



EMPLOYMENT MEMO 2009

Newsletter Issue 1

April 2009

- ▶ [Contents](#)
- ▶ [Focus on...](#)
- ▶ [Recent cases](#)

Welcome to the first Employment Law Memo 2009 newsletter, which complements our online updating service. This newsletter rounds up all the changes which come into force this April, and highlights cases of particular interest. Further, it also provides a cumulative list of all case updates published to date.

For the online update service, please click [here](#) for a month-by-month listing of the cases, legislation and proposals covered, and for the facility to search by topic or specific paragraph. We also send emails detailing our updates. Further, all updates are automatically integrated into the online version of the Memo, which means that you can be confident that you are fully up to date.

We hope you find our service useful and informative and welcome any comments you may have as to how we can improve our service.

- ▶ [All newsletters](#)
- ▶ [Online updates](#)
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In this issue...

Focus on:

- » [Round up of legislative and other changes](#)

Recent cases:

- » [Highlights and cumulative list](#)

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FOCUS ON... LEGISLATIVE CHANGES IN APRIL 2009

Here is a summary of the many legislative changes that occur in April. Further information can be found at the relevant paragraphs listed below.

▶ [Contents](#)

▶ [Focus on...](#)

▶ [Recent cases](#)

Remuneration

National minimum wage – new enforcement regime

See EM ¶2904, ¶2906

From 6 April, a new enforcement regime comes into force.

National minimum wage – compensation

See EM ¶2911

From 6 April, the tribunal will have the power to order employers to compensate workers for any financial loss sustained as a result of unlawful deduction from wages or non-payment of redundancy awards.

▶ [All newsletters](#)

▶ [Online updates](#)

▶ [Contact us](#)



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Tax – medical health assessments

See EM ¶3155

Annual health screenings and medical check-ups provided to employees by an employer are exempt from income tax and NIC. However, the statutory rule currently requires that the benefit is made available to all of the employer's employees generally on similar terms. From 6 April 2009, this condition will no longer apply, so that the benefit can be selectively provided to some employees and still be exempt.

Tax – company cars for disabled employees

See EM ¶3223

From 6 April, in determining what tax is payable on a company car for a disabled employee, the list price of an equivalent manual car will be used which will have the effect of reducing the tax charge.

Time off

Annual leave – increase to statutory entitlement

See EM ¶4005

A worker whose annual leave year begins on or after 1 April will be entitled to 5.6 weeks' statutory leave.

Focus on...



FOCUS ON... cont...

Annual leave – end of transitional provisions

See EM ¶4014

From 1 April, the transitional exception with regard to workers' additional entitlement (¶4005) that employers and workers can agree that the worker's additional entitlement (i.e. those days or part days of leave owed to him in addition to previous entitlement of 4 weeks' leave) may be taken in the form of a payment in lieu will no longer apply.

See EM ¶4018

Also from 1 April, the transitional exception with regard to workers' additional entitlement that employers and workers can agree that the worker's additional entitlement (i.e. those days or part days of leave owed to him in addition to previous entitlement of 4 weeks' leave) may be carried over to the next leave year will no longer apply.

Sickness, injury and absence

Statutory sick pay – increase to rate

See EM ¶4165

From 6 April, the fixed weekly rate will be £79.15.

Rights of parents and careers

Statutory maternity pay, statutory adoption pay and statutory paternity pay – increase to rate

See EM ¶4401

From 5 April, the set weekly rate will be £123.06.

Right to request flexible working – extension to parents of older children

See EM ¶4690, ¶4694

From 6 April, the right to request flexible working will be extended to parents of children under 17 (or under 18 if disabled).

▶ Contents

▶ Focus on...

▶ Recent cases

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer
friendly version

Focus on...



FOCUS ON... cont...

Discipline and grievance

Abolition of the statutory dispute resolution procedures

See EM ¶6501+

The statutory disciplinary and grievance procedures and provisions relating to them will be abolished on 6 April.

In its place employers and employees should follow a short new Code of Practice on discipline and grievance issued by the Advisory, Conciliation and Arbitration Service (Acas). Under this new system if an employee subsequently brings a successful tribunal claim, the tribunal has a discretion to adjust any award upwards or downwards by up to 25% if either the employer or employee has unreasonably failed to comply with the new Code.

Transitional provisions will provide for those situations where a disciplinary process or grievance relates to a trigger event arising before the new system comes into force. Consequently, in relation to disciplinary and dismissal procedures, the outgoing system will continue to apply where an employer has:

- » sent a step 1 letter;
- » held a disciplinary meeting; or
- » dismissed the employee

on or before 5 April 2009.

