EMPLOYMENT TEAM **PUMP COURT CHAMBERS**

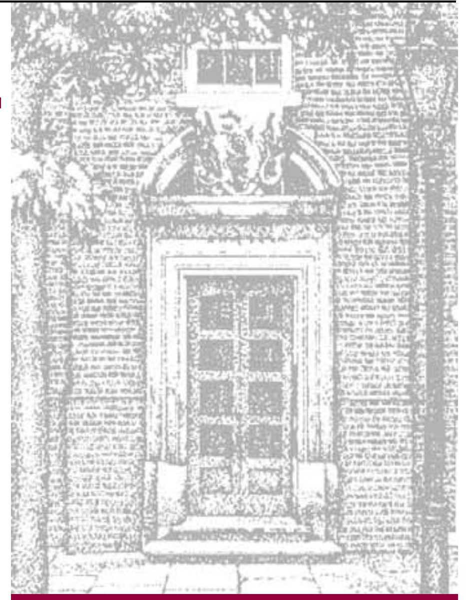
Newsletter

November 2009

CHAMBERS NEWS

Welcome to the 2nd Edition of Pump Court Chambers' Employment CPD Update. Every 2 months members of our Employment team bring you the latest developments in UK and EC employment law. After reading the newsletter you can claim 1/2 an hour of free CPD by completing the relevant quiz at www.pumpcourtcpd.com.

In this edition Alison Russell considers the recent flurry of cases on sickness and holiday pay and Jennifer Lee and Eleanor Bruce summarise a number of other interesting decisions including *Nicholson v Grainger* and *Ministry of Defence v Debique*. Finally, given the rapid approach of the festive season, no employment newsletter could possibly be complete without an article on the horrors of the office Christmas Party.
Helen Trotter and Spencer Keen (Co-Editors)



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SICKNESS AND HOLIDAY - RECENT CASE LAW UPDATE

Article 7 of the **EC Working Time Directive 2003/88** provides that domestic law must ensure that every worker is entitled to paid annual leave of at least four weeks. Further, article 7(2) provides that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.
The provisions of the Directive were incorporated into UK law by way of the **Working Time Regulations 1998**, particularly regulations 13 to 16. For any leave year beginning after 1 April 2009, a worker is entitled to the basic four weeks paid annual leave and a period of 1.6 weeks additional leave.

Although apparently simple in their drafting, the Regulations have given rise to a number of tricky practical issues. Two questions in particular have caused much uncertainty: (i) to what extent if any does a worker absent due to ill-health continue

SICKNESS AND HOLIDAY - RECENT CASE LAW UPDATE CONTINUED

to be entitled to paid annual leave and (ii) if entitled, how should such a worker be able to take his entitlement.

These questions arose to be decided in two recent ECJ cases which involved both long-term and short-term sickness absence: *Stringer & ors -v- HM Revenue & Customs* [2009] IRLR 214 and *Franciso Vicente Pereda -v- Madrid Movilidad* SA [2009] IRLR 959.

Stringer & ors -v- HM Revenue & Customs

The facts of the case are very familiar to employers. One employee, absent on indefinite sick leave for several months, sought to take paid annual leave whilst on sick pay. Three other employees sought payment in lieu of untaken annual leave where each had been absent on sick leave during the leave year in which they were subsequently dismissed. In each case, the period of the sick leave did not exceed the duration of the leave year applicable.

The employees' claims were upheld by both the ET and the EAT. However, the Court of Appeal allowed the employer's appeal *inter alia* on grounds that as there is no obligation to work during sick leave, a worker cannot take paid annual leave. The House of Lords then referred the matter to the ECJ for clarification.

The questions referred to the ECJ were:

- Does art. 7(1) mean that a worker on indefinite sick leave is entitled (i) to designate a future period as paid annual leave and (ii) to take paid annual leave, in either case dung a period which would otherwise be sick leave?

- Where a payment in lieu of paid annual leave is permitted upon termination, in circumstances in which the worker has been on sick leave for all or part of the year in which the employment relationship is terminated, does art.7(2) impose any requirements or lay down any criteria as to whether the allowance is to be paid or how it is to be calculated?

