branch staff entrance. However, this was also inaccessible to him. The Bank offered what it asserted to be a "*reasonable alternative*", namely a combination of internet banking, telephone banking and the use of branches elsewhere in the city. The Bank also suggested that Mr Allen could use NatWest branches. However, when he attempted to do this he was turned away on the grounds that NatWest did not permit the use of an RBS card at its branches.

On 20 August 2007, Mr Allen issued proceedings alleging unlawful disability discrimination on the grounds of a breach of section 19(1)(b) of the Disability Discrimination Act 1995 ("DDA") in failing to comply with the duty to make reasonable adjustments in section 21(2) without justification.

When the case was considered at first instance several access solutions were considered by the Judge: 1. The "*lobby scheme*" involving the installation of a platform lift within the entrance lobby adjacent to the customer entrance. The Bank had obtained planning permission for this scheme but rejected it on the grounds that the turning circle required could not be accommodated and the works would cause severe disruption as they required alterations to incoming gas mains, water mains and internal services. 2. The "*Owen scheme*" (which was recommended by the single joint expert, Richard Owen) involved the installation of a platform lift in the area which forms part of the existing banking hall. This was rejected because it would require the loss of an interview room on the ground floor.

In January 2009, His Honour Judge Dowse declared that the Bank had discriminated against Mr Allen contrary to section 19(1)(b), awarded damages in the sum of £6,500 for injury to feelings and ordered the Bank to install a platform lift in accordance with the "*Owen solution*" no later than 30 September 2009.

The Bank then appealed to the Court of Appeal on 5 separate grounds; including the argument that His Honour Judge Dowse had not understood the other facilities offered by the Bank that would allow Mr Allen to access banking facilities(although it did not seek to disturb the award of damages made by the Judge). This argument was given a rather short shrift by Lord Justice Dyson, who highlighted that there were many bank customers who preferred the traditional face to face banking, drawing on the fact that the bank maintained some 2,300 branches throughout the country to which its customers have physical access. The Court of Appeal therefore upheld an injunction which required the

[11] For more details please see this link: http://www.muscular-dystrophy.org/about_muscular_dystrophy/conditions/97_duchenne_muscular_dystrophy

bank to undertake some £200,000 of building work to make its full range of services available to a wheelchair-bound customer.

Lord Justice Wall, dismissing the appeal, stated that as Mr Allen could not access the facilities "*a duty on the part of the Bank plainly thereby arose*". Many businesses will now have to consider whether they fall under the definition of "service provider" under the DDA.

Employer entitled to move employee to new place of work to facilitate making reasonable adjustments

In a judgment handed down just before Christmas the Employment Appeal Tribunal found that an employer[12] (the supermarket chain Lidl Ltd) was entitled to move a disabled employee (Ms Garrett), to a different store where it would be easier for it to put in place the reasonable adjustments required to meet its obligations under the Disability Discrimination Act 1995.

A dismissal can itself be a failure to make reasonable adjustments under the DDA

In Fareham College Corporation v Walter[13], the Employment Appeal Tribunal held that an employer's failure to make reasonable adjustments to avoid dismissing a disabled employee was sufficient to render the dismissal itself an act of discrimination under the Disability Discrimination Act 1995.

Sex discrimination

Protection during IVF treatment

In Sahota v Home Office and Pipkin[14] the EAT considered the extent of protection from sex discrimination during in vitro fertilisation (IVF) treatment.

The EAT held that less favourable treatment of employees who are undergoing IVF treatment but who are not pregnant, either because treatment has begun but ova have not yet been implanted, or because an implantation has failed but further implantation is contemplated, is not automatically directly discriminatory. The decision endorsed the view in an earlier ECJ case[15] that such protection is afforded only in a limited period; the time between ova being collected and the "*imminent*" implantation of the fertilised ova.

[12] Gartett v Lidl Ltd [2009] UKEAT/0541/09
[13] UKEAT/0396/08; UKEAT/0076/09
[14] UKEAT/0342/09
[15] Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG

Race Discrimination

Contract workers

In Leeds City Council v Woodhouse and others[16] the Council was found potentially liable for the act of one of its employees who discriminated against an employee of one of its service providers.

The Employment Appeal Tribunal considered the circumstances in which an individual providing work for a third party who is not their employer is protected from race discrimination by the third party or its employees.

This decision is particularly relevant for companies that carry out outsourcing or agency work.