In relation to grievances, the outgoing system will continue to apply those grievances which:

- » solely take place before 6 April 2009: or
- » start before 6 April 2009 and continue after that date with regard to claims presented to the tribunal:
 - on or before 4 October 2009 in respect of equal pay, redundancy pay and dismissals in connection with official industrial action; and
 - on or before 4 July 2009 with regard to other claims.

See Chapter 19 for full details as to the operation of the new system.

Payroll

PAYE codes

See EM ¶6832

From 6 April, the V tax code, which indicates the married couple's allowance for those aged under 75, will be withdrawn. As all those individuals born before 6 April 1935 and qualifying for married couple's allowance will be at least 75 during 2009/10, they will instead be eligible for the allowance at the rate applying to those aged 75 and over.

▶ Contents

▶ Focus on...

▶ Recent cases

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version

Focus on...



FOCUS ON... cont...

Online filing

See EM ¶6882

From 6 April, large employers with 50 or more employees will be required to file forms P45 and P46 online as well as forms P35 and P14.

Reporting requirements

See EM ¶6898

From 6 April, a replacement of a car provided to an employee (e.g. an upgrade or newer model) is no longer a reportable event requiring the submission of form P46(Car).

Trade unions, collective bargaining and industrial action

Trade union rights – duty not to unlawfully exclude or expel a member

See EM ¶7140

From 6 April, the new rules relating to the duty not to unlawfully exclude or expel a member come into force.

Ending employment

Unfair dismissal – Polkey reversal provision repealed

See EM ¶8443

The Polkey reversal provision will be repealed on 6 April and will no longer apply after this date.

Redundancy – recovery of redundancy payments

See EM ¶9013

From 6 April, with regard to any tribunal claim for the recovery of redundancy payments, tribunals have the power to order employers to compensate workers for any financial loss sustained as a result of the non-payment of redundancy awards.

▶ Contents

▶ Focus on...

▶ Recent cases

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version

Focus on...



- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases

- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer
friendly version

Focus on...

FOCUS ON... cont...

Handling disputes and alternative resolution

Acas conciliation – extending time of involvement

See EM ¶9219

From 6 April, Acas's duty to offer free conciliation services with regard to employment tribunal claims will continue throughout the proceedings until the tribunal delivers a judgment.

Acas conciliation – pre-tribunal dispute conciliation

See EM ¶9219

Further, from 6 April, Acas officers will have a discretionary power to offer conciliation in a pre-tribunal dispute although they can refuse to do so, even if both parties request it, without having to give a reason.

Recovery of sums payable under Acas-supervised compromises

See EM ¶9353

From 1 April, the recovery of sums payable under Acas-supervised compromises (i.e. an Acas-brokered settlement, or compromise, to avoid proceedings or bring proceedings to an end) will become directly enforceable in the county courts, removing the need to register such agreements with the county court before proceeding to apply for enforcement.

Tribunal claims

Determining cases without hearings

See EM ¶9502

From 6 April, to facilitate early resolution of disputes, tribunals can decide cases without any hearing if all the parties have consented in writing.

ET1 Form

See EM ¶9511

From 6 April, it will no longer be necessary to state on the form ET1 whether or not:

- » the claimant is or was an employee of the respondent;
- » the claim includes a complaint that the respondent has dismissed the claimant or has contemplated doing so; and
- » the claimant has raised the subject matter of the claim with the respondent in writing at least 28 days prior to presenting the claim to an employment tribunal and, if the claimant has not done so, why not.



▶ Contents

▶ Focus on...

▶ Recent cases

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer
friendly version

FOCUS ON...

FOCUS ON... cont...

New Claim and Response forms and guidance will appear on www.employmenttribunals.gov.uk from 6 April 2009.

Entering a defence

See EM ¶9521

From 6 April, where a respondent is legally represented, the respondent or his representative must, at the same time as the application is sent to the Employment Tribunal Office, provide all other parties with the following information in writing:

- » details of the application and the reasons why it is made;
- » notification that any objection to the application must be sent to the Employment Tribunal Office within 7 days of receiving the application or, if a hearing of any type is due to take place before then, before the date of that hearing; and
- » that any objection to the application must be copied to both the Employment Tribunal Office and all other parties.

Further, the respondent or his representative must confirm in writing to the Employment Tribunal Office that this rule has been complied with. The above time limit of 7 days may be extended where the Employment Judge or tribunal considers it in the interests of justice to do so.

Where a respondent is not legally represented, the Secretary shall send a copy of the application to all other parties and inform them of the matters listed above.

New Claim and Response forms and guidance will appear on www.employmenttribunals.gov.uk from 6 April 2009.