The ECJ identified two distinct issues within the case. Firstly, whether a worker on sick leave accrues the right to annual leave. Secondly, how should any such right be exercised in practice.

What it is of particular interest in both the judgment of the ECJ and the Advocate General's Opinion is the analysis of the purpose of the entitlement to paid annual leave and its place within EU social policy. Having extensively considered the history to the Working Time Directive, the ECJ held (in unusually emphatic terms) that the right to paid annual leave is a particularly important principle of Community social law from which there can be no derogation.

SICKNESS AND HOLIDAY - RECENT CASE LAW UPDATE CONTINUED

The policy importance of such a right is the principle that a worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety. This is the rationale behind prohibiting payment in lieu save upon termination.

Whilst Member States may set conditions for the exercise of the right to paid annual leave, the existence of the right itself may not be made subject to preconditions (such as actually working during the leave year as had been found by the Court of Appeal). In fact, the ECJ went further than the factual limits of the case and made clear that there is no distinction between workers who are absent from work on sick leave (whether short or long-term) during the leave year and those who have in fact worked.

So, what discretion does exist for Member States within the strict trammels of article 7?

The ECJ held that domestic law can provide that a worker on sick leave is not entitled to take paid annual leave during that sick leave, provided he has an opportunity to take his paid annual leave during another period. This last proviso is critical to the discretion permitted and would require provisions enabling accrued leave untaken due to sickness absence to be carried forward into a future leave year. Such carry-over periods may be limited in time, but again provided that the worker has actually had the opportunity to exercise the right to annual leave. Domestic law cannot extinguish a worker's right to paid annual leave at the end of a leave year or carry-over period *where incapacity for work was the reason the worker could not exercise his right*. In other words, a blanket restriction on carry-over would not appear to be sufficient to ensure compliance with the right .

Of course, the UK Working Time Regulations currently provide that the basic four weeks annual leave must be taken in the leave year in respect of which it is due (reg.13(9)(a)) and the additional annual leave may be carried forward into the following leave year if there is a relevant agreement in place which so provides (reg.13A(7)). It would seem, therefore, that as a result of the ECJ judgment in *Stringer* the UK is in partial breach of its duty properly to implement the Directive.

The ECJ also held that domestic law can permit a worker on sick leave to take paid annual leave during that sick leave, although it is not required to do so. In this regard, the ECJ did not accept the Opinion of the Advocate who had concluded that whilst it may seem advantageous to a sick worker to permit him to take paid annual leave, this would frustrate the purpose of the entitlement and should not be permitted.

SICKNESS AND HOLIDAY - RECENT CASE LAW UPDATE CONTINUED

Finally, a worker is entitled to a payment in lieu of annual leave on termination where the employee did not have an opportunity to take the leave due to sickness absence for the whole or part of the leave year. In calculating the payment in lieu, the worker's normal remuneration should be applied.

It now seems likely that the Working Time Regulations will need to be amended properly to incorporate the ECJ's findings on entitlement and the carry-over period.

***Franciso Vicente Pereda -v- Madrid Movilidad* SA**

This case illustrates a further practical problem which arises when leave and sickness coincide. Here, Mr Pereda was due to take 11 working days leave but just before that leave would have started, he suffered an accident at work. By reason of the injury, Mr Pereda was absent due to ill-health during the entire period of this pre-booked holiday.

Mr Pereda subsequently requested a new period of leave on the ground that he had been on sick leave during the originally allocated leave. His employer refused his request and the matter was eventually referred to the ECJ for clarification.

The ECJ again took the opportunity to state that the right to paid annual leave is a fundamentally important principle of EU social laws from which there can be no derogation. The right to paid leave at the end of a leave year will only arise where the worker has had an opportunity to exercise the right to annual leave.

As paid annual leave is intended for the relaxation and leisure of the worker, whereas sick leave is intended for recovery, the purpose of the respective types of leave are very different. In such circumstances, to give effect to the social policy reasons for the art.7 rights, a worker on sick leave during a period of previously scheduled annual leave has the right, on his request and in order that he may actually use his annual leave, to take leave at a different time.

