

HR newsletter

Human Resource News
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Welcome to this issue of the Vision Risk Management HR and H&S News Letter

Right for Time Off to Train

A right to request time off to undertake training is to be introduced. The new right, which will be modelled on the right to request flexible working, will be available to employees who have been continuously employed for at least 26 weeks.

Employees will be able to request any training that will help them to be more productive and effective at work, and help their employer to improve productivity and business performance. Employees may, for example, request to undertake higher education; to participate in a qualification bearing programme such as the National Vocational Qualification; or to address a particular skills need. Employees will be permitted to make one request in any 12-month period.

Employers will be obliged to consider seriously requests that they receive, but will be able to refuse requests where there is a good business reason for doing so, including where they feel that the requested training will not help to improve business performance or productivity. It will be for the employee and employer to agree how much time may be taken but this is likely to be a key consideration for the employer. There will be no obligation on the employer to fund a request. However, employees may be entitled to government funding including that available through the government skills service Train to Gain.

The new right is to be included in the Children, Skills and Learning Bill, which will be put before Parliament in 2009. The implementation date is still to be announced.

Right to Request Flexible Work

As from April 6th the right to request flexible working is being extended to parents of children up to the age of 16. At present, only parents of children under the age of six or disabled children under 18, and employees with adult dependants, are able to make flexible working requests under the statutory rules. An employee must have been working for 26 weeks continuously before applying.



Holiday Entitlement Increase

The second of a two part holiday increase is to be introduced in 1 April 2009. The first increase introduced on 1 October 2007 gave employees working a 5 day week the statutory right to at least 4.8 weeks' paid annual leave (24 days including bank holidays). As from 1 April this entitlement will increase to 5.6 weeks (28 days including bank holidays).

The increase applies to all workers covered by the *Working Time Regulations 1998*, including agency workers and workers with their own equivalent working time provisions, (such as the *Road Transport Regulations 2005*, the *Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004* and the *Merchant Shipping (Working Time: Inland Waterways) Regulations 2003*).

Employers will be unable to pay in lieu or "buy out" any of the 28 days other than on termination of employment. The government felt that allowing a buy out could be open to abuse and was contrary to the objective of ensuring all workers have four weeks' holiday (20 days) in addition to bank holidays, in order to try and address the work-life

balance. However, the Regulations do not prevent employers buying out holiday entitlement in excess of the 5.6 statutory weeks. Workers are still allowed to carry forward additional leave into a following year, subject to contractual arrangements.

These are statutory minimum entitlements and do not prevent employers from providing greater contractual entitlement, as many already do. As all paid days of holiday count towards the statutory entitlement, including paid bank holidays, many employers will realise at this point that they are already providing at least 28 days paid holiday to their five-day workers.

The Department for Trade and Industry estimates that for businesses with less than 50 employees, entitlements will have to be increased in around 25% of cases, compared to 16% for medium-sized companies, or 11% for large companies

Despite the new entitlements Britain will still lag behind all other members of the European Union when it comes to paid leave. Top of the league is Denmark which offers 39.5 days of paid leave.

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Stress in the Workplace - Case Study

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The Court of Appeal in *Hatton -v- Sutherland* set a high standard making it difficult for employees wishing to bring stress induced personal injury claims against their employer.

However, in a new case (*Dickens -v- O2*), we see the Court widening the boundaries of its previous judgment which could pave the way for more stress claims. Below we look at the events that took place and the case that Ms Dickens could bring.

Ms Dickens began work as a secretary for O2 in 1991. Following her department's relocation from Slough to Hemel Hempstead in 2000, she was promoted to Finance and Regulatory Manager. The change of location increased commuting time by up to 3 hours a day and her new role required additional tasks for which she received no training. After an outburst of tears and a subsequent two day sick leave, her workload was reduced to a certain degree.

In 2001, Ms Dickens applied for an internally advertised post at the Slough office. In spite of the fact that she had

previously been unable to cope with audit work, which the new position involved, that she did not possess the necessary qualifications and that she took periodic sick leave due to Irritable Bowel Syndrome, she was given the job in August 2001.

In this new role, she was to be trained and supported by Ms Saunders, a Chartered Accountant, but in December 2001, Ms Saunders was moved to a different department, leaving Ms Dickens to cope with the February 2002 audit on her own.

As a result of the stress that this caused, Ms Dickens took a holiday, but felt no better on her return to work.

She requested a move to a less stressful position, but none was available. She did however switch to a new line manager and in April 2002, Ms Dickens asked for a 6 month sabbatical in order to recuperate effectively, stating how stressed she was. She repeated this request in May, but during a subsequent sick leave, she discovered that no referral had been made to the Occupational Health Department.

