



Shaun Pinchbeck, LL.B
Head of Employment Law

Member of the Employment Lawyers Association

Shaun also sat on a working party advising the Government on law relating to "working status"

We can help employers in all aspects of employment law including :

- **Disciplinary/grievance** issues
- **Contracts of Employment**
- **Unfair dismissal/redundancy**
- **Compromise Agreements/termination packages**
- **Discrimination** claims
- **Employment Tribunal** claims including representation at the Employment Tribunal

Head Office address

7-15 Gladstone Terrace,
Goole,
East Yorkshire,
DN14 5AH
T: 01405 765661
F: 01405 764201

www.heptonstalls.co.uk

e-mail: [Shaun Pinchbeck](mailto:Shaun.Pinchbeck@heptonstalls.co.uk)



Welcome to the latest issue of our free employment law update. In this month's issue we look at:

DEALING WITH MENTAL HEALTH ISSUES

Current figures show that mental health problems cost UK organisations a small fortune every year. We provide an overview of employers' obligations and some of the steps they can take to protect themselves. [\[more...\]](#)

HOLIDAY BLUES European law gives workers the right to four weeks' paid annual leave. Although member states can have legislation requiring sick workers to take paid annual leave during sick leave, we look at a case that said that they must also allow them to take it at another time if they want to. [\[more...\]](#)

WAIVE GOODBYE If an employee commits a breach of contract, the employer can either accept the breach and end the contract or waive the breach and affirm it. We look at a case that said that the company lost the right to dismiss the employee when it affirmed the contract by failing to take any disciplinary action. [\[more...\]](#)

IN BRIEF The Government recently announced that it was bringing forward a review of the default retirement age to 2010 and is now asking for evidence to inform that review. [\[more...\]](#)

Heptonstalls LLP's Employment Partner Shaun Pinchbeck has seen a significant increase in employers seeking advice on redundancy situations in the past year:

"My aim is to explore with clients whether there is a way to avoid having to make employees redundant by considering whether there is an alternative such as reduced hours. In the event that there is no realistic alternative, my aim is then to guide clients through the process to try to minimise the consequences to the client and to minimise the risk of claims being brought. If you are in a situation where you are even contemplating the possibility of having to make redundancies, then seeking advice from the outset is something that I would urge employers to do as mistakes made at any stage of the process can prove costly".

Do not hesitate to contact Shaun if you have any queries on 01405 765661 or email shaun.pinchbeck@heptonstalls.co.uk

Heptonstalls have created a very useful summary to guide you through the key points of current employment legislation. This covers key qualifying periods and limits including a schedule of forthcoming changes.

To obtain your own FREE copy e-mail Sarah.Leddy@Heptonstalls.co.uk putting "FREE Summary" in the subject box

DEALING WITH MENTAL HEALTH ISSUES

Current figures show that mental health problems (such as depression, anxiety and stress) cost UK organisations around £26 billion each year. This is the equivalent of £1,035 for every employee in the UK workforce. Most of this is due to the adverse impact mental health has on the way the employee does their job. For example, being less productive because of loss of concentration or memory problems.

Do employers have a duty to protect their employees

Under the common law, employers are obliged to take care of the health and safety of their employees so as not to expose them to a risk of injury. Since the landmark case of Walker v Northumberland County Council, this duty of care covers psychiatric as well as physical damage, including work-related stress.

This approach was then developed in Barber v Somerset County Council when the House of Lords said that the council was in breach of its duty of care to Mr Barber when it failed to be proactive and take the initiative. Instead it had adopted a "wait-and-see" policy.

The Court of Appeal then said in Sutherland v Hatton that employers who offer confidential counselling services are likely to have a complete defence to a stress-related claim. It also said that if workers are under stress, there is an onus on them to complain about it and bring it to the attention of their employer.

However, just because an employer provides a counselling service does not mean that it will act as a "panacea" in all cases. In Dickens v O2 the Court of Appeal said that employers have to be more proactive than just suggest that an employee makes use of the company counselling service.

What legislation can employees rely on?

Employees can rely on the following statutes if they want to bring a claim of psychiatric injury at work, depending on the circumstances:

- Health and Safety at Work Act 1974 - employers have a duty to ensure that, as far as is reasonably practicable, their workplaces are safe and healthy
- Disability Discrimination Act 1995 - employers are required to make reasonable adjustments to the workplace, such as reducing the employee's workload or pressures on an employee who is under stress. Tribunals have found that depression, anxiety and stress are all covered by the DDA
- Protection from Harassment Act 1997 - In Majrowski v Guy's and St Thomas's NHS Trust, the House of Lords said that employees can use this legislation to sue their employers for damages for workplace harassment by a fellow employee. However, the conduct has to be sufficiently oppressive and unreasonable to sustain criminal liability
- Discrimination legislation - if someone is being treated unfairly by, say, a line manager who treats female staff in an overbearing and dominating way, they could argue that such behaviour amounts to sex discrimination

Heptonstalls have created a very useful summary to guide you through the key points of current employment legislation. This covers key qualifying periods and limits including a schedule of forthcoming changes.

