

# Employment Law Update:

## Recent and Proposed Changes

### Work and Families

The Work and Families Act 2006 has received royal assent and the Maternity and Parental Leave, etc and the Paternity and Adoption Leave (Amendment) Regulations 2006 have been published in draft form. These pieces of legislation will result in extended rights for parents and carers of adults and will come into force on 1 October 2006.

#### Maternity leave and pay

Under current legislation, broadly speaking, a pregnant employee is entitled to the following:

- ◆ 26 weeks ordinary maternity leave ("OML") if she has given appropriate notice to her employer of the pregnancy, the expected week of childbirth ("EWC") and the date the OML is to begin and if requested, has provided medical evidence of the EWC.
- ◆ 26 weeks additional maternity leave ("AML") immediately following OML if the employee has 26 weeks' continuous employment as at the end of the 15th week before the EWC. During AML, only some terms and conditions of employment remain in force, for example notice periods and confidentiality obligations.
- ◆ Statutory maternity pay ("SMP") of 90% of normal weekly earnings for the first 6 weeks of OML and £108.85 for the next 20 weeks (or, if lower, 90% of normal weekly earnings), if she meets various qualifying criteria.

As a result of the new legislation, the following changes are anticipated:

- ◆ SMP will be paid for up to 39 weeks (rather than the current 26 weeks), although the intention is that SMP will eventually be paid for an entire year.
- ◆ Any employee who qualifies for OML, will automatically qualify for AML (i.e. the requirement to have 26 weeks continuous service will be removed).
- ◆ During the maternity leave period, the employee will be able to work for up to 10 days without losing her right to maternity leave or pay. These will be known as "keeping in touch days" and may include training or any other activity which assists the employee to keep in touch with the workplace. However, there is no obligation on employers or employees to agree to such days.
- ◆ The employer will be able to have reasonable contact with the employee during the maternity leave period in order to help plan her return to work and keep her up to date with workplace developments etc.

#### **Employment Team:**

Helen Wyatt  
hwyatt@gdlaw.co.uk

Katee Dias  
kdias@gdlaw.co.uk

Belinda Copland  
bcopland@gdlaw.co.uk

#### **Key Services:**

##### **Contractual**

Drafting terms of business and terms of engagement;  
Advising, drafting and negotiating 'one-off' client contracts

##### **Regulatory**

Advising on the impact of employment agencies and related legislation, and new developments

##### **Employment**

Drafting contracts of employment;  
Advising on termination and unfair dismissal claims;  
Enforcement of restrictive covenants;  
Dealing with TUPE

August 2006

## Employment Law Update: Recent and Proposed Changes

- ◆ Employees returning from AML must give 8 weeks notice if they intend to return to work earlier than the end of the AML period. Currently, employees only need to give 28 days notice so this extended period of notice will assist employers to make necessary transitional arrangements.
- ◆ The exemption from automatic unfair dismissal in relation to employers with 5 or less staff will be removed. Previously small employers were not obliged to keep a post open for an employee returning from AML. After the new legislation comes into force, all employers, regardless of size, will have the same obligations in respect of the mother's right to return.

Very similar provisions are to be introduced in relation to adoption leave and pay. They are intended to apply in respect of employees whose EWC or date of adoption is on or after 1 April 2007.

### Paternity leave

Additional paternity leave will be introduced for new fathers ("father" being defined by the relationship to the child or child's mother). Currently, fathers are only entitled to two weeks paternity leave but under the new legislation, it may be possible for fathers to take an additional 26 weeks paternity leave provided specific criteria are met. The pay available for ordinary paternity leave will remain at 2 weeks pay at the same rate as SMP, currently £108.85 per week. However, the pay in respect of additional paternity leave (over the first 2 weeks) will be dependent upon whether the mother has fully used her entitlement to SMP or not.

If the mother returns to work after OML but before the end of AML, the mother can opt for the remainder of her entitlement to SMP to be transferred to the father instead. This would

mean that the balance of any SMP would be paid to the father as additional statutory paternity pay.