National rules relating to the timing of leave will apply to re-scheduled leave, so an employer will still be able to decline re-scheduled leave if the request is made on insufficient notice or if the dates are not suitable. The Directive does not prevent domestic law allowing a worker to take paid annual leave during sick leave but where the worker does not wish to do so, paid annual leave must be granted to him for a different period.

Whilst *Pereda* involved a substantial period of sickness which pre-dated the annual leave, was work-related and clearly genuine, there is nothing in the judgment of the ECJ which would appear to limit their conclusions to such facts. Difficult questions therefore arise as to what happens when a worker who has actually started their annual holiday becomes sick.

The ECJ's reasoning would appear to be that (as long as they were genuinely sick and irrespective of whether the sickness was caused by work or by the holiday itself!) the worker could treat the day(s) as sick leave and reclaim the annual leave subsequently. Given the possibilities of abuse, it appears likely that employers will want to require stringent evidence of genuine sickness rather than permitting mere self-certification by a phone call.

ALISON RUSSELL

Blame It On The Boogie?

We've all been to a party that hasn't turned out like it should have. Whether it's fist fights, illicit liaisons, or a clash of political ideals, nothing can spoil the festivities faster than a ruckus or two. Or, depending on your perspective, nothing is better than the resulting gossip. But put all of this into the context of a workplace, and you have a fertile breeding ground for employment litigation. So, staggering towards the punch bowl, reindeer antlers slightly skewed on head, and ignoring the fact that a colleague and a clerk have just emerged from the stationary cupboard together, The Employment Team Newsletter takes a festive and light-hearted romp through some of the more memorable workplace claims, both historic and recent.

Sometimes, the motives of the employer can be as pure as the driven snow yet the result of them is still unlawful. Of all the organisations one might expect to see as a defendant in the EAT, Amnesty International may not be the top of your list. But in August of this year, it was held that Amnesty's decision not to hire a Sudanese woman for a Sudanese research role was in breach of the RRA 1976. in Amnesty International v Ahmed [2009] UKEAT 0447_08_1308, the tribunal held that, as the non-appointment had been solely based on the candidate's ethnic origins, there had been direct discrimination and Amnesty's motives in acting thus were irrelevant.

Sometimes, however, it is not the motive of the defendant that is questionable but their very sanity. Such was the case some years ago, in Insitu Cleaning Co Ltd v Heads [1994] UKEAT 576_92_0505 when Mrs Heads brought her memorable claim for sexual discrimination against her employer company, Insitu Cleaning, and one Michael Brown. No doubt Mr Brown would say he was misunderstood, but it does seem a little unfortunate that he saw fit to greet Mrs Heads with the memorable words “Hiya, big tits”. As salutations go, it seems to lack a little something – and clearly both the original tribunal and the EAT agreed, finding that Mr Brown had sexually discriminated against Mrs Heads, with the latter describing the novel submission that the remark was akin to a comment being made about a man's bald head as “absurd”. Quite.

So, what to do if, at the Christmas meal, you are seated next to a fervent eco-warrior? Well, according to Burton J, giving judgment in Grainger Plc v Nicholson [2009] UKEAT/0219/09/ZT such passionate commitment is capable of being a philosophical belief for the purposes of the 2003 Religion and Belief Regulations – so don't offer him EasyJet gift vouchers as a secret santa, or take his attempts to insulate his house with egg boxes anything other than seriously.

And finally, just in case you feel that those of us who are self-employed can behave as badly as we like and damn the consequences – not so fast. At the time of writing, 4 New Square Chambers are fighting a 33 million pound discrimination case brought by Aisha Bijlani. Three consecutive heads of chambers and the head clerk have been named as defendants, with the dirty linen of chambers being washed in the full glare of the media's unforgiving lenses. Watch this space for how it all turns out. That's one Christmas party I am very pleased not to have an invite to.

And if it all goes horribly wrong, and you find yourself, one egg nog too many, grasping Brenda from accounts under the mistletoe with far more enthusiasm than is seemly, don't forget - the Pump Court employment team will hit the ground running in January, delighted to help!