Jurisdiction

Mariner on foreign registered ship can bring unfair dismissal claim

In Diggins v Condor Marine Crewing Services Limited[17] the Court of Appeal confirmed that a seaman who was employed on a ship registered outside Great Britain was entitled to bring a claim of unfair dismissal.

Condor Marine Crewing Services Limited is a company operating out of and registered in Guernsey. It employed Mr Diggins through a subsidiary company as a chief officer on board a vessel which plied its trade primarily between the Channel Islands and Portsmouth. The vessel itself is registered in Nassau in the Bahamas. The employer argued that this precluded him from bringing a claim for unfair dismissal. To make matters more complicated, for the duration of Mr Diggins' duties on board ship, which typically involved two-week rosters, he lived on the vessel; however, his home is in Lowestoft!

A preliminary issue before the Employment Tribunal was whether it had jurisdiction to hear Mr. Diggins claim for unfair dismissal due to the territorial extent of the Employment Rights Act 1996 (discussed further below), and whether mariners fell within the group of peripatetic[18] employees as defined in the House of Lords case of Serco[19]. The Serco case provides that the mere fact that somebody is an employee who sometimes works outside the United Kingdom does not necessarily prevent him from claiming unfair dismissal if and when he is dismissed from employment; it depends whether he can establish the necessary link with the United Kingdom; known as the extra-territorial jurisdiction.

Under section 199(7) of the Employment Rights Act 1996, a mariner is entitled to claim unfair dismissal if the ship is registered to a port in Great Britain, he does not work wholly outside Great Britain according to his contract, and he is ordinarily resident in Great Britain.

[16] UKEAT 0521/08
[17] [2009] EWCA Civ 1133
[18] Essentially an employee whose work takes him or her to many different places.
[19] Lawson v Serco [2006] UKHL 3 [2006] ICR

Lord Justice Elias in the Court of Appeal set out the correct approach: "*if one asks where this employee's base is, there can only be one sensible answer: it is where his duty begins and where it ends. The company may have been based in Guernsey but Mr Diggins had no real connection with that place and he had even less with the Bahamas, where the ship is registered... it seems to me that the base was in Great Britain*".

Mr Diggins fell outside the statutory provisions of section 199(7), but did in fact satisfy that test on the basis that he was a peripatetic worker as envisaged in Serco, and he could therefore bring a claim for unfair dismissal.

Expect more cases dealing with the class of peripatetic workers in 2010.

Employer released from obligation to provide work where employee in breach of duty of good faith

In Standard Life Health Care Limited v Gorman and others[20] the Court of Appeal upheld an injunction preventing employees from joining a competitor for the duration of their current notice periods.

In the absence of an express "*garden leave*" clause, the Court held that the employer was entitled to rely upon a suspension clause to keep the employees from attending work during their notice periods, even though this prevented them earning any remuneration, as they were paid on a commission-only basis. The Court also held it was "*strongly arguable*" that any obligation on the employer to allow an employee to work is interdependent upon the employee fulfilling their obligations to the employer. Where the employee breaches the duty of good faith, the employer is released from the obligation to provide work.

Procedure

The consequences of lying to the Tribunal!

A case in the Employment Appeal Tribunal (Dunedin Canmore Housing Association Limited and Mrs Margaret Donaldson) highlights the severe consequences of failing to heed the contractual provisions of a compromise agreement, and lying.

Mrs Donaldson entered into a compromise agreement which contained a specific provision requiring her to keep the existence of the agreement and its terms strictly confidential. This is a usual requirement in a compromise agreement.

Shortly after the agreement was signed her employers discovered that there was knowledge of the agreement in their workplace. Her employer therefore withheld payment of the settlement monies.

Mrs Donaldson then brought a breach of contract claim in the employment tribunal, in which she argued that she had not breached the confidentiality provisions in the compromise agreement. This argument was rejected and her case was dismissed by the

[20] [2009] EWCA Civ 1292

Tribunal. However, the Tribunal did not make an award of expenses to her former employer.

The Employment Tribunal found that one particular employee had intimate knowledge of the compromise agreements and its terms. He advised that Mrs Donaldson had phoned him and talked about the agreement on two occasions at about the time it was signed. The Employment Tribunal found that Mrs Donaldson had not been telling the truth and that she had lied under oath.

It was also determined before the Tribunal that Mrs Donaldson had made disclosures about the agreement to another person with whom she had known for several years, and who was living at the same address as her at the time the agreement was signed. The Tribunal determined that he was not part of her immediate family.

