

## Employment Law Newsletter

### THE INTRODUCTION OF “MAYBE” FIT NOTES

The new ‘Statement of Fitness for Work’ known as a ‘fit note’ will replace the sick note from 6 April 2010. The intention is that the fit note will facilitate the earlier return to work of employees currently on long-term sickness absence.

One of the fundamental new features of the fit note is that GPs will be

able to list the changes employers can introduce to assist in an individual’s return to work. Specific suggestions are included on the new standard form, which will be available in an electronic format. These include a phased return to work, amended duties or hours and workplace adaptations.

It was decided that GPs

alone were not best placed to determine whether an individual was capable of returning to work and therefore there will not be a ‘fit for work’ option available. Instead a GP can indicate whether their patient is ‘not fit for work’ or ‘may be fit for work’. This is based on the rationale that it is the employer, in consultation with the employee, not

the GP who must decide whether they can accommodate any changes to facilitate a return to work. Fit notes would more accurately be called “maybe fit for work” notes.

An example of the new fit note can be found at the following Government website:  
[www.dwp.gov.uk/sicknote](http://www.dwp.gov.uk/sicknote)

### RETIREMENT AGE

The Government is currently undertaking a research project aimed at providing an insight into employers’ age based practices. The project will form the basis of a forthcoming review into the default retirement age, which is currently 65.

This month, an amendment to the Equality Bill aimed at abolishing the default retirement age altogether, has been withdrawn by the peers in the House of

Lords who originally proposed it.

The Equality Bill is arguably the most important and long-anticipated piece of legislation due to come into force in 2010. It is expected that the Bill will receive Royal Assent in April and the majority of its provisions will come into force in October 2010. The aim of the legislation is to harmonise and to strengthen current discrimination law.

### UNFAIR DISMISSAL – the range of reasonable responses test.

The Court of Appeal in *Sarkar v West London Mental Health NHS Trust* has restated the standard test for unfair dismissal.

An employer needs to:

1. show that the dismissal was for one of six potentially fair reasons, and
2. that it acted reasonably in applying that reason.

Leaving aside retirement

(which is a potentially fair reason with its own statutory procedure), the tribunal will need to see a fair procedure was followed. When assessing whether an employer acted reasonably, a tribunal must determine whether the decision to dismiss was within the range of reasonable responses that a reasonable employer, in those circumstances, might have adopted.

### TUPE

A recent Court of Appeal decision has held that private sector employers involved in outsourcing are only bound by collective terms, including pay rates, that are in force at the time of a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (now TUPE 2006). New collective terms negotiated after a transfer are not enforceable against the private sector employer.

This decision is principally of interest to those involved in public/private sector transactions. For more information please contact us directly.

## TIME TO TRAIN

From 6 April 2010 employers with 250 or more employees will have to seriously consider an eligible employee's formal request for time-off to undertake study or training.

Employees with 26 weeks' continuous employment will be entitled to make a request for time-off where the training is for the purpose of improving their effectiveness at work and the performance of the business. There is no requirement that the study or training will lead to a formal

qualification.

Within 28 days of receiving a valid request the employer must either accept or meet with the employee to discuss their request and within 14 days of that meeting, inform the employee of the outcome in writing. In accepting an employee's request an employer may make suggestions as to more appropriate training or qualifications, however an outright refusal must be for a reason which falls into one of

a set of specified business reasons which include; cost burden, inability to reallocate work, or the employer's belief that the training would not improve employee effectiveness or business performance.

A refusal can be appealed by the employee.

If the requested leave is granted, the employer has discretion as to how much time-off is allowed and to a certain extent, how the leave

is taken. All time-off will be unpaid and there is no right to request payment.

If a request for time-off is not dealt with properly employees have the right to bring a claim in the employment tribunal.

Employers are well advised to ensure they fully understand the implications of the Regulations before dealing with a request for time-off to train, so as to avoid falling foul of the strict procedure.

## LONG TERM SICKNESS ABSENCE & HOLIDAY ENTITLEMENT

In the case of *Shah v First West Yorkshire [2010]* an employment tribunal has been the first to decide that the Working Time Regulations 1998 should be interpreted in accordance with the ECJ's decision in *Pereda* to allow annual leave ruined by sickness to be carried over to the following leave

year. In coming to the decision, it was necessary for the tribunal to read in additional words to the Working Time Regulations, whose strict interpretation does not permit the carry over of holiday entitlement.

## ANNUAL LEAVE

In the recent case of *Lyon v Mitie Security Ltd [2010]*, the Employment Appeal Tribunal (EAT) confirmed the principle that an employee's failure to give sufficient notice of intended holiday leave could result in the loss of the right at the end of the leave year.

Mr Lyons gave three weeks' notice of his intention to take accrued annual leave at the end of the leave year, when he was

contractually obliged to give a minimum of four weeks' notice and, as such, his employer did not pay him for the period of leave taken. The EAT confirmed that the right to statutory leave in Regulation 13 of the Working Time Regulations is not unchallengeable and that statutory or contractual notice requirements could correctly operate so as to result in the loss of the right to leave at the end of the year leave in respect of leave not taken.

## PATERNITY LEAVE

The government has published six sets of draft Regulations relating to the introduction of additional paternity leave and pay. These Regulations will come into force on 6 April 2010 and will apply to parents of babies due after 3 April 2011 and adoptive parents who are notified of having being matched with a child on or after that date.

The Additional Paternity Leave Regulations 2010 will provide eligible employees (normally fathers) with the right of up to 6 months' leave to care for a child if the child's mother or primary carer returns to work without exercising their full entitlement to maternity or adoption leave.

The Additional Statutory Paternity Pay (General) Regulations 2010 enables

certain employees to claim additional statutory paternity pay (ASPP). Subject to eligibility and notice criteria, employees will be entitled to ASPP when the mother of the child - who has been entitled to maternity allowance, statutory maternity pay or statutory adoption pay - has returned to work.

The intention of the Regulations is to give parents more choice in child care responsibilities and a fairer share of leave entitlements. The scheme has also been designed to minimise the administrative burdens on businesses whilst allowing fathers a greater opportunity to be involved in raising their child.

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