

Headline

news from **Head  Office**

September 2009

ACAS Annual Report 2008/09 - an Increase in Unfair Dismissal Claims

ACAS' Annual Report for 2008/09 shows a clear rise in unfair dismissal claims which they believe is linked to the current recession. The number of claims that stated unfair dismissal as the main ground of complaint increased from 33,352 last year to 43,028 this year, a significant 29 percent.

Not surprisingly redundancy pay claims are up from 2,891 to 3,938, an increase of 36 percent and ACAS say that 'redundancy, lay-offs and business transfers' are the most common issues giving rise to calls to their advice helpline.

Interestingly some types of claim have decreased significantly, most notably working time claims that dropped from 17,407 last year to 2,889 this year. Overall the total number of claims received for conciliation from Employment Tribunals decreased from 151,249 last year to 138,535 this year, a fall of 8 percent.

Unsurprisingly the Report attributes some of the reduction to the success of the pre-claim conciliation scheme which ACAS have been rolling out.

Further information can be found at www.acas.org.uk.

Apprentices – Week's pay rises to £95

Many industries use apprenticeship schemes to identify and train new talent, to help the community and provide an affordable solution to fill low skilled roles. Apprentices are likely to be viewed as employees for the purposes of employment



law and the primary purpose of their employment is training and learning, often under a fixed term contract.

The majority of employees are subject to the National Minimum Wage ('NMW'), however apprentices are an exception to the rule and they do not qualify for the NMW provided they are aged 18 or under, or are aged 19 or over and are in the first year of their apprenticeship.

As the NMW does not apply the Government has imposed a minimum rate of pay to prevent abuse of apprentices by employers as they are often in a weaker bargaining position because they need the training to progress in their chosen career. This minimum rate of pay rose on the 1st August 2009 by £15 a week, from £80 to £95 (excluding Northern Ireland). Should the exemption no longer apply, for example by turning 18 while in their second year, they will be entitled to the NMW.

It is thought the increase follows a fall in the number of young people joining apprenticeship schemes and the Trade Union Congress has welcomed the increase as they see young women most likely to benefit.

Human Resources • Health and Safety

supporting your business piece by piece

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Introduction to

Head Office

Head Office provides an innovative and effective way to ensure that your business complies with the legislative requirements of both Human Resources and Health & Safety.

Keeping up with the ever changing legislations and pressures faced managing a team of staff is very expensive, particularly with the use of ad hoc employment lawyers and HR / health and safety consultants.

Head Office aims to reduce these expenditures through a monthly subscription which provides an insurance policy against the costs of an employee taking you to an employment tribunal and any award payouts. On a day to day basis, Head Office supports the business by providing updated guidance on new legislation and case law, a dedicated helpline staffed by HR legal experts and a contract / letter template builder. This can be used both as a support mechanism for an existing HR team or as part of an owner managed business where there is no dedicated HR resource.

Key benefits include:

- **A safety net with our exclusive insurance policy that covers the costs of getting to tribunal and any award up to £250,000**
- **Minimising the risk to your cashflow (the average costs of attending a tribunal now stands at £9,500)**
- **Budgetary certainty without the need for adhoc HR consultants / employment lawyers**
- **Improved procedures resulting in increased productivity**
- **Easy access to commercial and practical legal advice**
- **More time to focus on managing your business.**

As part of the offer Head Office will provide an initial review of your current position with the aim of recommending the most appropriate solution for your needs.

Call us now on 0845 217 8650 to speak to one of our expert advisers.

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Abercrombie & Fitch lose Disability Discrimination Claim

Ms Riam Dean, a 22 year old law student from Greenford, West London, worked as a sales assistant for Abercrombie and Fitch at their Saville Row branch. She issued a claim against the clothing retailer saying that management removed her from the shop floor and told her to work in the stockroom as she wore a prosthetic limb (she was born without her left forearm).