To obtain your own FREE copy e-mail Sarah.Leddy@Heptonstalls.co.uk putting "FREE Summary" in the subject box

What can employers do to protect themselves from claims?

The Health and Safety Executive (HSE) recommends that employers draw up and implement a mental health policy as part of their health and safety at work policy. This would demonstrate that they recognise and accept that mental health is an important issue and would also emphasise their commitment to promoting the mental health of their workforce.

The HSE says that the most important step in the process is to bring about a positive change in attitude and assumptions amongst employees and management towards mental health. Information on mental health issues should therefore also be included in:

- the organisation's equal opportunities policy
- training for supervisory staff on managing disability which should give specific examples of behaviour which may indicate mental health problems
- disability awareness training for all levels of staff
- job advertisements.

[\[Back to contents \]](#)

HOLIDAY BLUES

Article 7 of the European Working Time Directive gives workers the right to four weeks' paid annual leave. In **Pereda v Madrid Movilidad SA**, the European Court of Justice (ECJ) held that although member states can introduce legislation allowing a worker on sick leave to take paid annual leave during sick leave, they must also allow workers to take their annual leave at another time if they wish to do so.

What happened?

Mr Pereda was allocated a period of annual leave from 16 July to 14 August 2007 in accordance with the company's staff leave schedule for that year. Following an accident at work on 3 July, he went on sick leave until 13 August, which meant that he only had two days' holiday left. On 19 September, he asked his employer for a new period of paid annual leave for 2007 (from 15 November to 15 December) on the ground that he had been on sick leave during the original allocation. His employer refused.

The ECJ emphasised that member states cannot opt out of article 7 because the entitlement to paid annual leave is such an important principle of Community social law.

And although member states were allowed to introduce legislation setting down conditions for exercising the right to paid annual leave (including the loss of the right by the end of a leave year or of a carry-over period), they had to ensure that anyone who did lose it had actually had the chance to exercise it in the first place.

Workers could not, therefore, lose the right to paid annual leave at the end of the reference period laid down by national law, if they were on sick leave for the whole or part of the leave year and had not actually had the chance to take it.

Heptonstalls have created a very useful summary to guide you through the key points of current employment legislation. This covers key qualifying periods and limits including a schedule of forthcoming changes.

To obtain your own FREE copy e-mail Sarah.Leddy@Heptonstalls.co.uk putting "FREE Summary" in the subject box

This, said the ECJ, was because the whole point of paid annual leave was to enable workers to rest and to enjoy a period of relaxation and leisure. The purpose of sick leave was to allow workers to recover from being ill.

It followed, therefore, that a worker on sick leave during a period of previously scheduled annual leave had the right to take that leave during a period which did not coincide with their sick leave, but only if the worker actually requested it.

The right to reschedule their leave was still subject to the rules and procedures of national law, taking into account the interests of the undertaking itself. However, if the employer could not agree to the worker's request for a new period of annual leave, they had to let them take it at a different time, even though this might mean they had to carry over their leave to the next holiday year.

The Working Time Directive did not, therefore, preclude national legislation or practices which allowed a worker on sick leave to take paid annual leave during that sick leave, but equally that "where that worker does not wish to take annual leave during a period of sick leave, annual leave must be granted to him for a different period".

[\[Back to contents \]](#)

WAIVE GOODBYE

If an employee commits a breach of contract, the employer can either accept the breach and end the contract or waive the breach and affirm the contract. In **Cook v MSHK Ltd and anor**, the Court of Appeal said that the company lost the right to dismiss the employee when it affirmed the contract by failing to take any disciplinary action.

What happened

Mr Cook started work for MSHK Ltd in November 2001. His contract imposed post-termination restrictions which prevented him from undertaking any activities that competed with MSHK.

In January 2007 MSHK agreed to lend Mr Cook £100,000 interest free to buy a flat in order to secure his loyalty to the company. In March, Mr Cook was offered a very senior job at Warner Music UK and handed in his notice on 18 May. MSHK accepted Mr Cook's assurances that he would not be competing with them in his new job.

