

Retail People

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Issue 1

Holiday - the employment law aspects

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1 Comment

Welcome to the first edition of *Retail People*, our bi-annual newsletter geared specifically to the retail industry. In each edition of *Retail People* we intend to focus on a particular issue of interest to retailers. In this edition we look at the employment law aspects of holiday and holiday pay. In particular, we look at the issues surrounding Christmas trading and report on the latest position on rolled-up holiday pay. But first, a general round-up of recent developments in employment law.

Maternity leave and flexible working

The DTI has published a consultation paper entitled "Work and Families: choice and flexibility" on its proposals for longer statutory paid maternity leave (from six months to nine months by April 2007) and for an extension of the right to request flexible working to carers of adults and parents of older children. The DTI also proposes to introduce a new right for mothers to transfer a proportion of their maternity leave and pay to fathers to give parents more choice when caring for their children. The consultation paper is available on the DTI website (see <http://www.dti.gov.uk/workandfamilies>). The consultation period closes on 25 May 2005.

Calculating maternity pay

The Statutory Maternity Pay (General) (Amendment) Regulations 2005, which came into force on 6 April 2005, change the rules for calculating maternity pay.

The level of a woman's maternity pay is calculated on the basis of her average earnings, and to establish her average earnings a specific "reference period" is looked at. This period is the eight-week period leading up to the 14th week before the expected week of childbirth.

Until now, if a woman received a pay increase after the end of the reference period, the increase would not be included in the calculation of her average pay, and therefore would not be reflected in her maternity pay, unless backdated to apply to the reference period.

The new regulations provide that a woman should get the benefit of a pay rise which takes effect (or would have done so had she not been absent on maternity leave) at any time from the beginning of the reference period to the end of maternity leave.

So from now on, whenever an employer implements a pay rise, it should analyse the effect of that pay rise on every woman who is pregnant and working during the reference period, or on maternity leave. There may well be cases where maternity pay must be recalculated.

National Minimum Wage

The DTI has announced that the National Minimum Wage will increase from £4.85 per hour to £5.05 per hour with effect from October 2005. It will then increase to £5.35 per hour from October 2006.

The National Minimum Wage for young workers (i.e. 18 – 21 year olds) will increase from £4.25 per hour in October 2005. There will be a further increase to £4.45 per hour in October 2006.



Information and consultation

The Information and Consultation of Employee Regulations 2004 came into force on 6 April 2005. The Regulations give employees the right to request that their employer negotiates an information and consultation agreement with them setting out the circumstances in which they will be informed and consulted by their employer. The Regulations will initially apply to undertakings with 150 or more employees, but by April 2008 will apply to all undertakings with 50 or more employees.

If you would like to know more about the Information and Consultation Regulations, please contact Erica Neustadt (erica.neustadt@ffw.com) and request a copy of our briefing note.



2 Christmas trading

Christmas comes but once a year, and each time it does, employment law has developed new complexities that need to be considered when administering retail staffing. We know it's only April, but the planning needs to start now.

In this article we consider the following issues:

- drafting contracts for fixed-term employees hired to cover the Christmas rush
- embargoes on taking holiday during the build-up to Christmas and potential religious discrimination pitfalls

Christmas Day trading

The Sunday Trading Act 1994 prohibits large shops (i.e. more than 280 square metres or 3,000 square feet) from opening on Easter Sunday and on Christmas Day, when it falls on a Sunday. The Christmas Day (Trading) Act 2004, which came into force on 9 December 2004, extends this prohibition to prevent such shops from opening on Christmas Day whichever day of the week it falls.

Drafting contracts for fixed-term employees hired to cover the Christmas period

Christmas Day is a public holiday in England and Wales. However, employees have no automatic right to holiday, with or without pay, on that day. Most employees do, in fact, receive paid leave, either as a result of a contractual term or through custom and practice in their industry.

Retailers face the busiest time of the year in the build-up to Christmas, and many stores take on additional staff to deal with the extra work. Such seasonal workers are generally employed on fixed-term contracts.

Since larger shops are prevented from opening on Christmas Day, are they within their rights to draft fixed-term contracts which exclude the right to payment for that day?

The answer depends on the terms of employment for the permanent workforce. If permanent employees have the right to paid leave for Christmas Day, the Christmas recruits may have a claim under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("Fixed-term Employee Regulations"), if they do not have a similar right.

Under the Fixed-term Employee Regulations, fixed-term employees have two rights against their employer: the right not to be treated less favourably than comparable permanent employees with respect to the terms of their contracts of employment, and the right not to be subjected to any other detriment.