She stated that it was agreed she could wear a white cardigan to cover the link between her prosthesis and upper arm but when she refused to remove it in the summer the management said she did not fit the company's 'look policy'. It was alleged that they suggested she worked in the store room until the more covering winter uniforms arrived some months later. Ms Dean felt that she was bullied out of her job and was being treated differently and unfairly because of her disability. She had only worked 5 shifts before she resigned and made her claim in the Central London Employment Tribunal.

The 'look policy' apparently states that all employees "represent Abercrombie and Fitch with natural,

classic American style consistent with the company's brand" and "look great while exhibiting individuality".

The Tribunal decided the issues in her favour, finding harassment and failure to make reasonable adjustments. These claims are not dependent on any period of service in order for the employee to benefit from the protections they afford. Miss Dean was awarded £7,800 for injury to feelings and £1,077.37 for loss of earnings.

Ms Dean did argue direct discrimination for which further damages could have been awarded, however as the firm subjected all staff to the "look policy" they were not treating her any differently

Although the increases were heavily opposed by various trade organisations the Government believes that nearly a million workers will benefit from the increased rates.



Gisda Cyf v Barratt Court of Appeal

Date of termination is when the letter was read, not as stated.

When an employer notifies an employee of his or her summary dismissal by letter, the effective date of termination is the date the employee actually reads the letter and not the date it is written, posted or delivered.

Why is the date of dismissal important? A claim for unfair dismissal must be brought within three months of the effective date of termination (EDT) and it is therefore vital that the correct EDT is identified. There are limited circumstances where the time limit may be extended, however unless the Claimant can demonstrate that it was not reasonably practicable to issue the claim within the three months and they issued the case within a reasonable period it is unlikely to be granted. If the ex-employee misses this date the Tribunal may not hear their claim.

The date of termination is defined as the date on which notice, if given, expires or, if no notice is given, the date on which the termination takes effect. In this case the Court of Appeal had to

decide when the Claimant was actually summarily dismissed, was it when the letter was dated, when it was posted or the date it was read.

Gisda Cyf was a charity that suspended an employee pending an investigation into her allegedly inappropriate conduct at a private party. The employee was notified of her dismissal by letter but as she was not at home for several days she only read the letter 6 days after it was posted. She subsequently issued a claim at the Tribunal after 3 months from the date the letter was written and posted but before the 3 months after she read it expired. The jurisdiction of her claim was therefore argued.

The key issue that the Court needed to decide was when the decision to dismiss was communicated to the employee. Previous case law said that this was when it was actually read or when the employee had a 'reasonable opportunity' of reading it. The reasonable opportunity provision was to cover circumstances where letters were deliberately left unopened. Here the employee was away from



home visiting her sister who had just given birth and so had not deliberately gone away in order to avoid reading the letter. Due to the nature of the letter it was not considered appropriate to read the letter over the phone.

The Court of Appeal, by a majority of two to one, upheld the previous decisions as they disliked the idea of an employee's time limit starting to run before they had a reasonable opportunity to know they had been dismissed. They therefore applied the later date and allowed the Claimant's claim to progress.

It is increasingly common for employers to dismiss people via letter or email to avoid confrontation, however this case is a clear reminder that the best way to have certainty of a date of dismissal is to deliver the decision to the employee in person and hand the employee a letter to confirm the date of termination.

First Corporate Manslaughter Act Trial Date Set

It has been reported that the Gloucestershire Company, Cotswold Geotechnical Holdings, the first firm in the UK to be charged under the new corporate manslaughter laws, has now had a trial date set for 23 February 2010.

The expected 6 week trial at Bristol Crown Court will investigate the circumstances surrounding the death of Alexander Wright, a geologist, who was crushed to death in September 2008 when the pit he was collecting soil samples in collapsed.



Cheltenham Borough Council v Laird



Employee did not make misrepresentations when answering medical questionnaire.

Cheltenham Borough Council ('CBC') claimed substantial damages (nearly £1 million) against a former employee alleging that she had made fraudulent and negligent misrepresentations in her pre-employment medical questionnaire by failing to disclose her history of recurrent depressive illnesses. In doing so they say that they were induced into entering into a contract of employment in circumstances where they would not otherwise have done so. The large damages figure was due to the ill-health element of the employee's pension.