HELEN TROTTER

RECENT CASES

Pulham & Others v LB Barking & Dagenham (EAT - 28/10/2009)

The Council operated a scheme rewarding loyalty and experience, which paid increments to employees if they satisfied a length-of-service (25 years) and an age criterion (55 years). It started to pay out under this scheme, which was negotiated with the unions, on the 1 April following the date at which the employee met the criteria. The scheme was terminated with effect from 1 April 2007, but employees already in receipt of the increment were allowed to retain it by way of "pay protection".

Mrs Pulham (and 15 colleagues) achieved 25 years' service in March 1999, but would not be 55 until 2011. On the coming into force of the Employment Equality (Age) Regulations 2006 on 1 October 2006, she unsuccessfully sought payment of the increment under the scheme, claiming that the age criterion was unlawful. She then brought a claim for age discrimination in that between 1 October 2006 and 30 March 2007 she was excluded from the scheme, and from 1 April 2007 she was excluded from the pay protection arrangements.

The employment tribunal dismissed her claim in relation to both periods. As regards the first period, the tribunal's reasoning was unclear, but appeared to be (a) either that no detriment occurred prior to the abolition of the scheme because employees only became entitled to payment from the 1 April following their fulfilment of both qualifying conditions, or (b) that the discrimination was, in fact, justified because the Council was in the course of negotiating the abolition of the scheme. As regards the second period, it held that the restriction of the pay protection arrangements to those already in receipt of the benefit was justified because of the cost of extending it. The tribunal was also persuaded in that regard by the fact that the arrangements in question had been negotiated with the unions.

Mrs Pulham appealed to the EAT (Underhill P), which allowed her appeal and remitted the case for a fresh hearing, by a new tribunal, on the question of justification. Underhill P considered what the position would have been if the scheme had been abolished, and the pay protection introduced, no later than the coming into force of the 2006 Regulations. On that basis, he asked 2 questions (a) as a matter of principle, were the pay protection arrangements capable of justification? If so, (b) was the Tribunal's conclusion that they were in fact justified open to it in law?

In determining those questions, the EAT applied the basic principles formulated by the Court of Appeal in Redcar and Cleveland Borough Council v Bainbridge [2009] ICR 133, which concerned equal pay and pay protection. Where the existence of past direct, or indirect, discrimination has been "recognised", the continuation of such discrimination in the form of transitional or phasing-out arrangements can never be justified. However, in circumstances where transitional arrangements continue, to some extent, features of a previous regime which are subsequently recognised to have been discriminatory, a "more flexible approach" should apply and the continuation of such arrangements may be capable of justification.

A tribunal must apply the proportionality test, and whether the employer had any reason to think that the arrangements might be discriminatory will be a relevant consideration.

This meant that (a) in principle, pay protection arrangements of the kind in question were capable of justification, and that (b) the tribunal's conclusion that the arrangements were justified was questionable because of (i) the reliance it placed on the fact that the arrangements had been

RECENT CASES CONTINUED

negotiated with the unions, and ii) the importance it placed on the fact that the Council had exhausted its reserves and had no funds to meet the costs of eliminating the discrimination. The second could be a factor but could not, as was so treated by the tribunal, be decisive.

R (E) v Governing Body of JFS (formerly the Jews' Free School) - appeal to the Supreme Court 27/10/2009

As a faith school, the Jews' Free School gave priority to "*...children who are recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR) or who have already enrolled upon or who have undertaken, with the consent of their parents, to follow any course of conversion to Judaism under the approval of the OCR*". This meant that the school gave priority to children who were recognised as Jewish by the orthodox Chief Rabbi because they are descended from a Jewish mother, in preference to children of mothers who converted to Judaism through procedures not recognised by the Chief Rabbi.

A child whose mother was a convert to Judaism failed to get a place at the Jews' Free School in 2006. The Jewish father complained that this was because of the entrance policy noted above, and claimed that membership of a religious group based on descent amounts to membership of the group by reason of ethnic origins within the meaning of the Race Relations Act. Although section 50 of the Equality Act 2006 exempts schools of a religious character from the full rigour of the rules prohibiting discrimination by educational establishments, this exemption covers *religious* discrimination only, not *racial* discrimination. On that basis, it was argued that the exemption could not apply and the JFS policy, based on race, would therefore be unlawful.

