

# Noticeboard

## The future for family-friendly and flexible working latest government proposals

You will have seen the recent headlines relating to the DTI's proposals for longer statutory paid maternity leave and an extension of parents' rights to request flexible working. The DTI has published a Consultation paper, entitled "Work and Families: Choice and Flexibility", which elaborates on the Government policy outlined last September by the then Trade & Industry Secretary Patricia Hewitt.

We look at some of the main changes proposed:

### Extension of Maternity and Adoption Pay

#### Under the current system:

- There are 2 periods of statutory maternity leave: 26 weeks' Ordinary Maternity Leave ('OML') and 26 weeks' Additional Maternity Leave ('AML').
- Subject to the 26 week period of qualifying service, Statutory Maternity Pay ('SMP') is payable to the employee at 2 rates: 6 weeks at 90% of her normal salary and 20

weeks, currently at £102.80 or 90% average weekly earnings if less. AML is unpaid.

- During OML an employee is entitled to benefit from all her terms and conditions of employment as if she were at work except for her normal pay for example use of company car, mobile phone, bonuses etc. She is also entitled to return to the same job.
- During AML an employee is not entitled to benefit from these benefits. She is only entitled to return to the same job unless it is not reasonably practicable.

#### The Government is proposing:

- to increase SMP and Adoption Pay from 6 to 9 months by April 2007, with the goal of 1 years' paid leave by the end of the next Parliament.

It will achieve this by one of the following means:

- removing the requirement for an

#### Welcome to the Summer Edition.

Summer time and the thoughts of employers and employees alike turn to that coveted work life balance - particularly those with families.

In this edition of Noticeboard, we focus on parents and work. With the re-election of a Labour Government, we look in particular at the Government's latest proposals for "family friendly " (if not employer friendly) policies in the workplace. This in addition to our regular round up of relevant legal developments for employers.

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employee to work for an employer for a minimum period to qualify for AML;

- abolishing AML and extending OML to 12 months; or
- extending OML to 12 months with different rights of return depending on the period of leave taken.

The Government also intends to clarify the rules on the right of return after AML and Additional Adoption Leave, so that it is clear that a woman cannot be dismissed or selected for redundancy simply because she is pregnant or has taken maternity leave, whatever the size of the organisation.

### Communication between employers and employees during maternity leave

**Under the current system:**

- an employee must notify her employer about her start date for her maternity leave (no later than the 15th week before the week her baby is due).
- the assumption is that an employee will return to work after her full maternity leave entitlement (6 or 12 months) is over: if an employee wishes to return earlier, she must provide her employer with a minimum of 28 days' notice of an earlier return date.

**The Government is proposing:**

- to provide employers with more certainty about an employee's intentions regarding their return date.

The Government has identified 3 options for amending this notice:

- employees to confirm their return date in advance.
- increasing the period of notice to 2 months; or
- increasing the notice period to 3 months.

The Government also proposes to improve communication between employers and employees both before and during maternity leave by:

- reinstating the contact point in place prior to April 2003, where an employer could contact an employee about her plans to return after 15 weeks' leave;
- providing a right for an employer to make reasonable contact with an employee; or
- increasing awareness through improved guidance on keeping in touch.

### Transferable maternity leave and pay

**Under the current system:**

- only women are entitled to take maternity leave.
- employees can start their maternity leave up to 11 weeks before the expected date of birth but cannot return to work until 2 weeks after the birth.
- men are entitled to take 2 weeks paid paternity leave up to 8 weeks after the birth.



**The Government is proposing:**

- To give mothers the right to transfer a proportion of their statutory maternity leave and pay to fathers. The mother will decide whether or not to transfer maternity leave and pay to the father. It will be her entitlement to statutory leave and pay which will determine how much leave and pay the father will benefit from.
- An initial non-transferable period of 6 weeks would recognise that the majority of mothers begin their maternity leave and pay before the expected date of birth as well as taking some time afterwards.
- The same principles will also apply for adopters.
- Eligible mothers and fathers will need to notify their respective employers by a specified point in time when transferring leave and pay.