The message from the Employment Appeal Tribunal could not have been clearer: "*The issue was not whether a lay person could reasonably have been expected to understand the law. It was whether she had or had not, in simple human terms, approached the essential factual matters that lay at the heart of her case honestly and reasonably. She had not done so and these are exactly the sort of circumstances where a Tribunal has a responsibility to make clear that it is quite unacceptable to cause expense to another party by bringing proceedings on that basis*".

It was held that Dunedin Canmore Housing Association Limited was entitled to an award of expenses, and the case was remitted to the Employment Tribunal to decide upon the amount of the award. Pursuant to the 2004 Tribunal Rules the maximum amount that can be awarded is £10,000.

Lying to get a job= suspended sentence, a fine and community service

In December last year a senior NHS human resources manager, who gave false representations in on line applications about her qualifications in order to obtain a job at Devon Primary Care Trust, received a six month suspended prison sentence from Exeter Crown Court, and was ordered to pay £9,600 in compensation.

Kerrie Devine must also carry out 150 hours of unpaid community work after pleading guilty to six counts of fraud by false representation (Contrary to Section 2 of the Fraud Act 2006). Devine made false representations to Devon PCT in March 2007 in six attempts to obtain employment.

Kerrie Devine falsely claimed to be part way through a Chartered Institute of Personnel and Development (CIPD) course and to hold a degree in Human Resource Management from Oxford Brookes University. She also falsely claimed to hold a certificate in Marketing from the same university, and a Chartered Institute of Marketing Advanced Certificate.

Fine for hiring an illegal worker

Many employers rushed to carry out a review of their HR files in September 2009 when Baroness Scotland was fined £5,000 for employing an illegal worker. That amount was in the mid range of the scale, as the civil penalty can be up to £10,000 per illegal worker.

Employers are advised to put in place vigorous administrative practices to ensure that they do not fall foul of the law. Employers should remember to ask for original documents and check, check and check again that you have the correct documents; and also remember to take copies.

Employers must request, and the individual must provide, certain original documents to establish their eligibility to undertake the work on offer. The documents which are required vary, depending on whether the person is subject to immigration control. Employers should consult the detailed Comprehensive Guidance for more information.[21]An employer is excused from paying a civil penalty if they are able to show that they complied with any prescribed requirements in relation to the employment of an individual[22].

The Home Office Guidance provides: "*..you will have an excuse against liability to pay a civil penalty for employing an illegal migrant if you check and copy certain original documents* ***before*** *someone starts working for you. If the person has a time limit on their stay in the UK, you will also have to carry out repeat checks on their documents at least once a year to have the excuse*"[23].

Legislation

The Treaty of Lisbon

On 1 December 2009, the Treaty of Lisbon came into force bringing with it a wave of changes to the constitutional make up of Europe, including important changes to the organisation and jurisdiction of the European Union's court system.

The Treaty of Lisbon amends the EU and EC treaties, without replacing them. The purpose of the Treaty is to "*provide the Union with the legal framework and tools necessary to meet future challenges and to respond to citizens' demands*[24]".

The aims of the Treaty have been broadly described as creating/developing:

- A more democratic and transparent Europe,
- A more efficient Europe,
- A Europe of rights and values, freedom, solidarity and security,
- Europe as an actor on the global stage.

[21] Comprehensive Guidance, page 21.
[22] section 15 (3) of the Immigration, Asylum and Nationality Act 2006.
[23] Home Office, Border and Immigration Agency- Prevention of Illegal Working – Comprehensive Guidance for employers on preventing illegal working (2008). (the "Guidance ") page, 5.
[24] http://europa.eu/lisbon_treaty/glance/index_en.htm

The Foreign office has published a guide entitled "*Lesser Known Lisbon – the things you might not now about the treaty*[25]" (bizarrely this can be found in the UK in Spain section of the FCO web page).

This guide refers to a Citizen's Initiative, which gives EU Citizens the opportunity to petition the European Commission for a change in policy, which could ultimately lead to new legislation. For a petition to be valid, it needs to contain one million EU signatures from a number of different EU countries.

The Equality Bill

The Equality Bill 2009-2010 completed its Commons Report stage on 2 December 2009. The ambitious aims of the Equality Bill are to reform and harmonize discrimination law; to render as unenforceable secrecy clauses' in contracts of employment; certain employers will be required to publish information about the differences in pay between male and female employees; and equality of opportunity will be increased.