Although the employee's employment was conditional upon a satisfactory medical report, the High Court decided that the employee had not made any false, or even misleading, statements in the questionnaire. The crucial question in the case was whether her answers to the questions were in fact inaccurate or disingenuous and the Court first examined the questions and how they could be interpreted.

It was decided that the questions were poorly drafted and ambiguous and the court applied existing legal principles that an ambiguous question may have more than one truthful answer. Accordingly the interpretation of questions will differ depending on the person's knowledge (a lay person as opposed to someone with medical

training). The Court said that the employee had responded in a way that a reasonable person in her position might have responded and as a result CBC's claim failed.

The questions and her answers are below and serve as a timely reminder to employers to ensure all pre-contractual and contractual documentation are properly drafted.

- 'Do you normally enjoy good health?'
– 'Yes'
- 'Do you have either a physical and/or mental impairment?'
– 'No'
- 'Date when you last had medical treatment and reason'
– 'Bruising to lower back following a fall at work 17/9/2001'
- 'Have you any ongoing condition which would affect your employment?'
– 'No – n.b. I get occasional migraine but this does not affect my ability to work or usually require time off from work. (Treated with Zonig)'



Rank Nemo (DMS) Ltd and others v Coutinho Court of Appeal

Failure to pay tribunal award might amount to victimisation

In 2004 the Claimant was made redundant prior to a transfer of the business to Rank Nemo (DMS) Ltd ('RN'). The Claimant won a claim for automatic unfair dismissal and race discrimination and was awarded £72,000 in compensation. Despite obtaining a Court Order for payment, RN refused

to pay the award and as a result the Claimant claimed that their failure to pay the award was an act of victimisation contrary to the Race Relations Act 1976. The original Tribunal decided that it was a question of enforcement and not a matter for the Tribunal to decide but on appeal it was decided that it was a matter of jurisdiction and the claim would be allowed to proceed to a full hearing. We await the full decision.

If successful the Claimant could receive both the original Tribunal award and damages for any loss of benefit or detriment suffered as a result of the victimisation, however if RN continues to refuse to pay the award, further civil steps may be required for the Claimant to recover the sums.

The Pit Falls of Organising a Christmas Party

It may only be September but the Christmas Party season is creeping ever closer and for most businesses it is the time to start calling venues to book 2009's festivities. Even employers who set out with nothing but the best of intentions for their party will remain at risk if things turn sour.

Christmas functions organised and attended by management, even those outside of usual working hours, can attract liability for employers and therefore it is recommended that employers should be wherever possible, actively involved with organising and policing the event.

The following guidelines are relevant to all social events and corporate functions and not just the Christmas party.

Organising an event

The following should be considered when organising an event to avoid disputes arising and if delegating its organisation to an employee these guidelines should be clearly communicated.

Equal Opportunities

- When organising catering include a variety of options to cater for vegetarians and those with specific dietary requirements due to religious beliefs or medical conditions.
- Consider other events held throughout the year so that events are scheduled on a variety of days and times during the week, e.g. lunch times, weekday evenings and weekends to prevent the exclusion of any particular group.
- If seeking to book an 'activities' based event, consideration should be given to whether any employees or guests may be



- excluded from the event due to a disability.
 - If extending invitations to 'partners' ensure that any invitation wording does not imply that it is limited to married spouses or opposite-sex couples only, but includes same-sex partners.
 - Ensure a plentiful supply of low and non-alcoholic beverages are supplied and limit the amount of free alcohol available to a modest amount.
 - Make external entertainers aware that the Company is committed to equal opportunities and that they should do everything reasonably practicable to ensure that attendees of the event are not subjected to unacceptable behaviour.
- ### Health and Safety – a continuing duty
- If the event is to be held on Company premises, reasonable steps must be taken to ensure that visitors are reasonably safe when using the premises for the purposes for which they were invited.
 - Alcohol should not be provided in circumstances where the event is held during a working day where employees are expected to return to work following the event.
 - If employees are due to operate heavy machinery or drive in the course of their employment the organiser should endeavour to arrange the event at a suitable time to allow the presence of alcohol in the employee's blood stream to fall below the current legal maximum naturally e.g. over a weekend.
 - Organisers should not encourage or promote drink driving. Consider arranging transport home such as hiring coaches or minibuses, providing taxi numbers or holding the event close to public transport.