- When the mother returns to work, the father will immediately begin his period of transferred leave so that, as now, the total period of leave taken is continuous.
- Should a father who has taken transferred leave and pay subsequently decide to return to work earlier than planned, any untaken leave will be lost.
- The notice period that mothers and fathers have to give to their respective employers when transferring leave, should be kept in line with those that apply to mothers when notifying the start and end dates of their leave at present.

The Government sees 3 main options with regard to the amount of leave and pay that could be transferred:

- Any leave and pay after 6 weeks following the start of maternity leave (or 2 weeks after the birth of the child if this is later);



- Any leave and pay after 6 months following the start of maternity leave; and
- Any leave and pay after 3 months following the start of maternity leave.

## Flexible Working

### Under the current system:

- Employees with at least 26 weeks' continuous service with a child under 6 or a disabled child under 18 years of age have the right to request to work flexibly for the purposes of fulfilling childcare obligations.
- Eligible employees can seek to change their hours of work, times that they work and/or work from home.
- Employers can refuse a request on business grounds.

### The Government is proposing:

- to extend the right to parents of older children under 9; under 12 and under 17; and
- to extend the right to other groups such as carers of elderly or sick dependants.

## Implications

The Government's proposals are certainly far reaching: increasing paid maternity leave, the transfer of maternity pay and leave to fathers and the extension of flexible working to carers of older children, the disabled and the elderly.

According to the consultation paper more than 1 in 5 households have a carer and there are 5.3 million carers in

the workplace and with an ageing population, this number is only going to increase. Many employers, particularly small employers, already struggle with accommodating periods of absence for extended maternity and parental leave, albeit unpaid, let alone flexible working requests. Employers will be extremely concerned at the potential cost, uncertainty and disruption to their businesses and penalties for non-compliance that the proposals could bring.

The Government's view, however, is that family friendly policies are cost effective. According to a 2003 NCSR survey cited in the consultation paper, 75% of managers said that the costs involved were minimal and 66% said that introducing flexible working reduced their costs. This must depend largely on the size and nature of the employer's business. In any event, there are a number of positives that must come from this in terms of the retention of valued employees that might otherwise have had to leave the workplace and also the provision for better notice and communication with the employer when employees take leave.

## Your Views

The DTI consultation closed on 25 May 2005. The consultation paper can be viewed in full at [www.dti.gov.uk/workandfamilies](http://www.dti.gov.uk/workandfamilies)

## Bonuses on Maternity Leave

Employers are entitled to make a pro rata reduction in bonuses paid to female employees to reflect periods when they are absent on maternity leave, so the Employment Appeal Tribunal held recently in the case of *Hoyland -v- Asda Stores*.

### The Facts

During 2002 Asda set up a bonus scheme to reward its employees. The scheme provided that where an individual store's profits exceeded its target employees were entitled to an additional bonus equivalent to 20% of the full bonus under the scheme. Under the scheme, bonus payments were reduced in certain circumstances where for example the employee was part-time or in the case of absences of 8 consecutive weeks or more during the year. Maternity leave was treated as absence for these purposes.

H was a part-time worker and so expected her bonus to be pro-rated. However, she was not expecting her bonus to be reduced to take into account her 183 days maternity leave. H brought a claim to the Tribunal for unlawful deductions from wages and sex discrimination.

### The Tribunal

The Tribunal found that there had been no discrimination against H. However, it held that the fact that H had not been paid her bonus for the 2 week period when she was absent from work on compulsory maternity leave was an unlawful deduction from wages. They awarded her £5.20. H appealed.

### The EAT Decision

The EAT dismissed H's appeal, confirming that employers are entitled to make a pro rata reduction in bonuses paid to staff to reflect periods when an employee is absent on maternity leave. In reaching its decision the EAT considered 3 lines of argument:

#### ■ 1. Sex Discrimination

Under Section 6(2) of the Sex Discrimination Act 1975 (SDA), employees are protected against discrimination by employers. However, section 6(6) excludes discrimination in relation to "benefits consisting of the payment of money when the provision of those benefits is regulated by the woman's contract of employment". The EAT agreed with the Tribunal in concluding that the amount of bonus was not discretionary. The scheme formed part of H's contract of employment so she was not protected under the SDA.

