News Update **26 July 2013**

Carry-over of 1.6 weeks' additional statutory leave not required by EU law

In Sood Enterprises Ltd v Healy the EAT held that the Working Time Directive, which requires a minimum of 4 weeks' paid annual leave, does not require carry-over of the additional 1.6 weeks' leave provided for under UK legislation by Regulation 13A of the Working Time Regulations 1998 (WTR 1998), where a worker is prevented from taking holiday due to long-term sickness absence. Latest ECJ decisions have held that it is acceptable for domestic law to set conditions on the payment of leave which exceeds the four weeks' minimum entitlement under the Directive. Within this context, Regulation 13A of the regulations, which provides for the additional 1.6 weeks' leave, is such a domestic provision and therefore does not contravene EU law.

This decision clarifies the position, so far not addressed by UK appellate courts, and accords with the Government's proposals in the Modern Workplaces consultation to implement ECJ case law that sick workers must be entitled to carry-over untaken holiday entitlement in some circumstances, but this only would apply in respect of the 4 weeks' minimum leave required by the Directive and not to the additional 1.6 weeks' annual leave provided for by the WTR 1998. Of course, while not required by law, the employer may still allow for the carry-over of the additional 1.6 weeks, as part of the terms and conditions of employment.

Dealing with frightened witnesses

In Duffy v George the Court of Appeal upheld Duffy's appeal that a tribunal was not entitled to make findings against him of sexual harassment because the accuser, Miss George, did not give oral evidence and was not available for cross-examination. The Court held that as Miss George was not prepared to attend the hearing and give oral evidence, the tribunal should have held a preliminary hearing (PH) to consider how a fair and just substantive hearing could have been conducted, particularly where Duffy had made it clear that he had questions to put to Miss George in cross-examination.

At the PH the tribunal should have explored whether the claimant was indeed too frightened to attend the hearing, how the claimant could have given oral evidence and how much weight should be attached to her written evidence were she not to attend. Other considerations should have been whether there should there be separate hearings at which the parties could give their evidence and whether the parties should be required to submit questions to the tribunal in advance, to put to the other party at the hearing. Only then should the tribunal have gone on to hold a substantive hearing at which the claimant did not give oral evidence.

This decision has a read across to internal investigations and disciplinary proceedings involving discrimination and harassment, where the complainant expresses fear of being directly questioned by the alleged discriminator/harasser, but where there must still be a fair and just process.

New ET1 online form introduced

The MoJ has confirmed that a new ET1 form will be available from Monday 29 July to accompany the introduction of tribunal fees and that claimants will not be able to submit a claim online using an ET1 in its current form after 4.00pm on Friday 26 July 2013. The new online submission service, with the new ET1 form, will be available from Monday 29 July. This means that claimants will therefore not be able to submit claims online on Saturday 27 July or Sunday 28 July, and will need to submit their claim either before 4.00pm today (26 July), to avoid paying a fee for issuing the claim or on or after next Monday, in which case the claimant will incur an issue fee. The website includes a copy of the new ET1 and guidance on its completion.

Government response to consultation on regulation of the recruitment sector

The Government has published its response to the consultation on proposed reform of the legislation which regulates employment agencies and employment businesses. It intends to replace the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 with a simpler regulatory framework. Some of the areas the new legislation will cover include: (i) ensuring that employment businesses do not withhold payments from temporary workers, for example where the employment business has not been paid by the hirer; (ii) preventing temporary workers from being penalised by employment agencies or employment businesses for giving notice to terminate a contract; and (iii) preventing employment businesses from enforcing unreasonable terms on a hirer when a temporary worker takes up permanent employment with the hirer.

Rising sick bill is costing UK business £29bn a year

Sick days are costing UK business nearly £29bn a year as UK workers take more than four times as many days off work due to sickness as their global counterparts, according to new research by PwC. UK workers have an average of 9.1 days off from their jobs each year due to sickness. This is nearly double the amount workers in the US take at 4.9 days of sickness a year, and four times more than their counterparts in Asia Pacific (2.2 days) and higher than Western Europe (7.3 days). The analysis reveals that while UK employees are taking less unscheduled absence days compared to two years ago (9.8 days in 2013, compared to 10.1days in 2011), the number of these days that are due to illness has risen over that time (9.1 days in 2013, up from 8.7 days in 2011) and so the associated cost of staff sickness has also risen. Sick days now account for £28.8bn of the UK's overall £31.1bn absence bill.