



EMPLOYMENT MEMO 2010

Newsletter Issue 1

April 2010

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Welcome to the first Employment Law Memo 2010 newsletter, which complements our online updating service. This newsletter rounds up the changes which have come into force so far this year, 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.

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- » Round up of legislative and other changes
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FOCUS ON — LEGISLATIVE CHANGES

Here is a summary of the changes that occurred so far in 2010. Further information can be found at the relevant paragraphs listed below.

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PRE-EMPLOYMENT

Right to work – revised guidance for points-based system sponsors

See ¶1771

The UK Border Agency has revised its guidance documents for employers and education providers who hold sponsor licences under the points-based system. Further information can be found at :

www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pbsguidance/

COMPANY INFORMATION AND CONFIDENTIALITY

Whistleblowing – possible action on the issue underlying allegation

See ¶2704

From 6 April, the Tribunal Service can forward the issue underlying a whistleblowing claim to a designated regulator.

REMUNERATION

Taxation of benefits — private fuel provided for company cars

See ¶3229

Where private fuel is provided for a company car, the cash equivalent of the benefit is calculated by multiplying a fixed sum by the appropriate percentage determined by the level of the car's carbon dioxide (CO₂). This fixed sum increased from £16,900 to £18,000 from 6 April.

Taxation of benefits — private fuel provided for company vans

See ¶3235

Where private fuel is provided, the employee will be assessed on a benefit of £550 from 6 April (an increase of £50).

Pensions — state pension age

See ¶¶3401, 8202

The state pension age is to be equalised at age 65, to be phased in over 10 years from 6 April.

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FOCUS ON — LEGISLATIVE CHANGES cont...

Pensions — early retirement age

See ¶3413

From 6 April, the retirement age that an employee can generally start receiving his occupational or personal pension increased from 50 to 55 years (unless due to ill health or in a specialised occupation, such as a sportsman).

Pensions — additions to information and consultation requirements

See ¶3448

Employers with 50 or more employees are required to inform and consult with employees before making specified changes to occupational pension schemes. From 6 April, changing what elements of pay are included within pensionable earnings and changing the proportion or limiting the amount of any element of pay that forms part of pensionable earnings are added to this list.

SICKNESS, INJURY AND ABSENCE

“Fit notes” to replace GP sick notes — new form

See ¶4211

From 6 April, the new statement for fitness to work (“fit notes”) replace GP sick notes. The new forms allow the option to indicate either that the employee is unfit for work or that he is fit for work provided that adjustments are made to his working hours, workplace or duties, or subject to a phased return to work.

The Department of Work and Pensions has published a guide for employers, see www.dwp.gov.uk/docs/fitnote-employer-guide.pdf

HEALTH AND SAFETY

Health and safety offences causing death and corporate manslaughter — definitive sentencing guideline published

See ¶¶5180, 5192

The definitive sentencing guideline for corporate manslaughter and health and safety offences causing death has been published by the Sentencing Guidelines Council. It applies to sentences passed on or after 15 February 2010.

The guideline stipulates that the appropriate fine for a health and safety offence which is shown to have caused death should seldom be less than £100,000 and could be hundreds of thousands of pounds, and that the appropriate fine for a corporate manslaughter offence should seldom be less than £500,000 and could be millions of pounds. Figures will be adjusted to take into account factors which aggravate or increase the seriousness of the offence and any mitigating factors. The guideline sets out factors likely to be regarded as aggravating or affecting the seriousness of the offence and those likely to afford mitigation. In addition, the court should consider the financial consequences of a fine, including the resources of the company and its ability to pay. For this purpose companies will be expected to provide the court with their published audited accounts for a 3-year period, including the year of the offence. Further, a publicity order should be imposed in virtually all cases of

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of corporate manslaughter (see below).

Corporate manslaughter — commencement of power to make publicity orders

See ¶5192

From 15 February, the court's power to make publicity orders came into force. The power applies to corporate manslaughter offences committed on or after 15 February 2010. It is not available for offences committed before that date, even if the court passes sentence after that date.

TRAINING AND PERFORMANCE

Right to request time off to train — new right where 250 or more employees

See ¶6334

From 6 April, there is a new right for employees to request time off to train where organisations have 250 or more employees. The training must be relevant to the employee's work, and the process is similar to that for requests to work flexibly. Employees must be continuously employed for not less than 26 weeks before making a request.