When assessing less favourable treatment, a global rather than a term-by-term comparison is made between fixed-term and permanent employees' contracts, to establish whether, over all, the fixed-term employees are worse off.

These rights only protect against less favourable treatment suffered because of employees' fixed-term status, or where such treatment cannot be objectively justified by the employer.

Guidance to the regulations states that less favourable treatment will be objectively justified if it can be shown that the less favourable treatment is:

- intended to achieve a legitimate aim (such as a genuine business objective),
- necessary to achieve it, and
- appropriate.

So, is failure to give fixed-term employees a day's paid leave for Christmas a breach of the Fixed-term Employee Regulations?

If their permanent comparators receive a day's paid leave, it would appear to be less favourable treatment on the ground of fixed-term working.

Is there any objective justification?

There are two potential justifications here: first, that large shops are prevented from opening on Christmas Day, and therefore do not have any work that they are able to give to the employees. Second, that it saves money not to pay fixed-term workers for a day when the employer knows they will not work.

Whilst retailers may try to show that shutting the store on Christmas Day to comply with the Christmas Day trading laws is objective justification, this defence is undermined



if permanent contracts allow payment for Christmas Day. (In other words, shutting is acceptable, non-payment is probably not).

It would also be hard for retailers to argue successfully that it is objectively justifiable to save money by not giving fixed-term workers paid leave on Christmas Day, if individuals working under permanent contracts do get paid leave. This argument is even less likely to succeed in the context of the industry's increased profits and turnover during this period.

If it can be shown that more women than men take fixed-term work over Christmas, then retailers could face claims of sex discrimination too.

What about insisting that fixed-term employees take a day's contractual leave on Christmas Day? Again, the arguments set out above are relevant; if permanent staff are not forced to do so, it will be risky to impose this on fixed-term employees.

Holiday embargoes

Because Christmas is one of the busiest times of the year for retailers, many retailers put an embargo on taking leave, generally covering November and December. However, during the period of November and December, there are several religious holidays which affect all the major religions represented in this country. What is the position of employees who wish to take time off for religious festivals that fall during this peak trading period? What about those who might wish to make a pilgrimage, such as a Hajj?

Anti-discrimination legislation

The Employment Equality (Religion or Belief) Regulations 2003 make it unlawful to discriminate against anyone on the basis of any religion, belief or similar philosophical belief, in all facets of employment. The Race Relations Act 1976 makes discrimination on the grounds of race unlawful.

Under this legislation, an individual may complain, amongst other things, of direct or indirect discrimination. Direct discrimination occurs where someone is treated less favourably on the grounds of race, religion or belief. Indirect discrimination occurs where a provision, criterion or practice is imposed on all employees, and therefore it might appear that all individuals are being treated the same, whereas in fact the provision, criterion or practice impacts disproportionately and adversely on one group.

Indirect discrimination?

An embargo on leave is a practice that affects the workforce without regard to ethnic or religious

background. Therefore, it is not a directly discriminatory policy. It will, however, impact more on some groups than on others, where religious holidays fall within the embargoed period. This year for example, Muslim, Hindu, Jain and Baha'i holidays fall between the beginning of November and Christmas. If people are refused leave to celebrate such holidays, this may amount to indirect discrimination.

The legislation also protects individuals against discrimination in access to employment. Therefore, if someone applies for a short-term contract to work over Christmas, but is unsuccessful because they say they will want to take leave to observe a religious holiday, this too may give rise to a claim.

What if someone asks for leave, during the embargoed period, to go on a religious pilgrimage, such as a Hajj? If the recent case of *Khan v Spencer Group plc* is followed, it may well amount to indirect discrimination to deny such a request at any time of the year.

In *Khan*, Mr Khan wanted to make a pilgrimage to Mecca. He requested six weeks' leave (five weeks' annual leave, and one week's unpaid leave) to do so. He received no answer from his employer, so, on the advice of his union he submitted a further, written request. He still received no reply, but his manager told him that he could assume that he could go.

On his return, Mr Khan was suspended without pay pending an investigation into unauthorised absence and subsequently sacked for gross misconduct. His claims to tribunal for unfair dismissal and indirect discrimination on the basis of religion or belief were successful. Whilst this case must be treated with a certain amount of care, as the employer was in liquidation and did not appear in court or put in a defence, it nevertheless provides a precedent for the application of the religious discrimination legislation.

