

## Employment Law Update

March 2010

### Legal Update

#### End of the runway for Mrs Eweida?

The Court of Appeal has now upheld the EAT's decision in the case of *Eweida v British Airways plc* (see the December 2008 edition of Employment Law Update) that Ms Eweida, a Christian employee, had not been discriminated against on the grounds of her religious belief when she was refused permission to wear a crucifix on display at work.

It agreed with the EAT's finding that in an indirect discrimination claim, it is necessary for the employee to show that the "provision, criterion or practice" (in this case BA's uniform policy) put a group of people holding the employee's religion at a particular disadvantage. Mrs Eweida could not show that Christians, as a group, were disadvantaged by BA's uniform policy. The case is helpful to employers seeking to enforce uniform policies as it appears to draw a distinction between items of clothing or jewellery which are a mandatory requirement of an employee's faith (and therefore are likely to disadvantage the group as a whole) and those, as in Mrs Eweida's case, which are a desired manifestation of faith.

Rumour has it Mrs Eweida intends to appeal to the Supreme Court....so this may not be the end of the road.

#### Carry-forward of holiday when sick

In the conjoined cases known as *Stringer & Others* (see the February 2008, February 2009 and July 2009 editions of Employment Law Update), the European Court of Justice (ECJ) confirmed that a worker on sick leave continues to accrue statutory annual leave and if a worker is sick whilst on holiday, they must be allowed to take their annual leave on returning to work, even if this means carrying it over to another holiday year.

In *Pereda v Madrid Movillad SA*, the ECJ held that a worker who is sick during a period of pre-arranged statutory holiday should, under the Working Time Directive (WTD), have the right to re-schedule the holiday at a later date and if necessary, in the next holiday year if their sickness continues beyond the end of the holiday year in which it accrued.

The *Pereda* decision does not sit easily with the Working Time Regulations 1998 ("the Regulations") which implement the WTD in the UK as they do not

allow statutory holiday to be carried forward to the next holiday year. This leaves employers unclear what they should do following *Pereda*....until now!

We have now seen the first Employment Tribunal case on the issue in *Shah v First West Yorkshire Limited*. The facts of the case are very similar to those in *Pereda*. Mr Shah booked four weeks' holiday from 22 February to 21 March 2009. Mr Shah was absent through ill-health during this period of pre-booked holiday and into the next holiday year (which started on 1 April). His employer refused to allow him to reschedule and take his holiday in the next holiday year, arguing that the Regulations require statutory holiday to be taken in the current leave year only.

The Tribunal upheld Mr Shah's claim for loss of holiday. Following *Pereda* it found that in order to comply with the WTD, national laws must allow an employee who falls sick during a period of annual leave to take that leave subsequently and if necessary, in the following leave year. Whilst the Regulations do not expressly permit this, the Tribunal read into the Regulations additional words in order to give effect to the decision in *Pereda*.

Whilst as an Employment Tribunal decision this is not binding on other Tribunals, it is indicative of the approach that is likely to be adopted in most cases. Therefore, employers should carefully consider requests from employees, who are sick during a period of statutory holiday, to take their holiday at a later date and where necessary, to carry it forward and take it in the next holiday year.

However, this does not mean an employee is entitled to receive contractual sick pay for the period of sick leave in question if they have not complied with the Company's sickness absence reporting procedures. An employer can still require an employee to comply with its procedures (such as informing the employer of their absence by a certain time on the first day of absence and providing GPs certificates) in order to receive any company sick pay.

#### Agency worker denied protection from discrimination

In the Court of Appeal case of *Muschett v HM Prison Service [2010] EWCA Civ 25*, Mr Muschett was engaged as a "temp" by Brook Street (UK) Limited and placed in a temporary role at Feltham Young Offenders Unit (the "prison"). In a letter to Mr Muschett, Brook Street stated that "the assignment may be terminated

by the client, yourself or us at any time without prior notice or liability". He worked at the prison from 22 January 2007 until 10 May 2007 and on the termination of this work brought claims against both Brook Street and HM Prison Service for unfair and wrongful dismissal and race, sex and religious discrimination.

The Tribunal and EAT found that Mr Muschett was not employed by Brook Street since he did not have a contract to personally carry out work for them. This is essential if an employee is seeking to demonstrate that they fall within the protection of discrimination employment legislation. Likewise, he was found not to be an employee of HM Prison Service as he could terminate his engagement with them at any time.

Mr Muschett sought to argue that he was protected by virtue of him being a "contract worker", that is someone who is "not employed by the principal himself but by another person, who supplies them under a contract made with the principal". The EAT held that Mr Muschett was not a contract worker either because this necessitated him being employed by Brook Street, which he was not. This is most surprising as agency workers were generally considered to fall within the definition of "contract workers" as case law had shown a tendency for Tribunals to imply an employment relationship between the agency and worker to bring workers within this definition.

As a result of this decision, agency workers who are not "employed" by the agency (most likely to be "temps") may now find it difficult to bring themselves within the protection of discrimination legislation.

## Quickfire!

- The Agency Workers Regulations 2010, due to come into force 1 October 2011, have now been published in their final form. A number of changes have been made to the draft regulations published in October 2009 particularly to the definition of "pay" and to clarify which weeks count towards the 12 week qualifying period.
- The Government has published its response to the consultation on the new "fit notes" for use by GPs from 6 April 2010. GPs will now only be able to certify workers as "may be fit for work" rather than "fit to work", placing the onus on employers to carry out a risk assessment on the employee's return. The DWP has now published guidance on the draft regulations which can be found at:

<http://www.dwp.gov.uk/docs/fitnote-employer-guide.pdf>.

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