#### ■ 2. Pregnancy Related Detriment

EC and UK law state broadly that employees on maternity leave are entitled to retain the rights connected with their employment contract and should not suffer any detriment because they take the benefit of ordinary maternity leave. However, this excludes those terms and conditions which relate to "wages or salary". The EAT therefore had to decide whether the bonus should be classified as "wages or salary".

The EAT agreed with the Tribunal who concluded that the bonus was

part of H's wages because "... it was paid through A's payroll with H's basic wage. It was subject to deductions of tax and national insurance contributions and a percentage of the bonus was paid into the H's pension plan with an equivalent amount contributed by A."

#### ■ 3. Article 141 EU Treaty

H tried to rely directly on EC law and submitted that credit should be given not only for the 2 compulsory weeks of maternity leave but for the whole 18 weeks of ordinary maternity leave or alternatively the 14 weeks' prescribed by the pregnant workers directive. The EAT rejected this submission stating that H could not rely directly on Article 141 having direct application in relation to her employment as is the case where public sector employees are concerned, as Asda was "not an emanation of the State" for these purposes.

### Implications

*Hoyland -v- Asda Stores* is a sensible decision allowing employers, who have a bonus scheme based wholly or partly on attendance, to pro rata bonus for employees on maternity leave other than compulsory leave. However, permission to appeal to the Court of Session (the Scottish Court of Appeal) has been granted so watch this space!

Employers should note that the position in respect of bonuses is likely to be different where the bonus is based on individual performance or targets rather than attendance.

## Holiday update



### Blair's Bank Holiday promise

Following Labour's win at the General Election on 5 May 2005, will Tony Blair keep to his pre-election pledge that all workers receive Bank Holidays on top of the 4 weeks' holiday entitlement they are currently entitled to under the Working Time Regulations 1998?

If so then those employers who provide the statutory minimum of 4 weeks' holiday entitlement inclusive of the 8 days' public holiday in the UK will need to revisit their contracts of employment.

### Holiday pay for employees on sick leave

Last month the Court of Appeal ("CA"), in *Commissioners of Inland Revenue v- Ainsworth*, overturning the EAT's decision in *Kigass* (2002), held that the right to 4 weeks' statutory paid holiday does not continue to accrue whilst an employee is on long-term sick leave.

Regulation 13 of the Working Time Regulations 1998 provides that workers are entitled to 4 weeks' paid holiday. The EAT in *Kigass* held controversially that even though the right to paid leave under the Regulations attached to 'workers', there was no requirement that the "worker" had to do any work or attend to work, either within any particular period or at all. Therefore workers who had exhausted their entitlement to contractual and statutory sick pay could still claim holiday pay, notwithstanding that they were still absent from work.

The CA in *Ainsworth* agreed with the Inland Revenue's argument that "leave" means a release from work and it would be contrary to all ordinary usage for a worker who is off work for a year or more as a result of serious illness to say that during some arbitrarily chosen part of that period he is taking 'leave'. Furthermore, their view was that the Regulations are intended to ensure minimum health and safety standards

in relation to working time, so that workers can expect a minimum period of release from the pressures of work.

### Holiday entitlement on Maternity Leave

As a reminder, paid annual leave (both contractual and statutory) that would normally accrue while the employee was at work should continue to accrue during the employee's ordinary maternity leave. However, contractual holiday entitlement will not accrue during a period of additional maternity leave unless the contract specifically provides for this. However statutory annual leave will continue to accrue during additional maternity leave at the rate of 4 weeks per year under the Working Time Regulations.

An employee absent on long-term sick leave outside her ordinary maternity leave for a pregnancy related reason will not according to *Ainsworth* then accrue statutory holiday.

## EAVESDROPPING - Fixed Term Contract



Lisa Goodyear takes a call from an HR Manager.

