

News, Legislation & Future Developments	Action Points
<p>Statutory Redundancy Payments – following the April 2009 Budget, the Government has confirmed that the planned increase in the weekly limit used to calculate statutory redundancy payments will take effect from 1 October 2009. The current weekly limit of £350 will rise to £380. This limit is usually reviewed and increased in February each year, but the Government has also stated that there will be no rise in February 2010 and the new limit of £380 will therefore be effective until February 2011.</p>	<p>Review & amend redundancy policies to reflect the new limit. Be aware that employees who are currently in a consultation period or on garden leave may be entitled to the increased payment where their termination date is on or after 1 October 2009.</p>
<p>Sickness Absence – the Government has commenced consultation regarding a new “fit note” to replace the current doctors’ sick notes which employees are required to obtain once they have been off work sick for more than 7 days. Under the proposals, doctors will be able to indicate that someone may be fit to undertake “some work”, and may also record information about any potential changes to the employee’s work environment or job role which could facilitate a return to work. However, employers will not be under any obligation to implement the doctor’s suggestions.</p>	<p>Watch out for future developments once the consultation period has closed on 19 August 2009.</p>
New Law	Action Points
<p>Transfer of Undertakings – The EAT held that a “common sense and pragmatic approach is required” when deciding whether a service provision change had taken place for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”). In this case, contractors had taken over the provision of services to asylum seekers but provided the services in a new way and at a new site. The EAT held that there was a TUPE transfer in this case and that the fundamental question for the tribunal was “whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor” <i>Metropolitan Resources v Martin Cambridge & others</i> UKEAT/0286/08/RN</p>	<p>Be aware that minor differences in the service before or after the transfer will not preclude the transfer from being a service provision change under TUPE. However, in this case the only two different factors were the location and the number of beds offered to asylum seekers, and so it is not yet clear how far the service must differ before TUPE ceases to apply.</p>
<p>Age Discrimination and Redundancy – the Court of Appeal has held that the use of length of service as part of the selection criteria in a redundancy exercise was technically age discrimination, but that as it constituted a proportionate means of achieving a legitimate aim, namely to reward loyalty and create a stable workforce, it was not unlawful. Rolls Royce had entered into collective agreements with the union providing for redundancy selection based on a point system, which included the provision of one point per year of continuous service. The Court of Appeal held that it was proportionate to use length of service in this manner because it was only one of many other selection criteria used, and it was not determinative of the selection. <i>Rolls Royce plc v Unite the Union</i> [2009] EWCA Civ 387</p>	<p>Care should be taken in relying on this case to justify using length of service in a redundancy selection exercise. In this case, particular consideration was given to the fact that length of service was only one of many other factors, and that the criteria had been agreed with the union. Employers are advised to review redundancy selection criteria to remove potentially discriminatory elements.</p>

National Minimum Wage – the Court of Appeal has held that tips distributed through a “tronc” system do not count towards the national minimum wage. The Respondent’s policy provided for tips to be collected by a “tronc master” and then distributed to staff on a weekly basis to top up their basic pay. The Court of Appeal held that the allocation of a tip was not a payment by the employer and therefore could not be included for the purposes of the national minimum wage where the money must be “paid by the employer to the worker”.

Commissioners for Her Majesty’s Revenue and Customs v Annabel’s (Berkeley Square Ltd) and others [2009] EWCA Civ 361

Following the decision of the EAT in this case, the Government announced that legislation to prevent tips being used to top up basic pay to the national minimum wage will be implemented before 1 October 2009 regardless of whether an employer’s method of paying those monies to their workers amounts to them being “paid by the employer”.

Compromise Agreements – The High Court has held that a compromise agreement between an NHS Trust and its Chief Executive was unenforceable because the Trust was acting outside of its powers. The National Health Service Act 2006 provides that NHS Trusts must exercise their functions “effectively, efficiently and economically”. Ms Gibb was dismissed following a serious outbreak of C.difficile at hospitals managed by the Trust. A compromise agreement was entered into under which Ms Gibb was due to be paid a compensation payment of £250,000 which included payment in respect of her notice period. The Judge held that the maximum compensation Ms Gibb would have been able to recover was approximately £145,000 representing her notice pay and the then maximum unfair dismissal award. The Judge held that the payment was therefore “irrationally generous” and that the Trust had acted outside its powers.

Gibb v Maidstone and Tunbridge Wells NHS Trust [2009] EWHC 862

Public sector employers should always consider the scope of their power when entering into a compromise agreement with senior employees which provide for generous severance payments. Private sector employers should also take care, particularly in light of the recent backlash against financial packages paid to senior managers in failing business in the financial sector, and the Government’s involvement in some large financial institutions.

Recruitment – The High Court held that a senior employee had not made fraudulent or negligent misrepresentations in failing to mention a history of stress and depression in a pre-employment medical questionnaire. The Court held that the Claimant had not given false answers in the medical questionnaire and that the answers were not, in the context of the questions asked, misleading.

Cheltenham Borough Council v Laird [2009] EWHC 1253

It was common ground in this case that the medical questionnaire was poorly drafted. It is therefore important that medical questionnaires are drafted clearly and widely to obtain as much relevant information as possible from the individual.

© Archon Solicitors LLP 2009

Telephone +44 (0) 20 7397 9650

www.archonlaw.co.uk

Partners: Nick Ralph, Rob McCreath, Corinne Aldridge,
Jill Scott, James Williams