Ms Dickens attempted a return to work, but suffered a breakdown and was signed off by her G.P. Her employment with O2 was terminated in November 2003.

Ms Dickens brought a negligence claim against her former employer in the County Court, alleging that their negligence had caused excessive stress in her employment during 2001 and 2002.

The judge decided that Ms Dickens' superiors had been given ample warning of her breakdown and had acted negligently by failing to make the necessary referral to the Occupational Health Department. This, coupled with a failure to send Ms Dickens home was construed to have deprived her of the chance of a swift recovery.

Although outside factors also contributed to her distressed state of mind, the judge upheld Ms Dickens'

claim, awarding her damages of £109,754.

O2 took this judgement to the Court of Appeal, arguing that the judge had 'lumped together' all the situations that lead to the claimant's distressed state rather than dealing with each event separately. Moreover, O2 claimed although their breach of duty may have increased the risk of injury, it had not caused it.

The Appeal Court, however, dismissed O2's objections and found in favour of the claimant.

Obviously no two cases are identical but the Court of Appeal indicated that foreseeability stemmed here from the employee spelling out to the employer the seriousness of her condition. As an employer you are not expected to be clairvoyant, but the Dickens case does show that once an employee has indicated that he/she is not coping you need to be proactive and respond to their concerns; measures such as making swift referrals to occupational health and allowing time off may help show that you are not breaching your duty of care.

In addition to the general duties imposed on employers under the Health & Safety at Work etc Act 1974, employers also have a specific duty under the Management of Health & Safety at Work Regulation 1999 to make suitable and sufficient risk assessments of the risks to the health & safety of its employees, which includes the assessment of risks relating to mental health as well as an employee's physical health. The 1999 Regulations also lay down duties relating to planning, organising, monitoring and reviewing protective and preventative measures, which includes the provision of health surveillance and appointment of competent persons to assist in undertaking health & safety measures, which if adhered to, should ensure that employees suffering from mental health issues receive prompt and appropriate assistance.

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Statutory Dispute Resolution Procedures

On 6 April 2009 the Employment Act 2008 will replace the statutory dismissal, discipline and grievance procedures (the Statutory Procedures) with a new ACAS Code of Practice on handling discipline and grievances (the Code). The Code still places obligations on employers and employees to follow disciplinary and grievance procedures, but the penalties for any failure to comply with the revised procedures will be less harsh.

The statutory dismissal, discipline and grievance procedures first came into force in October 2004 and required employers to implement formal disciplinary and grievance procedures as a minimum requirement, or alongside their existing procedures. They were designed to be straightforward and to encourage the internal resolution of disputes, without resorting to Employment Tribunals. However, an independent report by Michael Gibbons on 21 March 2007 revealed the procedures failed to achieve their desired effect.

The report stated the procedures were too complex, poorly drafted and made the process more lengthy and complicated. Furthermore, employers and employees were forced to seek external legal advice which had previously not been necessary. It was this report that suggested the repeal of

the procedure, which is now coming into effect.

The new bill is intended to provide greater clarity for employers and employees about their responsibilities and to simplify the process. Changes are:

- the statutory procedures will be repealed in their entirety;
- tribunals will have a discretion to increase or decrease awards by up to 25 per cent for unreasonable failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures. ACAS is in the process of substantially revising the existing Code;
- the position on procedural unfairness will revert to the pre-2004 Polkey position. Although a dismissal can be unfair purely on procedural grounds, the tribunal can reduce the compensation payable in those circumstances to reflect the likelihood that the dismissal would have gone ahead anyway if the correct procedures had been followed; and
- the fixed periods for ACAS conciliation will be abolished. ACAS's duty to conciliate will continue throughout the tribunal proceedings.
- tribunals' powers by which they may reach a determination without a hearing are amended (paving

the way for resolving fast-track monetary disputes in certain limited jurisdictions);

- tribunals are allowed to award compensation for any financial loss sustained as a result of unlawful deductions from wages or non-payment of redundancy payments;
- changes made to the enforcement of the national minimum wage;
- the employment agency standards enforcement regime is amended; and
- trade union membership law is amended to enable trade unions to apply membership rules which prohibit individuals who belong to a particular political party from membership.

There are now meaningful obligations for employees and their representatives, so Employment Tribunals have a benchmark for assessing any reduction in the award of compensation. Employees are required to:

- Raise and deal with issues promptly
- Not unreasonably delay meetings or decisions
- Act consistently

The Code expressly does not apply to dismissals due to redundancy or the non-renewal of fixed term contracts on their expiry.

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