The most significant amendment was a new clause designed to help disabled people succeed with direct discrimination claims where their job applications falter following employers' pre-employment health enquiries. There were also drafting changes to the definitions of combined discrimination, direct discrimination, "*discrimination arising from disability*" and harassment. The Government has not ruled out adding further provisions concerning representative actions in equal pay claims and caste discrimination.

The Bill was read for the first time in the House of Lords on 3 December 2009 and is expected to receive Royal Assent in spring 2010.

A warm welcome to the Supreme Court

The new Supreme Court replaced the House of Lords as the highest appeal court in the UK in October 2009. The creation of the Supreme Court separates the judicial function carried out by the Law Lords from the rest of the parliamentary process.

Work Place Parking Levy Regulations

The imaginatively named "*Workplace Parking Levy (England) Regulations 2009*" came into force on 1 October 2009. These relatively unknown provisions will allow Local Authorities in England (excluding those in Greater London) to decide whether to introduce a workplace parking levy (WPL) scheme to reduce the amount of workplace car parking provided by employers and educational establishments. The intention behind this initiative is to reduce car commuting in favour of other means of transport, such as car sharing.

The Regulations, made under the Transport Act 2000, do not specify charging levels, exemptions and discounts which the Local Authority will decide in light of local circumstances. The Department for Transport will be preparing guidance on the issues to be taken into consideration by authorities when developing a WPL scheme. No WPL

[25] http://ukinspain.fco.gov.uk/en/working-with-spain/britain-eu/lisbon-treaty/lesser-known-lisbon

scheme is expected to come into operation until 2011 and no levy is expected to be collected before April 2012.

Prohibition on using tips for National Minimum Wage (NMW)

From 1 October 2009, employers were prohibited from counting service charges, tips and gratuities processed through their payrolls towards the payment of the NMW[26].

Swine Flu Guidance

Swine flu was the talk of the town amongst HR practitioners and business owners in 2009, and indeed it continues to have an impact on the effectiveness of UK business.

Many organisations are finding that their current rigid sickness absence policies are not fit for purpose. Most GP surgeries have published posters telling anyone who thinks that they may have swine flu to stay away, and to complete a National Flu pandemic online assessment[27]. Upon completion of the on line assessment if an individual is considered to have swine flu they are provided with an authorisation code for a "flu friend" to take to a pick up point, to collect Tamiflu. As such employers may not receive the traditional doctor's certificate.

The employer organisation, the Local Government Employers (LGE), has published updated advice on how to deal with self-certification, and sick pay during a swine flu outbreak[28]. The guidance is intended for the public sector but it is considered likely that the guidance will be adopted in the private sector.

The guidance suggests employers help reduce the burden on GP's by considering more flexible, and alternative methods of dealing with sick employees. For example, rather than requesting a doctor's certificate to prove an employee's illness after seven days, employers could consider extending the self-certification period and asking their own medical staff (assuming of course that that they have their own medical staff) to get in touch with the sick employee to determine if he or she is indeed unable to attend work.

The current estimate is that around half of people who become ill due to swine flu recover within about 7 calendar days without needing to see a doctor. The recommendation from the National Health Service is to take Tamiflu, rest and get better.

Continuity plan

It is recommended that employers carry out a risk assessment and also develop a comprehensive continuity plan in the event of a swine flu outbreak at their place of work. The continuity plan should identify key staff and consider if it will be possible for members of staff to work from home.

[26] BIS has also published a new industry code of best practice on tips: www.berr.gov.uk/files/file52948.pdf
[27] https://www.pandemicflu.direct.gov.uk
[28] http://www.lge.gov.uk/lge/core/page.do?pageId=2567800#contents-3

Such assessments are particularly relevant in the financial sector as all firms regulated by the Financial Services Authority (FSA) are required to take reasonable care to organise and control their affairs responsibly and effectively, with adequate risk management systems.

Employers are also advised to check the terms of their office insurance policies to establish if losses arising from certain types of business interruption or, in the most extreme cases, the death of key personnel are covered.

Cabinet Office guidance

The Cabinet Office has also published the following guidance on how to reduce the risk of catching or spreading swine flu, and what to communicate to employees[29]:

- Cover your nose and mouth when coughing or sneezing, using a tissue when possible,
- Dispose of dirty tissues promptly and carefully – bag and bin them ,
- Avoid non-essential travel and large crowds wherever possible,
- Maintain good basic hygiene, for example washing your hands frequently with soap, and water to reduce the spread of the virus from your hands to your face, or to other people; and,
- Clean hard surfaces (e.g. kitchen worktops, door handles) frequently, using a normal cleaning product.