### Adult carers

Employees who care for adults (e.g. a disabled spouse, an elderly parent, etc) will be entitled to request flexible working (such as part-time working, job share, etc). It is anticipated that this right shall come into force in April 2007. At present, only those who have responsibility for children under six (or eighteen, if disabled) have a legal right to request flexible working arrangements.

### Fixed Term Contracts

Do you have an employee who has been engaged on a series of fixed-term contracts for the past four years? If so, that employee may now be a permanent employee rather than a fixed-term employee. Regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 states that where an employee has been continuously employed on two or more fixed-term contracts for a period of four or more years, they will be deemed to be a permanent employee unless the employer can objectively justify why they should remain a fixed-term employee.

Employees should make a written request to the employer for confirmation of whether they have become a permanent employee. On receipt of such a request, the employer should respond within 21 days confirming their status and, if appropriate, explaining why they remain a fixed-term employee. The employer should also issue employees with a revised statement of employment particulars within one month of them becoming a permanent employee to reflect their new employment status.

## Employment Law Update: Recent and Proposed Changes

### Employer's Liability for Harassment

In the case of *Majrowski v Guy's & St Thomas' NHS Trust*, the House of Lords held that an employer can be vicariously liable for a breach by an employee of the Protection from Harassment Act 1997. Thus employees (and ex-employees) can now bring claims against employers for damages in the civil courts if they are subjected to a course of conduct (meaning at least two incidents) amounting to harassment, by a fellow employee during the course of employment. Employers are therefore advised to ensure that they implement and enforce anti-bullying and anti-discrimination policies to minimise the risk of harassment taking place at work.

### Holiday Pay: "A Week's Pay"

In *May Gurney Ltd v Adshead and others*, the EAT has addressed the question of what amounts to "a week's pay" for the purposes of calculating holiday pay. Employers will know that a worker is entitled to a week's pay in respect of each week of annual leave. Where a worker's pay in normal working hours does not vary with the amount of work done (i.e. is fixed), then the amount of a week's pay is the amount which is payable by the employer under the contract of employment (i.e. is determined by reference to basic salary). However, where remuneration varies with the amount of work done, the weekly rate at which a worker must be paid for annual leave is calculated by taking an average of their remuneration over the 12 weeks preceding the holiday period.

In case law, it has been found that commission should not be included when calculating a week's pay for holiday pay purposes. True commission payments are not paid as a result of variations in the amount of work done, but for example, in a sales environment, are paid as a result of the occurrence of an event, i.e. a sale. Working

hours and activities do not change to earn commission.

In *May Gurney*, the terms of payment of two types of bonus were such that they were considered to be payments that must be taken into account when calculating holiday pay entitlement. There was an attendance bonus that was payable simply for working the contracted hours per week and this was part of normal remuneration. There was also a productivity bonus that varied with the amount of work done, but could not be said to be a commission, which was also to be taken into account.

The result of this case is that employers need to identify the basis on which they make awards of pay in excess of normal salary, as they may be payments which should be taken into account when calculating holiday pay, i.e. if they are in effect a fixed uplift on salary or dependent upon output or the amount of work done.

### Age Discrimination

As many of you are probably aware, from October 2006, new legislation will come into force to prohibit discrimination on the grounds of age. The DTI estimate that there will be 8,000 claims in respect of age discrimination in the first year. To avoid being part of this statistic, employers should take steps now to ensure that they are ready for the legislation. Such steps should include a review of recruitment application forms, updating equal opportunities policies and training existing staff, examining service related benefits and ensuring that they are familiar with the retirement procedures for employees due to retire on or after 1 October 2006.

© GOODMAN DERRICK LLP

This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.

### **Further information**

If you would like further information about the issues raised in this newsletter, or any aspect of employment law and the recruitment industry, please do not hesitate to contact Helen Wyatt, Head of Employment [hwyatt@gdlaw.co.uk](mailto:hwyatt@gdlaw.co.uk) or any other member of Goodman Derrick LLP's employment team.

Goodman Derrick LLP  
90 Fetter Lane  
London EC4A 1PT  
tel +44 (0)207 404 0606  
fax +44 (0)207 831 6407  
[www.gdlaw.co.uk](http://www.gdlaw.co.uk)