New Case Law Update for Employment Committee Meeting 7.09.12

NHS Leeds v Larner – Holiday Requests from Sick Workers

Mrs Larner worked for NHS Leeds as a clerical officer and went on sick leave on 5 January 2009. Having not returned to work, she was dismissed by reason of capability on 8 April 2010. Mrs Larner subsequently lodged a tribunal claim for arrears of pay, specifically in relations to the statutory holiday entitlement that she did not use during her sickness absence and for which she did not receive any payment on termination.

Article 7 of the Working Time Directive provides that member states must ensure that every worker is entitled to paid annual holiday of at least four weeks. This is implemented in Great Britain by the Working Time Regulations 1998, which provide workers with the right to take 5.6 weeks' paid holiday in each leave year.

The Court of Appeal upheld Mrs Larner's claim for holiday pay for the leave year from 1 April 2009 to 31 March 2010.

The CA upheld the EAT's decision and in doing so made a number of comments about Article 7 of the Working Time Directive and how it applied to this case:

- The right to annual leave in Article 7 was directly effective against an emanation of the state, such as an NHS trust or Local Authority;
- Under Article 7, NHS Leeds was not permitted to make a payment in lieu of the lost leave while employment continued. Its only option, therefore, was to allow it to be carried forward into a later leave year
- Under Article 7, if a worker is unable or unwilling to take leave owing to sickness, they must be allowed to take it at another time, if necessary this could be in a later leave year
- Neither Article 7 or case law requires that a worker must make a request to either take or carry forward annual leave whilst on sickness absence

The Court of Appeal did consider the case of Fraser v St George NHS Trust which established the somewhat crude rule of "use it or lose it" and placed the onus was on the employee to request leave, rather than for an employer to advise employees of their rights to it. Should they not make such a request, they were then not entitled to the leave and/or equivalent payment on termination.

Frustratingly the CA in Larner only referred to *Fraser* in passing and indicated that the facts in that case could distinguish it from *Larner*. In *Fraser*, the employee had returned to work after a period of sickness and had worked for almost a year before being dismissed. Therefore, she had had the "opportunity" to take her holiday in the year before her dismissal, whereas Mrs *Larner* did not benefit from this opportunity as she was dismissed whilst still on sickness absence. The outcome of this, therefore, is that there is still some uncertainty over whether the decision in *Larner* indicates that *Fraser* was wrongly decided or whether it was a decision they supported.

What does this mean for PCC?

What is clear is that,a worker is unable to take the four weeks' annual leave conferred by the Working Time Regulations as a result of their sickness:

- they must be permitted to take it at another time and this can include carry over into a later leave year
- should their employment terminate before it is taken, compensation for untaken leave must include any amount owing from leave not taken in previous leave years (and not just for leave owing from the particular year in which their employment ended)

This decision is a logical one when you consider that holiday entitlement is provided to workers for very specific reasons (i.e. to provide necessary rest and recuperation) and therefore it follows that if a worker is sick they cannot take advantage of the protective purposes of holiday and should, therefore, be permitted to take it at a date when they are well. Should their employment terminate then this right is still owed to them, albeit in the form of a payment equivalent to the period of holiday that they were unable to use. This case clarifies both this and, importantly, what period of untaken leave can be compensated on termination.

The Enterprise and Regulatory Reform Bill

The Enterprise and Regulatory Reform Bill is making its way through Parliament. Its aim is to simplify regulation and to improve the employment tribunal system by encouraging settlement of disputes before an employment tribunal claim is lodged.

The key employment proposals include:

- a duty on the parties and ACAS to attempt pre-claim conciliation
- appointment of legal officers to determine certain simple or low value claims with the consent of the parties to ensure rapid resolution of straightforward claims
- potential variation of the statutory limit on the compensatory award for unfair dismissal claims
- a discretionary power for employment tribunals to impose a financial penalty on employers of 50% of the financial award ordered by the employment tribunal in an employment tribunal claim, subject to a minimum of £100 and a maximum of £5,000, if the employment tribunal finds that a breach by the employer has one or more aggravating features
- amendments to the whistleblowing legislation to restrict "qualifying disclosures" to those made in the public interest
- compromise agreements to be renamed as "settlement agreements".

Fees For Employment Tribunal Cases

The Ministry of Justice (MOJ) has now published its response to the consultation on charging fees to bring and continue claims in the employment tribunal.

In summary, the fees which the MOJ proposes to implement in the latter half of 2013 are:

Fee Type	Level 1 claims	Level 2 claims	EAT fees
Issue fee	£160	£250	£400
Hearing fee	£230	£950	£1200
TOTAL	£390	£1200	£1600

The fee structure is based on the following key proposals:

- Fees will be charged in two stages; the first on issue of the claim and the second prior to hearing.
- The fee structure for employment tribunal claims is based on two levels of claim:
    - Level 1 claims are generally for sums due on termination of employment, such as unpaid wages, payment in lieu of notice and redundancy payments. For level 1 claims, the issue fee will be £160 and the hearing fee will be £230.
    - Level 2 claims generally are more complex, including claims for unfair dismissal, discrimination, equal pay and whistleblowing claims arising under the Public Interest Disclosure Act. For level 2 claims, the issue fee will be £250 and the hearing fee will be £950.
- The fees for appeals to the Employment Appeal Tribunal will be an appeal fee of £400 and a hearing fee of £1,200.
- There will be a separate fee structure for multiple claims based on the number of claimants. Further fees are proposed for other applications, including reviews of default judgement, applications to dismiss following settlement, mediation by judiciary, counterclaims and applications for review.
- Tribunals will have a discretionary power to order an unsuccessful party to pay any costs that the successful party has incurred by way of fees.
- The HM Courts and Tribunals fee remission scheme will be extended to employment tribunals, so that those on low incomes do not have to pay.

- Another alternative that is available to the claimant is pursuing mediation from a judge, rather than lodging a full claim; this will cost £600. The government is keen to push this option, as shown by the fact that the fee has come down from the £750 suggested in the initial consultation.