So, on the one hand, there is the possibility of claims of indirect discrimination by employees, and on the other, retailers want to staff their stores adequately to meet increased demand. It is clearly not enough to suggest that retailers should recruit more temporary staff; such staff are typically quite inexperienced and retailers need more of their permanent staff to be there to ensure a smooth operation, not simply more bodies.

How can employers' and employees' needs be reconciled in this case? We recommend that retailers should deal with requests for leave for religious holidays as sympathetically and flexibly as possible. It is also useful to formulate a policy that fully explains the need for an embargo, and sets out how requests for holiday during that period will be handled.



If an employer does face a claim of indirect race or religious discrimination for refusing a request for leave, it may run the defence of 'objective justification'. However, it would have to show that the embargo is a proportionate means of achieving the legitimate aim of meeting high pre-Christmas consumer demand. Having

a clear and publicised policy in place, as suggested above, will increase the chances of successfully defending a claim. A schedule showing monthly turnover and staffing needs peaking during November/December will also be helpful in demonstrating objective justification in any legal proceedings.

3 Rolled-up holiday pay

Rolled-up holiday pay has proved to be one of the most controversial issues under the Working Time Regulations 1998. In this article we look at the issue of rolled-up holiday pay, and in particular the recent guidance issued by the Employment Appeal Tribunal, and assess whether the practice of rolling up a worker's holiday pay as part of their hourly or daily rate of pay can benefit your organisation.

Rolled-up holiday pay

The Working Time Regulations 1998 provide workers with the right to 4 weeks' holiday each year with pay.

The Regulations apply to "workers", which has a wider meaning than "employees", but not so wide as to include the genuinely self-employed.

Usually, it is relatively straightforward to calculate a worker's annual holiday entitlement. However, it can be difficult to calculate their holiday pay, particularly where a worker has no normal hours of work.

If a worker's normal hours of work vary from week to week, or there are no normal hours of work and a worker is paid according to the number of hours worked, then the worker's holiday pay will be calculated by reference to the number of hours worked over the 12 weeks leading up to the worker's holiday. The worker's holiday pay can therefore vary depending upon when the worker takes his or her holiday. For example, a worker whose workload varies during the course of the year will receive a higher rate of pay in respect of holiday if he or she takes holiday at the end of a particularly busy period when his or her average earnings are higher.

Calculating a worker's holiday pay can be a time-consuming exercise for HR and Administration managers. It also requires accurate records to be kept of the hours that the worker has worked in the previous 12 weeks. However, a way around this is to "roll-up" a worker's holiday pay as part of their hourly or daily rate of pay.

An employer rolls up a worker's holiday pay where, rather than continuing to pay the worker during their holiday, the employer spreads out the worker's holiday

pay across the time the worker actually works, adding it to the worker's normal salary. As a result the employee gets paid an amount in respect of holiday pay each pay day instead of at the time that the holiday is taken.



Guidance

This practice has been challenged in the Employment Tribunals. In 2003, the Employment Appeal Tribunal (EAT) issued guidance on the circumstances in which rolled-up holiday pay may be lawful under the Working Time Regulations. This guidance was clarified earlier this year by the EAT.

According to the EAT, in order for rolled-up holiday pay to be lawful under the Working Time Regulations:

- there must be agreement between the employer and the employee to roll up holiday pay; and
- the employer must be able to show that the rolled-up holiday pay is additional to the employee's



contractual rate of pay for time worked.

The EAT suggests that the best way to show this is by:

- incorporating the provision for rolled-up holiday pay into the contract of employment (although rolled-up holiday pay need not necessarily be set out in the contract of employment, but can also be incorporated by a collective agreement or through custom and practice);
- identifying the percentage or amount allocated to holiday pay (or particulars sufficient to enable it to be calculated) in the contract, and preferably also in the pay-slip; and
- keeping records of holidays taken (or of absences from work when holidays are deemed to have been taken) and for reasonable practical steps to be taken to ensure that workers take their holiday before the end of the relevant holiday year.

Possible benefits

Rolling up holiday pay as part of an employee's hourly or daily rate of pay can be advantageous for retailers, particularly if a retailer employs casual workers or employees whose hours vary from week to week, as it can save the retailer the time-consuming task of trying to calculate their holiday pay when they actually take holiday. It can also be advantageous for workers as their holiday pay is paid on an accruing basis in advance, which, as the EAT pointed out, enables sums to be saved, or invested, or even paid by way of a deposit in advance of a holiday.

Practical considerations

If a retailer currently rolls-up holiday pay, or decides to roll-up holiday pay at some point in the future, then the retailer should make sure that you include a provision for rolled-up holiday pay in the contract of employment, and set out clearly in the contract the percentage or amount allocated to holiday pay.