On 22 May, a senior manager for MSHK found out that Mr Cook would be working in direct competition with them. An argument then ensued and Mr Cook went off sick until 4 July. While he was still on sick leave, Mr Cook accepted the terms of the loan agreement, and the company wrote to him reminding him of his continuing contractual obligations, including those of fidelity, during his notice period and saying they expected him to return to work. It also said that the loan would not now be made available to him. The letter did not mention that disciplinary action might be taken against him or that his conduct warranted dismissal.

When Mr Cook returned to work he was charged with a number of offences, including a

Heptonstalls have created a very useful summary to guide you through the key points of current employment legislation. This covers key qualifying periods and limits including a schedule of forthcoming changes.

To obtain your own FREE copy e-mail Sarah.Leddy@Heptonstalls.co.uk putting "FREE Summary" in the subject box

breach of the implied term of trust and confidence, and was summarily dismissed. MSHK then made an application for damages and a declaration of the lawfulness of his dismissal.

The High Court said that as MSHK had not mentioned the allegation that Mr Cook had misled them in any of its correspondence with him, it had affirmed the contract in respect of this breach and could not, therefore, justify a lawful dismissal. However, it agreed that Mr Cook had a duty to tell MSHK Ltd of his "settled intention" to compete with them; and that in accepting the loan Mr Cook was in breach of his fiduciary duty to the company by putting his own interests first.

The Court of Appeal rejected the company's appeal that it had been justified in dismissing Mr Cook on the ground of dishonesty. It said that MSHK had instead affirmed his contract in the period between the time it realised Mr Cook had been dishonest and the time it summoned him to a disciplinary hearing by paying him full salary, by trying to persuade him to return to work and by failing to take any disciplinary action for several weeks.

It disagreed, however, with the High Court that it was a breach of the implied term of trust and confidence for Mr Cook not to have told the company of his "settled intention" to work for a competitor. As MSHK had been aware of this breach before he went off sick, it had had to decide what to do about it and it clearly decided to affirm the contract.

[\[Back to contents \]](#)

Heptonstalls have created a very useful summary to guide you through the key points of current employment legislation. This covers key qualifying periods and limits including a schedule of forthcoming changes.

To obtain your own **FREE** copy e-mail Sarah.Leddy@Heptonstalls.co.uk putting "**FREE Summary**" in the subject box

IN BRIEF

The Government recently announced that it was bringing forward a review of the default retirement age (DRA) from 2011 to 2010, which was introduced when the Employment Equality (Age) Regulations came into effect in October 2006. It is now asking for evidence to inform that review.

The review will be conducted jointly by the Department for Business, Innovation and Skills and the Department for Work and Pensions and will consider whether the default retirement age of 65 remains appropriate and necessary.

As part of the review, it has commissioned a major research project – the Survey of Employers' Policies, Practices and Preferences relating to age – which, it says, will provide an insight into employers' age based practices, in particular the use of the default retirement age.

However, because it wants to take into account the broadest possible range of evidence to inform the review, the Government is asking all stakeholders and interested individuals to now submit evidence in the following broad areas:

- The operation of the default retirement age in practice
- The reasons that businesses use mandatory retirement ages
- The impacts on businesses, individuals and the economy of raising or removing the default retirement age
- The experience of businesses operating without a default retirement age
- Ways in which the costs of raising or removing the DRA could be mitigated and benefits realised.

The closing date for submissions is 1 February 2010.

For more: [Click Here](#)

[\[Back to contents \]](#)

Offices

7-15 Gladstone Terrace, Goole, East Yorkshire, DN14 5AH Telephone: 01405 765661 Fax: 01405 764201	1 Vicar Lane, Howden, East Yorkshire, DN14 7BP Tel: 01430 430209 Fax: 01430 432101	9-11 Ropergate End Pontefract, West Yorkshire, WF8 1JU Tel: 01977 602804 Fax: 01977 602805	72 Mary Street, Scunthorpe, North Lincolnshire, DN15 6LA Tel: 01724 289959 Fax: 01724 289965
-------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------

Disclaimer: This newsletter is a summary of legal issues not intended to provide specific legal advice nor intended to be comprehensive. If advice is required please contact your solicitor. This transmission is intended solely for the addressee (s) and is confidential. If you are not the named addressee, or if the message has been addressed to you in error, you must not read, disclose, reproduce, distribute or use this transmission. Delivery of this message to any person other than the named addressee is not intended in any way to waive confidentiality. If you received this transmission in error please contact the sender or delete the message.

List Maintenance To unsubscribe from our update e-mail sarah.leddy@heptonstalls.co.uk

Heptonstalls have created a very useful summary to guide you through the key points of current employment legislation. This covers key qualifying periods and limits including a schedule of forthcoming changes.

To obtain your own **FREE** copy e-mail Sarah.Leddy@Heptonstalls.co.uk putting "FREE Summary" in the subject box