*HR: One of our employees is due to return from maternity leave and we no longer require the services of the individual we took on to cover for her. The replacement employee was taken on under a fixed term contract on the basis that her contract would terminate when the post holder returned from maternity leave. To date, she has been employed for 5 months. I understand from her immediate supervisor that she is very unhappy about this and is contemplating bringing a claim. Could she claim unfair dismissal?*

*LG: A fixed term contract is one for which the date of termination of the contract is predetermined by the expiry of time or completion of a specific task. If the employee is employed under a fixed term contract*

*and that contract expires without being renewed this is deemed to be a dismissal. However, this would not normally give rise to a claim for unfair unless the employee has the requisite 1 year's service to bring such a claim. That is unless the employee could assert that the dismissal was for an automatically unfair reason such as pregnancy or health and safety, in which case there is no qualifying period to bring a claim. You explained that the employee does not have 1 year's service, but could she allege that her dismissal is automatically unfair on other grounds?*

*HR: No. Are there any other grounds on which she could bring a claim?*

*LG: The employee could potentially bring a claim under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. The Regulations make it unlawful for an employer to treat a fixed term employee less favourably than a comparable permanent employee as regards the terms of his or her contract or to subject the employee to any other detriment because of their status unless there is an objective business reason for treating them differently.*

*The employee could argue that the expiry/ termination of the contract is a detriment under the Regulations. In fact there has been a recent Court of Appeal case (Department for Work and Pensions -v- Webley) where the employee tried to argue just that. You will be relieved to hear, however, that the Court of Appeal found in favour of the employer.*

*The Court held that as a matter of law fixed term contracts are not*

*unlawful. It is the essence of a fixed term contract that it comes to an end at the expiry of the fixed term. Therefore it must follow that the termination of a fixed term contract by the passage of time cannot, in itself, constitute less favourable treatment under the Regulations. The Court also found that an employer's failure to convert a fixed term contract into a permanent contract cannot constitute less favourable treatment.*

*HR: So, can I just wait for the contract to expire?*

*LG: Strictly speaking, prior to dismissing you should follow the new statutory dismissal and disciplinary procedures, introduced on 1 October 2004. However, as the employee has less than 1 year's service it is difficult to see what claim she could bring if you do not follow these. The procedures apply to all types of dismissal and are not limited to those based on conduct or capability. The standard procedure provides that as a minimum the employer:*

*(1) sends the employee an invitation to attend a meeting setting out the reason for the meeting, i.e. The expiry of her fixed term contract;*

*(2) holds a meeting (to which the employee has the right to be accompanied); and*

*(3) informs the employee of her right to appeal.*

*For the reasons set out above, it is unlikely that the employee would have any grounds for an appeal unless the employee could legitimately point to a reason for dismissal unconnected to the expiry of the fixed term.*

## Agency Workers - employees by implication

In the Winter 2004/2005 edition of Noticeboard, we looked at the case of Brook Street Bureau (UK) Limited v. Dacas, a case concerning the vexed issue of whether an agency worker is an employee of the client or the agency. The Court of Appeal determined that in the absence of an express contract, a contract of employment could be implied from the conduct of the parties and from the particular circumstances.

The Employment Appeal Tribunal ('EAT') has now issued its first appeal decision in this area since Dacas in the case of Cable & Wireless v. Muscat. The case involved an appeal by C&W against a decision that M was C&W's employee, even though there was no express contract between them.

### The Facts

M was employed by Exodus Internet Limited ('EIL') until, at the request of EIL, he became a 'designated contractor'. He set up a limited company E-Nuff ('E') for invoicing purposes, but otherwise continued to work as before.

When C&W took over EIL in 2002, M was told to provide his services to C&W through an agency. An agreement between E and the agency was entered into. M continued working as before. C&W paid for the equipment M used. M took his annual leave to suit C&W. M's only contact with the agency was in relation to the payment of his invoices. M's contract was subsequently terminated and he claimed unfair dismissal.