TRADE UNIONS, COLLECTIVE BARGAINING AND INDUSTRIAL ACTION

Trade union rights — blacklisting trade unionists now unlawful

See ¶7140

From 2 March, the compilation, dissemination and use of blacklists, which contain details of trade union members and activists and whose purpose is to discriminate against these workers on grounds of their trade union membership or trade union activities is unlawful. Claims can be made to the employment tribunal where a worker has been refused employment or employment agency services, or has been unfairly dismissed or subjected to a detriment, for a reason relating to a blacklist. Alternatively, where a worker has suffered or will suffer a loss due to the use or apprehended use of a blacklist, he can apply to the civil courts for damages, including damages for injury to feelings. Those affected can also apply for orders restraining or preventing the compilation, use, sale or supply of the blacklist in question.

TRIBUNAL CLAIMS

ET and EAT cost orders

See ¶¶9709, 9801

From 6 April, the hourly rate used to calculate the amount of preparation time payable has increased to £30.

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Rates and awards	Maximum limit	££
Employer's insolvency: guaranteed debts	£3,040 (arrears of pay) ¹ £2,280 (holiday pay) ¹	££9054
Failure to comply with notification requirements (retirement)	£3,040 ¹	££8223
Flexible working: failure to consider/correctly consider employee's request	£3,040 ¹	££4788
Guarantee payments	£21.20 (daily limit) ²	££2924,7867
Redundancy pay: statutory (SRP)	£11,400 ¹	££9005
Right to be accompanied: disciplinary/grievance hearing/flexible working hearing/meeting to consider his request to continue working beyond retirement date	£760 ¹	££6790,4788,8224
Statutory maternity pay ⁴ , statutory adoption pay and statutory paternity pay	£124.88 (weekly set rate) ⁵	££4401
Statutory sick pay	£79.15 (weekly set rate) ⁶	££4165
Trade unions: refusal of employment or employment services of agency on grounds of trade union membership	£65,300 ²	££7590
Trade unions: employer's unlawful inducement	£3,100 ³	££7573,7582,7593
Trade unions (statutorily recognised): employer's failure to consult on training	£760 ¹	££7388
Trade union: unjustified discipline, or unreasonable exclusion or expulsion, by union	£76,700 (maximum) ² £7,200 (minimum if applicable) ²	££7143,7141
Unfair dismissal: basic award	£11,400 ¹ (minimum in certain cases: £4,700) ³	££8575,8577

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Rates and awards	Maximum limit	££
Unfair dismissal: compensatory award	£65,300 (no limit where dismissed unfairly or selected for redundancy for reasons connected with health and	£8587
Unfair dismissal: additional award (failure to re-employ or reinstate employee)	between £9,880 and £19,760 ¹	£8689, 7598
Written particulars: employer's failure to provide statement/incomplete or inaccurate	£760 or £1,520 ¹	£1465
<p>Notes:</p> <ol style="list-style-type: none"> 1. From 1 October 2009 (SI 2009/1903). 2. From 1 February 2010 (increase/decrease (SI 2009/3274)). 3. From 1 February 2009 (no increase/decrease on 1 February 2010 (SI 2009/3274)). 4. The first 6 weeks of statutory maternity pay are paid at the earnings-related rate (£4493). 5. From 4 April 2010 (SI 2010/793). 6. No change on 6 April 2010 (SI 2010/793). 		

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RECENT CASES — HIGHLIGHTS

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 the cases covered by our 2010 updating service to date.

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EMPLOYMENT CONTRACT, VARIATION AND BREACH

Mutual trust and confidence — test for breach of mutual trust and confidence and whether employers can cure fundamental breaches of contract

See ¶¶1246, 1715

The Court of Appeal has considered the correct test for whether there has been a breach of mutual trust and confidence in this case which concerned a university lecturer whose marks were altered without consultation. The Court confirmed the EAT's view that the range of reasonable responses test should not be used in constructive dismissal cases.

The Court went on to consider whether the employer had remedied the breach by conducting an enquiry so that the lecturer was not entitled to claim constructive dismissal. It held that an employer who has committed a fundamental breach of contract cannot cure it by its subsequent actions. If the employer takes steps to put matters right after a fundamental breach this does invite the employee to affirm the contract, but the employee is under no obligation to do so and does not lose the right to accept the breach and claim constructive dismissal. However, the Court commented that an employee cannot ordinarily expect to continue working for very long without losing the option of termination, particularly if he fails to make his position clear at the outset and the employer has offered to make suitable amends.

Buckland v Bournemouth University Higher Education Corp [2010] EWCA Civ 121

DISCIPLINE AND GRIEVANCE

Disciplinary procedures – legal representation where dismissal could have greater consequences

See ¶6558

The Court of Appeal held that a teaching assistant alleged to have had inappropriate contact with a student was entitled to legal representation at a disciplinary hearing on the grounds that it would have a strong influence on the decision of the Independent Safeguarding Authority as to whether he should be placed on the list of persons barred from working with children.

G, R (on the application of) v X School and ors [2010] EWCA Civ 1

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RECENT CASES — HIGHLIGHTS cont...