Managing Employee's Conduct

- Assign a specific manager to stay sober and take responsibility for supervision. Ensure they are trained to deal with drunk or disorderly employees.
- If the event is of a purely social nature employees should not be pressured to attend and if they do attend they should not be pressured into drinking alcohol.
- Organisers should consider circulating a memorandum to all employees (regardless of their expected attendance) about the event, the standards of conduct that is expected of them and the potential of disciplinary action for falling below these standards.

Employers may also wish to display a suitably worded notice in a prominent place that liability for loss or damage to property of those attending the event is excluded.

Attendance at the event

Regardless of whether the event is held on company premises and whether employers are paid or not, they must conduct themselves as they should on a usual working day. A clear outline of conduct expected could include: -

- Only consume a moderate amount of alcohol and in any event ensure that they are fit, able and legal to work by their next contracted start time.
- No fighting, either physically or verbally with other attendees.
- Not to use inappropriate language.
- Not to use illegal drugs.
- No unwanted sexual advances to other attendees.
- No inappropriate comments, jokes or actions that may offend other attendees or are based on a person's age, sex, race, disability, religious belief or sexual orientation.
- Not to harass, insult, bully, threaten or intimidate other attendees in any way.



- Only smoke in designated areas.
- Not to commit any criminal offences.
- Not to act in contravention of any other Company Policies, including but not limited to the Equal Opportunities or Harassment Policy.
- Act in a way that brings the Company's reputation into question.

It should be clearly communicated that good conduct is required towards all persons present including venue staff and failure to meet the required standards may result in disciplinary action up to and including dismissal.

What to do when things go bad

Incidents of varying severity can occur at social events and range from petty arguments to drunken or sexual harassment and assaults. The manager in charge should quickly diffuse the situation if possible and make notes of those present and what happened at their earliest opportunity as this may be evidence in subsequent disciplinary actions.

Once work recommences a full, fair and consistent disciplinary

procedure should be undertaken as soon as possible, including a full investigation, potential suspension and disciplinary hearings that are compliant with the ACAS Code of Conduct. It is important to ensure that all action is taken within a reasonable time, especially where employees have been suspended due to their conduct.

It is hoped that following the above guidance will help limit the impact that incidents have on the business and make resolving the disputes more efficient.



Statutory Redundancy Pay Increase – 1st October 2009

In an economy where employers are increasingly looking to redundancy as a means of reducing costs to their business, the Chancellor in his 2009 budget stated that the maximum weekly pay for the purposes of calculating the statutory redundancy payment would increase from £350 to £380 on 1st October 2009. The statutory redundancy payment is calculated on an employee's age, length of service (maximum of 20 years) and weekly pay (subject to the maximum above).

Normally the increase is an annual one that takes effect on 1st February each year but the October date effectively brought forward the February 2010

increase. The government has made it clear that there won't be a further increase in 2010 and will remain at £380 until 1st February 2011.

This increase has not yet been officially enacted but The Department for Business Innovation and Skills (BIS, formally BERR) has published its final impact assessment on the Work and Families (Increase of Maximum Amount) Order 2009 so we do not believe it will be long before it is announced as official. www.Businesslink.gov.uk does confirm that the rate is 'up to a limit of £350 up to and including 30 September 2009' which indicates the change is imminent.

The report identifies that on the grounds of fairness, the Government has decided to introduce a one-off increase in statutory redundancy pay and compensation payments to help those being made redundant without placing undue burdens on employers and the Exchequer'.



It is thought that the increased limit will become applicable where the actual date of dismissal by way of redundancy occurs on or after the 1st October and not the date of any earlier 'at risk' meetings or consultations. However, until the increase is enacted this cannot be confirmed.



