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

UPDATE OF WORKING TIME

REGULATIONS The 1998 Working Time Regulations were introduced for health and safety reasons. This update looks at the most significant case law relating to one important provision - paid holiday entitlement. [[more...](#)]

SWAP SHOP The Disability Discrimination Act gives examples of "steps" that employers can take to comply with the duty to make reasonable adjustments. We look at a case which said that swapping the jobs of two postholders or creating a new post could be a reasonable adjustment. [[more...](#)]

CONSEQUENCES OF DISMISSAL When deciding whether a dismissal has been fair, tribunals have to consider whether the employer acted reasonably or not. We look at a case which said that tribunals must take into account the seriousness of the consequences of dismissal for the employee. [[more...](#)]

IN BRIEF The Government announced recently that it will limit the number of workers entering the UK from outside Europe. [[more...](#)]

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UPDATE OF WORKING TIME REGULATIONS

The aim of the Working Time Regulations (WTR), introduced in 1998, was to improve health and safety at work by introducing minimum rules relating to rest periods, hours and holidays.

Although the regulations restrict the average number of hours that a worker can work over a specified period of time (among other things), the UK exercised its right to opt out from that provision and continues to do so. The coalition government recently pledged to do all it could to limit the application of the Working Time Directive in the UK.

This update looks at the most significant case law relating to one important provision of the WTR - paid holiday entitlement.

Are employees entitled to holiday pay when off sick?

The European Court of Justice (ECJ) said in **Commissioners of Inland Revenue v Stringer** that workers are entitled to their statutory holiday entitlement, even if they are off sick because it is a fundamental social right.

Workers therefore do not lose their right to paid annual leave at the end of the leave year if they had been off sick for the whole or part of the leave year and lost their job at the end of it, if their incapacity was the reason for losing their job.

And if the worker's employment does come to an end, the ECJ said that they were still entitled to an allowance in lieu of the leave that they could not take (paid at their normal salary) and employers must ignore sickness absence when calculating what they are owed.

The UK Supreme Court has now said that workers who are denied holiday pay can pursue a tribunal claim for unauthorised deductions from wages under the Employment Rights Act 1996 as well as under the Working Time Regulations.

Is rolled-up holiday pay lawful?

The ECJ said in the conjoined case of **Caulfield v Hanson Clay Products Ltd; Clarke v Frank Staddon Ltd**; and **Robinson-Steele v RD Retail Services Ltd** that rolled-up holiday pay is unlawful.

However, it also said that employers can make part payments staggered over the year along with payments for work already done, so long as it's obvious that that is what they are doing. The issue of transparency is therefore key when deciding whether rolled-up holiday pay is lawful.

Take the case of **Lyddon v Englefield Brickwork Ltd** as a good example of how this is playing out in practice. The Employment Appeal Tribunal (EAT) said that it was lawful for Mr Lyddon's employers to include holiday pay within his daily rate because he was told at

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the outset that's what would happen; there was a system in place for calculating holiday pay through a computer programme; and his pay packet showed the amount of his basic wage and that holiday pay had been added.

Can statutory holiday entitlement be carried over?

Not unless the person was on sick leave in which case employers must allow the worker to take their annual leave at another time, if that's what they want to do (**Pereda v Madrid Movilidad SA**). The regulations do not allow carry over of holiday in any other circumstances.

However, employers can agree something different with their workforce for any contractual leave over and above the statutory limit to which they are entitled.

What notice do workers have to give for holidays?

Employers and workers can agree how and when to give notice of when leave is to be taken, but if they don't a worker must give notice that is at least twice the period of the leave to be taken.

Employers can, however, require workers to take their annual leave on particular days, as long as they give them notice. In **Sumsion v BBC Scotland**, the EAT held that there was nothing in the regulations restricting the days that employers could nominate as leave days.

And according to the decision by the EAT in **Lyons v Mitie Security Ltd**, workers can lose their entitlement if they ask to go on holiday too near the end of the year and cannot give the requisite notice, as long as the notice provisions have not been imposed in an unreasonable or arbitrary way.

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SWAP SHOP

Section 18B of the 1995 Disability Discrimination Act (DDA) gives examples of “steps” that employers can take to comply with the duty to make reasonable adjustments, including “transferring [the disabled person] to an existing vacancy”. In **Chief Constable of South Yorkshire Police v Jelic**, the Employment Appeal Tribunal (EAT) said that swapping the jobs of two postholders or creating a new post could be a reasonable adjustment.

What happened?

Following a number of stress-related absences between 2002 and 2004, Constable Jelic was assigned work in the “non-confrontational environment” of the Community Service Desk. This was then amalgamated with other units to form the Safer Neighbourhood Unit (SNU) where his work (which was mainly administrative) was generally held in high regard. In June 2007 the occupational health advisor wrote a medical report stating that his condition - Chronic Anxiety Syndrome - was likely to have become permanent.

The Disability Liaison Advisor then said that as SNU officers were now required to deal directly with the public, PC Jelic was not fulfilling the requirements of that role. She suggested that, given his status, he should undergo the Unsatisfactory Performance Procedure; be placed elsewhere in the organisation; or be retired on medical grounds. He ended up being retired on medical grounds in May 2008.