### Employment Tribunal

The tribunal found that M remained an employee of EIL when he became a contractor, and that his employment had transferred from EIL to C&W by virtue of TUPE. The tribunal held that there was an implied contract between C&W and M, and that M was an employee of C&W.

C&W appealed, arguing that the agreement concluded between E and the agency was crucial M was not an employee of C&W nor was he an employee of the agency. The agreement with the agency had destroyed the implied contract.

### Employment Appeal Tribunal

The EAT guided by Dacas held, however, that the presence of E was not enough to distinguish M's situation from Mrs Dacas. The commercial reality was that M was working for C&W and not the agency. Permission was given to C&W to appeal to the Court of Appeal.

### Implications

Up until Dacas and Muscat most companies could take comfort from the fact that where an individual provided his services through a limited company, let alone through a limited company via an agency, the individual would not be found to be their employee. This is clearly no longer the case. Muscat further illustrates that the tribunal will ultimately be influenced by what actually happens in practice and will find a way through the labels applied by the parties to establish the true nature of the relationship.

### In practice

It is no longer safe for companies to assume that putting in place complicated structures will release them from their obligations as an employer if that is what the reality is.

The test is essentially two fold. If there is: 1) 'control' - you control what the individual does and how he does it and 2) 'mutuality of obligation' - you pay the individual and in return for which he makes himself available to work for you, then the likelihood is that he is your employee. If you currently engage or are about to engage a contractor/ consultant then you need to re-evaluate the nature of the relationship. If it is to all intents and purposes that of employee/ employer then you need to weigh up the cost/ benefit of taking the individual on as an employee in the first place against the risk/cost of a subsequent finding by a tribunal that he is your employee.



# Employment Legislation Update

## Age

In summer 2005, the Government will be consulting on draft legislation making age discrimination in employment unlawful. Legislation is scheduled to come into force in the UK on 1 October 2006 in compliance with the EC Directive on age.

The legislation will ban unjustified age discrimination in recruitment, promotion and other employment terms, as well as in vocational training. One of the key areas for consultation is the setting of a mandatory default retirement age although the government has been keen to stress that the legislation is not about forcing people to work longer. Employers should not forget, however that the legislation will apply to young as well as older workers.

We recommend that employers wait and see what the regulations look like before committing to an overhaul of their employment policies and procedures for potential age bias. It is not too early, however, for employers to start thinking about those areas likely to be impacted for example recruitment policies, job descriptions, appraisal processes, training, promotion and service related pay, benefits and awards.

## TUPE

The draft regulations amending the Transfer of Undertakings (Protection of Employment) Regulations 1981 were published in March 2005. It is intended that the amended TUPE Regulations will be implemented in October 2005. The Employment group will be holding a seminar on this in September.

The key changes proposed are:

- TUPE to apply to all outsourcing contracts with limited exceptions
- Clarification of TUPE in relation to dismissal and changes to terms and conditions upon transfer
- Promotion of rescue culture where TUPE applies in an insolvency situation
- Requirement that transferor provide information to transferee about the transferring employees and their terms and conditions, rights and liabilities

## April 2005 (Maternity, Paternity and Adoption Pay)

New rates of maternity, paternity and adoption pay apply. From 3 April 2005, the rates will increase from £102.80 to £106. The earnings threshold will also rise from the current £79 to £82.

## Statutory Sick Pay

New statutory sick pay rate. From 6 April the rate will increase from the current £66.15 to £68.20 per week.

## Tribunal Procedure

Use of new tribunal claim form (ET1) and response (ET3), will be mandatory as at 1 October 2005. The Tribunal will reject any claim or response where the correct form is not used.

## Employee Consultation (The Information and Consultation of Employees Regulations 2004)

The Regulations, came into force on 6 April 2005 and implement the Information and Consultation directive in relation to employers with 150 or more employees.

## Unfair Dismissal

It is now automatically unfair to dismiss an employee because they have made a flexible working request or for attending jury service. Accordingly the 1 year service requirement and upper age limit for bringing an "ordinary" unfair dismissal case under Sections 108 and 109 of the ER 1996 are disapplied in such cases.

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