Default judgments – automatic

See EM ¶9526

Automatic default judgments will apply to proceedings which were commenced on or after 6 April where the claimant's claim is effectively uncontested. If the Employment Judge does not have enough information to issue a default judgment, he may require the respondent to provide additional information. He will then decide on whether to make a default judgment based on that information or, if the respondent fails to provide the information requested, will then make a default.

Default judgments – review

See EM ¶9726

With regard to default judgments that are issued from 6 April, Employment Judges will be given the power to review default judgments without the need for an application by one of the parties if there has been an administrative error, a party did not receive notice of the proceedings or one or more of the parties was absent when the decision to enter default judgment was made.



FOCUS ON... cont...

Further, from 6 April, a review of a default judgment need not be in public if all the parties to the proceedings consent in writing to a review without a hearing.

▶ Contents

▶ Focus on...

▶ Recent cases

Employment Judge sitting on his own – stage 1 equal value claims

See EM ¶9607

From 6 April, the Employment Judge can hear stage 1 equal value claims on his own.

Withdrawn claims – bar to future claims

See EM ¶9631

From 6 April, where a claim is withdrawn and the respondent has applied to have the claim dismissed, the claimant may not commence a further claim based on the same or substantially the same cause of action, unless the decision to dismiss is later reversed on review or appeal.

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version

Acas-conciliated settlement – automatic dismissal

See EM ¶9631

Where the parties agree in writing to an Acas-conciliated settlement with regard to a claim on or after 6 April, the tribunal will automatically dismiss the claim within 28 days of receiving written notification of the settlement terms and of the withdrawal.

ET and EAT cost orders

See EM ¶9709, ¶9801

From 6 April, the hourly rate used to calculate the amount of preparation time payable has increased to £29.

Enforcement of awards

See EM ¶9715

From 1 April, the recovery of tribunal awards will become directly enforceable in the county courts and the High Court, removing the need to register such agreements with the county court or High Court before proceeding to apply for enforcement.

Focus on...



- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases

- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer
friendly version

Recent cases

RECENT CASES

We send email updates which detail all the recent changes that have been added to our online updates page and the online version to all subscribers. These can be accessed by clicking on the updates in the emails, by using the online updates page or by using the online version of your Memo. We have selected a few of the cases most likely in our view to have a widespread impact, and summarise these below, followed by a cumulative list of all the cases covered by our 2009 updating service to date.

HIGHLIGHTS

Time off

Holiday entitlement during long-term sick leave

See EM ¶4007, ¶4102

The ECJ has ruled on this case dealing with the right of workers who have been on sick leave for the whole of a leave year to take statutory annual leave. According to the ECJ, in cases of long-term sick leave:

- » annual leave accrues in the normal way and if it is not taken the worker will be entitled to pay in lieu of annual leave;
- » it is open to member states to specify whether or not a worker may take paid annual leave during sick leave; and
- » any rule preventing the carry over of annual leave after the end of the leave year in such circumstances is contrary to European law.

As a result of this decision, the Working Time Regulations will require amendment to permit workers on long-term sick leave to carry forward annual leave and receive payment in lieu of accrued leave on termination of employment.

Stringer and ors v HM Revenue and Customs, Case C-520/06, ECJ

Equality at work

Sexual orientation harassment - whether covers harassment on the grounds of characteristics associated with sexual orientation

See EM ¶5361

The Court of Appeal has reversed the decision of the EAT in this case and held that harassment will be unlawful where it consists of homophobic mockery meted out in the knowledge that the victim is not homosexual as well as on the ground of a person's actual sexuality, or their reputed or assumed sexuality. The Court also remarked that the same interpretation of the legislation would apply to other areas of discrimination such as race and religion.

English v Thomas Sanderson Blinds Ltd [2009] IRLR 206, CA



- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases

- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer
friendly version

Recent cases

RECENT CASES cont...

Religion or belief discrimination - whether promoting religious belief is protected

See EM ¶5383

In this case, a social worker was dismissed for misconduct following a number of incidents in which he promoted his beliefs as a Christian to service users. He claimed that he had suffered discrimination on the grounds of his religion. He failed both in the tribunal and before the EAT on the ground that the reason for his dismissal was not his religious belief but that he was improperly foisting it on clients, contrary to a clear rule of the Council. The EAT held that the tribunal was right to find that the Council would have treated any employee who inappropriately promoted any religious belief or other strong personal view in the same way.

Chondol v Liverpool City Council [2008] EAT case 0298/08

Transfer of the business

Effect of TUPE - insolvency proceedings with a view to liquidate assets

See EM ¶7998

In this case, company A fell into financial difficulties and went into administration. The administrators concluded that there was no prospect of selling the business of A as a going concern and decided instead to sell its assets to company B who also took on the lease of company A's premises, in order to secure more for the creditors than would be achieved by winding up. Company B took on some of A's employees, but not the claimant who claimed unfair dismissal. The EAT held that while the primary purpose of administration is to rescue the company as a going concern, the fact that the administrators had concluded that this was not possible and instead focused on a favourable realisation of the assets meant that the special provisions did not apply.