The High Court rejected this claim in July 2008 (it held that the entrance criterion noted above was religious based and, therefore, lawful). That decision was overturned by the Court of Appeal in June 2009, which held that the policy was race based and, therefore, unlawful. The School appealed to the Supreme Court (formerly the House of Lords), where at the end of October the case completed its hearing before nine judges. The Supreme Court has reserved judgment, which is expected within the next two or three months.

JENNIFER LEE

Grainger PLC v Nicholson
EMPLOYMENT APPEAL TRIBUNAL
3 NOVEMBER 2009

Burton J sitting alone in the Employment Appeal Tribunal held that a belief in man-made climate change is capable of being a "philosophical belief" for the purpose of the Employment Equality (Religion or Belief) Regulations 2003 if it is genuinely held. The belief must be of a similar status or cogency to a religious belief.

At paragraph 24 Burton J sets out the limitations that should be placed upon a "philosophical belief":

The belief must be genuinely held

> It must be a belief and not, as in *McClintock*, an opinion or viewpoint based on the present state of information available
>
> It must be a belief as to a weighty and substantial aspect of human life and behaviour
>
> It must attain a certain level of cogency, seriousness, cohesion and importance

RECENT CASES CONTINUED

> It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (paragraph 36 of *Campbell* and paragraph 23 of *Williamson*)

At paragraph 32 Burton J emphasised the need, given the nature of the unusual belief, for evidence and cross examination directed to the genuineness of the belief, and also where relevant, with regard to the limitations set out in paragraph 24.

Ministry of Defence v Debique
EMPLOYMENT APPEAL TRIBUNAL
12 OCTOBER 2009

Cox J sitting in the EAT has handed down his decision in this indirect discrimination case. In dismissing the appeal it was held that the Claimant, a female soldier with childcare commitments, had been the victim of sexual and racial discrimination on the basis of two provisions:

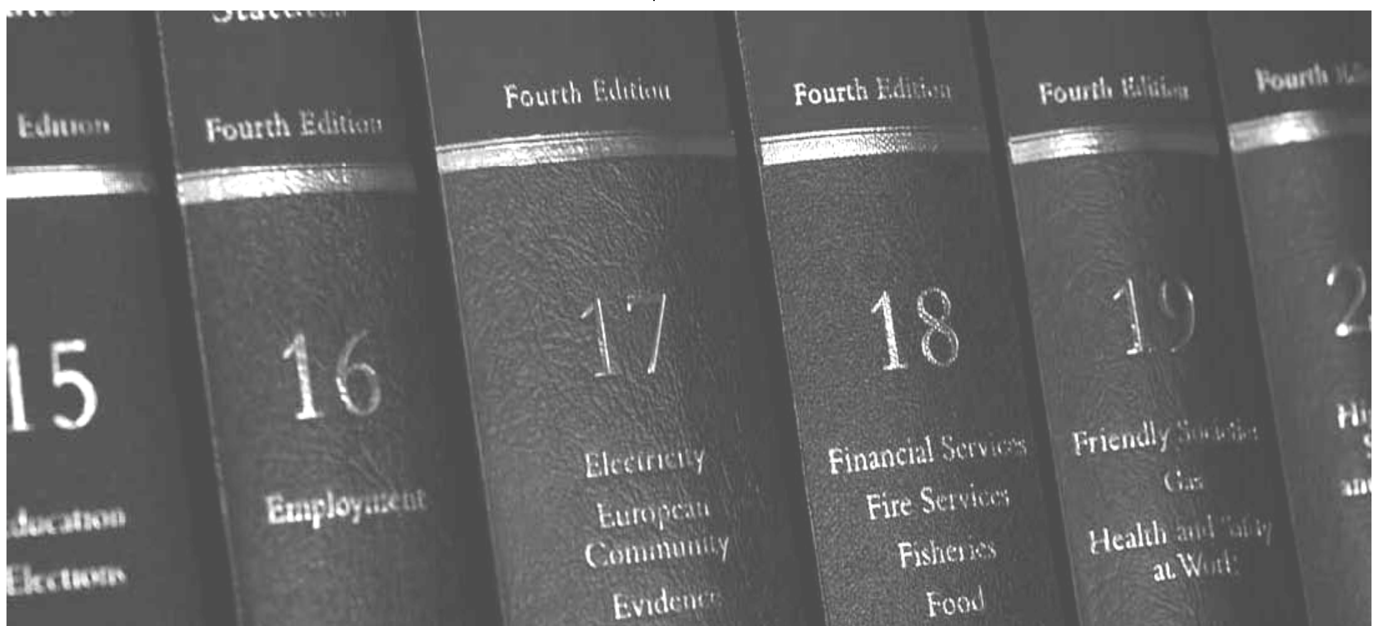
(1) requiring that the female soldier be available for deployment on a "24/7" basis;