PC Jelic claimed disability discrimination, arguing that his disability had been caused as a result of his employment and that the force could easily have made a reasonable adjustment to accommodate it. And the tribunal agreed. It said the force was clearly under a duty to make reasonable adjustments to accommodate his disability and to consider the matter objectively. The tribunal accepted that it would not have been reasonable to expect the force to keep him in his current position in the SNU, given the changing nature of the role. However, there was no reason why it could not have done a job “swap” between PC Jelic and another constable - PC Franklin - who was capable of doing PC Jelic’s job.

The third and final reasonable adjustment it could have carried out would have been to offer PC Jelic medical retirement, followed by a civilian job. The EAT essentially upheld the tribunal decision. It said there was nothing in section 18B that stopped tribunals from deciding that creating a new job for a disabled employee was a reasonable adjustment, if the particular facts of the case supported the finding. Nor was there any bar under section 18B against swapping postholders within an organisation. The list, said the EAT, was “illustrative” as opposed to “exhaustive” of the steps that an employer might take.

As the force had failed to consider either of these reasonable adjustments, the tribunal was right to decide that it had discriminated against PC Jelic on the ground of his disability. Finally, it found that the failure to re-hire him to do a civilian job after his medical retirement could also be a failure to make a reasonable adjustment, but as the tribunal had not fully explained its reasons for this finding, the EAT remitted the issue to another tribunal.

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CONSEQUENCES OF DISMISSAL

When deciding whether a dismissal has been fair, tribunals have to consider whether, in the circumstances, the employer acted reasonably or unreasonably. In **Salford Royal NHS Foundation Trust v Roldan**, the Court of Appeal said that tribunals must take into account the seriousness of the consequences of dismissal for the employee.

What happened?

Ms Roldan, a Filipino, was an experienced nurse employed in the hospital's high dependency unit. On 22 September 2007 a newly-recruited health care assistant, Ms Denton, complained that she had ill-treated a patient. After a disciplinary hearing in October, Ms Roldan was summarily dismissed for gross misconduct.

She appealed in January 2008, accepting that some of the criticisms had been valid but rejecting others. However, the appeal body chose to believe the evidence of Ms Denton and confirmed her dismissal. The consequences were far-reaching for Ms Roldan as not only did she lose her job, but also her work permit and the right to remain in the UK. She was also subject to a criminal investigation by the police.

The tribunal agreed with her that she had been unfairly dismissed because the investigation carried out by the Trust had been inadequate and she had not been given all the details of the allegations against her in that an earlier incident (which Ms Roldan could not recall) had been taken into account. It said that, in cases like this, there was an onus on the Trust to be "particularly even handed and fair in the way they conducted the investigation" because the consequences for Ms Roldan were so serious, including potential criminal charges and deportation. The Trust appealed to the EAT and won. As a result the case was remitted for a fresh hearing, but Ms Roldan then appealed to the Court of Appeal against that decision.

The Court of Appeal said the tribunal had directed itself correctly in accordance with the principles established in **Burchell v British Home Stores** and that appeal tribunals should not interfere with the original decision unless there was real evidence for it, or unless the tribunal's conclusion had been perverse.

As the law required tribunals to consider whether the investigation carried out by the employer was reasonable "in all the circumstances of the case", that had to include the consequences of dismissal. In this case, that included the fact that Ms Roldan's career would be blighted and that she would be deported. As a result, the Trust should have carried out a more thorough investigation and in particular, as there was a conflict of evidence between Ms Roldan and Ms Denton, it should have done more to test the evidence against Ms Roldan where possible.

The Court noted that the when there are "diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other", employers do not have to "believe one employee and to disbelieve another". In those circumstances "it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other". [[Back to contents](#)]

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IN BRIEF

The Government announced recently that it will limit the number of workers entering the UK from outside Europe so that net migration goes back to the levels of the 1990s when tens (rather than hundreds) of thousands of workers entered Britain.

It has also said that it will initiate a 12-week consultation period with businesses to decide how to reach the new limit. In the meantime it has announced that it will introduce an interim limit (with effect from 19 July 2010) to avoid a rush of applications and also to ensure that the number of work visas issued stays below 2009 levels.

The results of the consultation on the permanent limit will pave the way for fundamental changes to the way in which workers from outside the EU will be chosen to come and work in the UK, according to the Government.

The Home Secretary, Theresa May, has also asked the Migration Advisory Committee, the Government's independent adviser on migration issues, to launch a separate consultation into what level the limit should be set at, taking into account social and economic impacts.

And she said that the Government will also introduce measures to support British businesses. "Alongside limits will be action to get Britain back to work and provide business with the skills they need from the resident workforce - reducing the need for migrants at the same time as we reduce their number."

The Government's consultation will run until the middle of September. Permanent limits on non-EU economic migration routes will then be decided and put in place by 1 April 2011.

The interim measures include:

- capping the number of Tier One migrants at current levels and raising the number of points needed by non-EU workers who come to do highly skilled jobs from 95 to 100, and
- limiting the number of certificates of sponsorship that licensed employers can issue to those who wish to come to fill skilled job vacancies, reducing the number of people entering through Tier Two by 1,300.

To access the consultation document, go to:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/limits-on-non-eu-migration/>

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