In July of last year the Department for Work and Pensions indicated that the Government may introduce temporary measures allowing employees to self-certify sickness absence for a period of up to 14 days (rather than the current 7 days). However, this measure is yet to materialise.

In view of the LGE guidance, and also the need to contain the outbreak of swine flu in the work place, it is recommended that employers take a more flexible view of their current sickness absence policies. For example, employers may consider accepting a print out of the online swine flu pandemic authorisation code as proof of absence for a reasonable period in place of the traditional doctor's certificate.

Sickness absence

2009 also brought several important, and sometimes controversial, cases concerning sick pay.

Stringer

The ECJ case Stringer [30] was interpreted by the House of Lords in June 2009[31] who held that the Working Time Regulations (WTR) must be interpreted as allowing workers on long-term sick leave to take, and be paid in respect of, their statutory holiday entitlement.

[29] http://www.cabinetoffice.gov.uk/media/132829/intro_staffadvice_flu_planning.pdf
[30] Stringer and others v HM Revenue & Customs; Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] IRLR 214
[31] [2009] UKHL 31

The House of Lords also held that workers can bring claims for unpaid statutory holiday pay not only under regulation 30 of the WTR, but also under the deduction from wages provisions of ERA 1996. This raises the possibility that workers may be able to recover unpaid holiday pay going back several years, which might not be possible under time limits under the WTR.

Pereda v Madrid Movilidad SA[32]

The Pereda case held that a worker who is incapacitated during a period of previously scheduled statutory holiday should have the right to reschedule the holiday and roll it over to the following leave year.

Consultations

Combined Code: Report and Consultation

On 1 December 2009 the Financial Reporting Council (FRC) published its final report on the effectiveness of the Combined Code on Corporate Governance for UK listed companies and launched consultation on proposed changes.

The FRC proposes that the revised Code (to be re-named the UK Corporate Governance Code) will, amongst other changes, include new principles on the role of the chairman and non-executive directors and the composition of the board, as well as new controls on directors' remuneration.

New ACAS Code on time off for trade union duties and activities

ACAS has published the final version of its Code of Practice on time off for trade union duties and activities[33].

The Code aims to reflect the changing nature of the British workplace. The Code, which replaces the previous guidance issued in 2003, comes into effect on 1 January 2010 under The Employment Protection Code of Practice (Time Off for Trade Union Duties and Activities) Order 2009.

The Code includes guidance on time off for union learning representatives, and is also accompanied by two non-statutory guides on managing time off for union representatives and non-union employee representatives.

NON-STATUTORY GUIDANCE AND STATUTORY CODES OF PRACTICE FROM THE EQUALITY AND HUMAN RIGHTS COMMISSION ("EHRC")

In December last year the EHRC announced that it was developing five statutory codes of

[32] (C-277/08) [2009] IRLR 959

[33] http://www.acas.org.uk/CHttpHandler.ashx?id=274&p=0

practice and non-statutory guidance documents. The new codes and guidance will cover the following areas:

1. Employment and Occupation,
2. Services and Public Functions,
3. Equal Pay,
4. Education, and,
5. The Public Sector Equality Duty.

The EHRC will carry out a series of consultations, and the draft codes should be laid before Parliament in early summer 2010.

New ICO Guide to Data Protection[34] in clear English

The Information Commissioner's Office (ICO) has published a new guide to provide businesses and organisations with practical advice about the Data Protection Act 1998 and to dispel data protection myths. The new guide displays the Clear English Standard logo, uses practical, business-based examples to help organisations comply with the law and demystify data protection. It is a useful tool for all HR departments.

Bargate Murray - Press Clippings from 2009

The partners of Bargate Murray are often asked to comment in the National and trade press on current legal topics.

In November 2009 Philip Henson was at the cutting edge of the bankers bonuses debate when he was interviewed live on BBC News 24 commenting on the resignation threat from the board of RBS.

Philip Henson also wrote a column in the City AM newspaper setting out his views on the regulation of the banking sector; a copy of which can be viewed on the Bargate Murray web page.

34 http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/the_guide_to_data_protection.pdf

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Wishing you a happy and successful 2010.

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