Once more the changing economic environment and demographic of the UK has lead to an increased urgency for proposals to be reviewed and implanted to help aid the nations recovery.

Review of Default Retirement Age brought forward to 2010

The Government recently launched their 'Building a society for all ages' strategy which has brought forward to proposed review of the default retirement age from 2011 to 2010. They stated that they want to give older people more flexible retirement options to better suit the changed economic landscape.

At present businesses can require employees to retire at the age of 65 regardless of their individual circumstances provided they follow the

correct notice procedure and consider any requests to work beyond 65. Approximately 1.3 million people in the UK work beyond the 65 and it is thought that many more would if their employer allowed it.

With increasing awareness of stereotyping and better healthcare it is possible that the retirement age could be increased.

Equality Bill Update

The Equality Bill is continuing to progress towards enactment and completed the Commons Committee stage on the 7th July 2009 and other than a new 'dual discrimination' clause there are few major amendments. The Solicitor General did indicate that an attempt to redraft the disability-related discrimination provisions would be made before the Bill reaches the Report stage.

Currently there are difficulties in hearing claims where an employee suffers discrimination regarding more than one protected characteristic should they be inseparable. A provision for multiple discrimination claims was first considered in the Government's discrimination law consultation document 'Framework for fairness: Proposals for a Single Equality Bill for Great Britain'.

The proposed new right will allow employees to bring a direct discrimination claim in relation to a combination of two protected characteristics but would not cover indirect discrimination and harassment based on dual discrimination although these may still be brought separately. For example, a Muslim woman who was discriminated against may bring a dual discrimination claim on the basis of sex and religion and not have to argue separate sex and/or religion claims. It is noted that marriage and civil partnership, and pregnancy and maternity, which are protected characteristics will not be included in the dual discrimination legislation.

The test for discrimination on the grounds of pregnancy and maternity will be amended so that a woman claiming discrimination will have to show that she has been treated 'unfavourably', rather than 'less favourably' and in doing so removing the need for a comparator.

A further addition has been made preventing employers from contracting out of the protections under future legislation made under the Bill and not just the Bill itself.

There are further discussions relating to discrimination which is 'connected' with a disability following the recent case of Mayor and Burgesses of the London Borough of Lewisham v Malcolm that made it difficult for a disabled person to show that they had been subjected to disability-related less favourable treatment.

We await a date for the Bill's Report stage and will report fully on the Bill once the amendments have been finalised.

If you have any questions about the Bill or specific queries relating to Equal Opportunities, please call our legal advisors on 0845 217 8650. Our Equal Opportunities Policy for the Staff Handbook on our website is kept up to date of all legal changes for your assistance.



Religious holidays and what you should do



Once more the arrival of the Muslim observance of Ramadan on the 22nd of August 2009 serves as a clear reminder that UK employers should be accommodating to employees with specific religious beliefs.

There were 1.6 million Muslims in the UK according to the most recent 2001 census and many celebrate Ramadan. Ramadan takes place during the ninth month of the Islamic calendar to commemorate the passing of the Qur'an by the archangel Gabriel to the prophet Muhammad and lasts for 28-30 days depending on the length of the lunar month. This means that the dates of Ramadan change each year. It is the month of fasting and abstaining from anything that is 'ill-natured' between dawn 'til dusk.

Ramadan, in addition to other religious festivals and events, has a variety of implications on employers. Failure to handle issues correctly or discriminating against employees can lead to claims with unlimited compensation awards.

- Employers should ensure that participating employees know that the employer is sympathetic to such festivals and events and that the employee feels comfortable to discuss any issues with them.
- Employers should be prepared for an increase in requests for time off or different working arrangements.
- Employers should take steps to ensure that they have a clear holiday request policy in place and that this caters for religious holidays.

In addition, ensure that proper planning is put in place. For example the celebration of Eid celebrates the end of Ramadan and many employees may wish to book annual leave.