Oakland v Wellswood (Yorkshire) Ltd [2009] EAT case 0395/08

Information and consultation obligations - consulting about measures after transfer

See EM ¶8071

Where the transferee envisages taking measures, he is not obliged to consult with transferring employees prior to the transfer as he is not yet their employer. The EAT has confirmed that this also applies post transfer and held that there is no obligation on a transferee to provide information to, or consult with employees after a TUPE transfer has taken place where the transferee envisages measures after the transfer has been completed.



RECENT CASES cont...

UCATT and ors v Glasgow City Council and anor [2008] EAT cases 007/08, 0014/08

Comment Note that the new employer may have other obligations to consult post transfer (see Chapter 22 on Information and consultation in the workplace and Chapter 21 with regard to collective bargaining).

▶ Contents

▶ Focus on...

▶ Recent cases

Ending employment

Compulsory retirement ages – ECJ decision

See EM ¶8201

The ECJ has given its judgment in this case (commonly referred to as the “Heyday” litigation), confirming the opinion of the Advocate General that it is permissible to have a default retirement age provided that it is justified by reference to legitimate aims, which in this case regarding the UK Government’s default retirement age of 65 would be social policy objectives. The Court confirmed that the Directive did not require member states to set out an exhaustive list of factors justifying exemptions from the Directive. The case will now return to the High Court, which will decide whether it is in fact justified in this instance.

▶ All newsletters

▶ Online updates

▶ Contact us



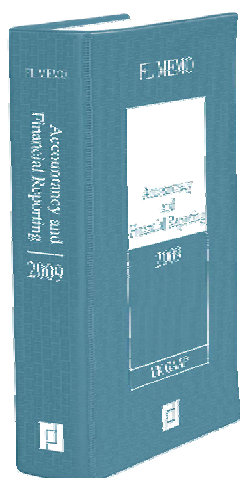
PDF printer friendly version

R (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform, Case C-388/07, ECJ

Recent cases

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- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases

- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer
friendly version

Recent cases

RECENT CASES cont...

Cumulative list of cases

Types of employment relationship

¶53 Protectacoat Firthglow Ltd v Miklos Szilagyi

Employment contract, variation and breach

¶1307 Enfield Technical Services Ltd v Payne; Grace v BF Components Ltd

¶1313 Blue Chip Trading Ltd v Helbawi

¶1716 Bridal Fashions Ltd v Burke

Flexible working

¶1983 Secretary of State for Children Schools and Family v Fletcher

Time off

¶4007 Stringer and ors v HM Revenue and Customs, Case C-520/06, ECJ

Sickness, injury and absence

¶4102 Stringer and ors v HM Revenue and Customs, Case C-520/06, ECJ

Equality at work

¶5361 English v Thomas Sanderson Blinds Ltd

¶5383 Chondol v Liverpool City Council

¶5383 London Borough of Islington v Ladele

¶5393 London Borough of Camden v Miah

¶5435 Richmond Pharmacology v Dhaliwal

¶5476, ¶5481 SCA Packaging v Boyle

¶5515 The Child Support Agency (Dudley) v Truman

¶5535 Eastern and Coastal Kent PCT v Jocelyn Grey

¶5615 Rolls Royce plc v Unite the Union [2009] IRLR 49, HC

¶5680 Fearnon and ors v Smurfit Corrugated Cases (Lurgain) Ltd

¶5682 Wilson v Health and Safety Executive

¶5720 Potter and ors v North Cumbria Acute Hospitals NHS Trust



▶ Contents

▶ Focus on...

▶ Recent cases

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version

Recent cases

RECENT CASES cont...

¶5722 Matuszowicz v Kingston upon Hull City Council

Discipline and grievance

¶6732 Bridal Fashions Ltd v Burke

¶6773 Suffolk Mental Health Partnership NHS Trust v Hurst and ors; Mid Staffordshire NHS Foundation Trust v Kaur and ors; Arnold and ors v Sandwell Metropolitan Borough Council

Information and consultation in the workplace

¶7710 Darnton v Bournemouth University

Transfer of the business

¶7998 Oakland v Wellswood (Yorkshire) Ltd

¶8067 Royal Mail Group Ltd v Communication Workers Union

¶8071 UCATT and ors v Glasgow City Council and anor

Ending employment

¶8201 R (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform,

¶8836 Rolls Royce plc v Unite the Union [2009] IRLR 49, HC

Employment claims

¶9573 Force One Utilities v Hatfield