EQUALITY AT WORK

Discrimination on the grounds of religion and belief - dress code requiring crosses not to be visible not discriminatory

See ¶15826

The Court of Appeal has held that a dress code which forbade wearing a cross which was visible when wearing uniform was not unlawful. The claimant argued that it would be indirect discrimination if a single employee were disadvantaged. The Court rejected this argument and confirmed that the correct interpretation of the legislation was that a group of employees must be put at a disadvantage. In this case, only one employee was affected, given that it was accepted that wearing a cross was a matter of personal preference, so her claim could not succeed. The Court also disagreed with the view of the employment tribunal that the dress code would have been disproportionate. It commented that where different groups in the workforce have conflicting views on a dress code a blanket ban may in some cases be the only fair solution.

Eweida v British Airways Plc [2010] EWCA Civ 80

TRANSFER OF THE BUSINESS

Collective agreements - employer will not be bound by changes negotiated after transfer

See ¶17985

The Court of Appeal has reversed the approach to be taken where contracts of employment which contain terms negotiated by collective agreement are transferred under TUPE. It held that the ECJ decision in *Werhof v Freeway Traffic Systems GmbH & Co KG* meant that a transferee will not be bound by changes to a collective agreement negotiated after the transfer date. This includes variations to existing collective agreements which are agreed after the transfer date.

Parkwood Leisure Ltd v Alemo-Herron and ors [2010] EWCA Civ 24

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RECENT CASES — HIGHLIGHTS cont...

ENDING EMPLOYMENT

Constructive dismissal - employee already in breach of contract cannot claim constructive dismissal

See ¶18230

In this case, an employee resigned and claimed constructive dismissal while he was under investigation for a number of disciplinary offences, including sexual harassment, drunkenness at work and breaches of confidentiality. He was successful in his claim for unfair dismissal in the employment tribunal. The EAT overturned the decision, finding that the tribunal had failed to take proper account of the claimant's own breaches of contract. It held that he was not entitled to terminate his contract on the ground of the employer's conduct toward him, as he was himself in breach of the duty of trust and confidence before the acts he complained of took place.

Aberdeen City Council v McNeill [2009] UKEAT 0037_08_1011

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New Edition

OUT IN APRIL



Be on top of the latest changes with VAT Memo 2010-2011

VAT Memo 2010-2011, to be published in April, has been fully revised and updated for the Budget 2010 announcements, and will include commentary on the following:

- restitution of the VAT rate to 17.5%
- new place of supply rules for cross-border services
- TOMS changes
- new tribunal and appeals system.

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¶¶1715, 1703 Keegan v Newcastle United Football Company Ltd, Arbit Trib

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¶2275 Diggins v Condor Marine Crewing Services Ltd, EAT

¶¶2275, 2276 Duncombe and ors v Secretary of State for Children, Schools and Families, CA

Company information and confidentiality

¶2530 Standard Life Health Care Ltd v Gorman, CA

Time off

¶3644 British Airways plc v Williams and ors, SC

¶¶4016, 4018 Lyons v Mitie Security Ltd, EAT

Health and safety

¶4959 O'Neill v Buckinghamshire County Council, EAT

Equality at work

¶5215 British Airways Plc v Mak and ors, EAT

¶5227 May and Baker Ltd (t/a Sanofi-Aventis Pharma) v Okerago, EAT

¶5550 Garrett v Lidl Ltd, EAT

¶5826 Eweida v British Airways Plc, CA

¶5615 Kucukdeveci (Social policy), ECJ

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¶5615	Petersen (Social policy), ECJ
¶5425	South London Healthcare NHS Trust v Al-Rubeyi, EAT
¶5615	Wolf (Social policy), ECJ

Discipline and grievance

¶6540	Dunn and anor v AAH Ltd, CA
¶¶6540, 6640	Sandwell and West Birmingham Hospitals NHS Trust v Westwood, EAT
¶6558	G, R (on the application of) v X School and ors, CA

Trade unions, collective bargaining and industrial action

¶7464	EDF Energy Powerlink Ltd v National Union of Rail, Maritime and Transport Workers, HC
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Transfer of the business

¶7985	Parkwood Leisure Ltd v Alemo-Herron and ors, CA
¶8065	Unison v Somerset County Council, EAT

Ending employment

¶8230	Aberdeen City Council v McNeill, EAT
¶8437	Sarkar v West London Mental Health NHS Trust, CA
¶8950	Shanahan Engineering Ltd v UNITE, EAT

Employment claims

¶9460	Aziz v First Division Association (FDA), CA
¶9475	Benjamin-Cole v Great Ormond Street Hospital for Sick Children NHS Trust, EAT
¶9574	Abegaze v Shrewsbury College of Arts and Technology, CA

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