(2) prohibiting her from inviting a member of her extended family (a half-sister) who was not of British origin, to stay with her in the Services Family Accommodation in order to assist with childcare.

The EAT agreed that the combined effect of the PCPs should be assessed because discrimination is often a multi-faceted experience and therefore PCPs not be artificially separated. Further it was held that the MoD could not argue that this was a collateral attack on immigration rules becuase the discrimination arose out of the course of employment and the Crown was to be treated as a single entity. Cox J held that it was irrelevant that the immigration PCP was not applied by the Crown in its capacity as an employer because there was no requirement for this gloss to be put on the RRA and the matter did not constitute an attack on immigration rules but the application of those rules on the Claimant through the MoD's own policies.

The EAT found that the PCPs above had not been shown to be a proportionate means of achieving a legitimate aim and upheld the claims.

ELEANOR BRUCE



Employment Team Programme

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Pump Court Employment Programme for 2009 to October 2010

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NOVEMBER 2009	Employment CPD Newsletter
JANUARY 2009	Employment CPD Newsletter
2 FEBRUARY 2010	Employment Update & Lunch at Hotel Du Vin, Winchester
MARCH 2010	Employment CPD Newsletter
23 APRIL 2010	Employment Update & Lunch at Hotel Du Vin, Winchester
MAY 2010	Employment CPD Newsletter Seminar - The Equality Bill – London venue TBC
11 JUNE 2010	Employment Update & Lunch at Hotel Du Vin, Winchester
JULY 2010	Employment CPD Newsletter Summer Event – Inner Temple Garden Party
SEPTEMBER 2010	Employment CPD Newsletter Seminar - Forthcoming legislation
15 OCTOBER 2010	Employment Update & Lunch at Hotel Du Vin, Winchester

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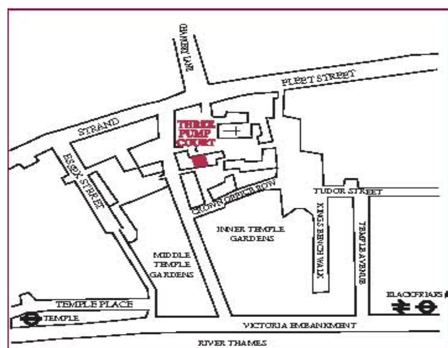

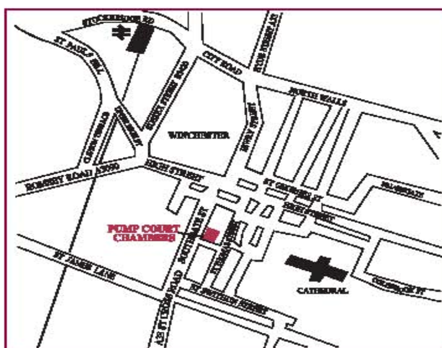

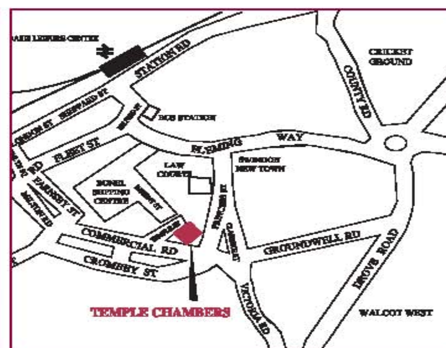

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