- Consider allocating a quiet space for meditation or prayer during breaks.
- Ensure managers are aware and kept up to date with any impending religious days.
- Little things that show understanding and sensitivity may be appreciated, such as not having food in meetings or 'working lunches'.
- Understand that participating employees may not attend evening events during Ramadan.

Good communication and consultation will help avoid a lot of misunderstandings and disputes that could arise when dealing with religious holidays and events.

The number of religious holy days, festivals and events is too large to be reproduced in this publication, however, a good list can be found on the BBC's website at <http://www.bbc.co.uk/religion/tools/calendar/year.shtml?2009>.

Consideration should be given to all religions and faiths including Hindu, Jewish, Sikh, Pagan, Muslim, Buddhist, Christian, Jain, Rastafari, Shinto and many more.

Please contact Damien Burns on 0845 217 8650 to discuss any concerns you may have regarding religious holidays requests.

Strings still attached to holiday and sick leave cases

HM Revenue & Customs v Stringer and others

The House of Lords recently handed down its decision in the case of HM Revenue & Customs v Stringer and Others which was hoped to clarify the position with the accrual of holiday entitlement while workers are off sick. However, this long awaited decision still leaves questions over the more technical aspects holiday accrual claims.

The central issue for the Court to decide was whether a claim for statutory holiday pay can be brought under the unlawful deductions from wages provisions in the Employment Rights Act 1996 (ERA), or whether it must be brought under the Working Time Regulations. This matters as the time limits for claims differ under the different legislation.

The provisions under the ERA are more favourable to employees as they allow a claim to be made within 3 months of the last deduction in a series as opposed to 3 months after each deduction under the Regulations. Practically this will be felt were employees seek arrears of untaken holiday on the termination of employment.



Following a decision in the European Court of Justice earlier this year the House of Lords decided that annual leave under the Working Time Directive can accrue during a period of sick leave and claims could be brought under either legislation.

Complications with the decision are likely to continue as many questions have been left unanswered. For example, what obligations are on the employer to notify the employee of their right to take leave and can they insist that it is taken at certain times and how does this impact on any contractual sick pay entitlement, could an employer defer a leave request for a period immediately following absence due to long-term sick? Such questions will only be addressed in future cases that argue these issues or if the Government specifically legislates to clarify the position.

Although this appears to be good news for employees the decision may encourage employers to terminate employees' contracts earlier than they otherwise would have done (where possible) in an attempt to avoid the payment of holiday pay to workers on long term sick leave.

If you have queries regarding sickness and holiday leave entitlement, please contact our legal advisor Giles Taylor on 0845 217 8650.



Dates to note for 2009

October 2009

1 Possible redundancy pay increases

Following the Chancellor's budget of 2009 he proposed changes for the maximum week's pay when calculating the statutory redundancy payment to increase to £380. It is expected to take effect from 1st October however no legislation has been enacted to provide for this.

Minimum wage rates to rise to:

Ages 22 and over, the rate will rise from the current GBP 5.73 per hour to GBP 5.80; Ages 18 to 21 it will rise from GBP 4.77 to GBP 4.83; and Ages 16 and 17 it will rise from GBP 3.53 to GBP 3.57.

Employers prevented from including tips in minimum wage

National Minimum Wage (NMW) legislation will be amended to prevent businesses using tips and gratuities count towards employee's pay for the purposes of the NMW.

Changes to the Companies Act

Further changes to the Companies Act are to be implemented on the 1st October 2009 including, changes to approximately 200 official forms, new processes and rules on incorporation, new powers for the registrar, fines for failing to update Company's House about changes to Articles of Association, new responsibilities and obligations on directors to disclose addresses, as well as several more. See www.companieshouse.gov.uk for more information.

12 New measures under Safeguarding Vulnerable Groups Act

A centralised vetting system for people working with children and vulnerable adults comes into force enabling certain employers to make checks online as to employee's suitability to work with vulnerable groups. Also updates will be given to employers under the scheme should an employee's status change. Fines up to £5,000 are possible if you knowingly employ individuals on the list or fail to make the relevant checks.

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