Rolled-up holiday pay is often expressed as an additional 8% of the employee's basic rate of pay, as this equates to roughly the same percentage of working days that an employee is entitled to take off as holiday each year under the Working Time Regulations. However, there is no set rule on what the percentage should be.

Note that if your organisation pays employees the National Minimum Wage, then the amount allocated to holiday pay should be calculated as an additional payment, i.e. on top the National Minimum Wage.

Finally, a word of warning. Although the EAT has held that rolled-up holiday pay is lawful under the Working Time Regulations, questions as to whether this practice

is compatible with the Working Time Directive have been referred to the European Court of Justice (ECJ) for a decision, and so the guidance set out above is subject to any change in law which results from this reference to the ECJ.

It is also important to note that, until clarification is received from the ECJ, the position in Scotland is different to that referred to above. Unlike England and Wales, in Scotland a provision in a contract of employment which provides for rolled-up holiday was found by the Court of Sessions to be unlawful under the Working Time Regulations. This means that, if you do roll-up holiday pay, you must limit this practice to employees working in England and Wales, and must not apply it to those working in Scotland.



4 Q & A: Holiday and holiday pay

In this section of the newsletter we answer the questions raised by you on a particular subject. Since this is the first edition of *Retail People*, we have answered some of the questions that our retail clients have raised in recent months regarding holiday and holiday pay. In the next edition of *Retail People* we will be looking at theft dismissals and the employment law implications of stop and search policies. We invite you to contact us with your questions on that subject.

Q. Can we refuse an employee's request to take holiday during peak trading periods, such as during the lead up to Christmas?

Possibly. First, see whether there is a contractual right to refuse such requests. If not, the Working Time Regulations 1998 set out notice provisions relating to taking annual leave. The Working Time Regulations oblige employees to give notice that they wish to take leave. That notice must be twice as long as the amount of leave required.

Check whether leave has been validly requested. If it has not, then it may be refused. Even if it has, the employer has the right to serve refusal on the employee. This refusal must also be served within the timeframe set out in the Working Time Regulations.

Whilst taking the above action will be in accordance with an employee's contract, and the Working Time Regulations, we would refer you to our article on Christmas trading, and holiday embargoes. You must also bear in mind that workers are entitled to taking four weeks' leave at some point during the leave year.

Q. Do workers who are absent on long-term sick leave or on maternity leave, continue to accrue statutory holiday during their sickness absence?

Yes. There is no requirement under the Working Time Regulations that some work needs to be done or that attendance at work is a prerequisite for a worker to claim four weeks' paid holiday entitlement. The only requirement is that workers must give their employers notice that they intend to take holiday in order to receive holiday pay.

Consequently, any worker off sick or on maternity leave is entitled to receive holiday pay during their absence (if they give their employer notice), even though they may have exhausted any entitlement to pay. It also means that, on termination of employment, workers can claim a payment in lieu of any unused statutory holiday, which will have accrued during sick leave.

It is important to remember though that this only relates to statutory holiday entitlement. Employers may provide

in the contract of employment that additional contractual holiday does not accrue during sick leave.

Q. Do we have to pay employees for accrued but untaken holiday entitlement on the termination of their employment if they have been dismissed for gross misconduct?

Yes. Employees are entitled under the Working Time Regulations to receive payment in lieu of any accrued but untaken holiday on the termination of their employment even if they are dismissed for gross misconduct.

However, employers may provide in the employment contract that an employee will receive a nominal sum as payment in lieu of any accrued but untaken holiday, if the employee is dismissed for gross misconduct. This sum should not amount to less than the National Minimum Wage. Employers may also provide in the contract that the employee will not receive payment in respect of any additional contractual holiday entitlement.



Your questions

The next edition of *Retail People* will come out in September 2005. Please e-mail your questions on theft dismissals to erica.neustadt@ffw.com. We can then gear our articles, and question and answer section to your concerns.

5 About us

Employment lawyers have to be fast – not just because the law is fast changing, but because employment problems in the workplace usually cannot wait. Problems that have been festering for months can come to a head when least expected. You cannot put things on hold while lawyers explore all the legal angles and prepare long letters of advice.

We react quickly and give coherent, pragmatic and appropriate advice. Whether you need immediate advice to deal with a crisis, a second opinion, assistance in drafting a letter or a detailed analysis of the issues, we have the experience and expertise to advise and guide you.

But we are not just problem solvers. We also help you avoid problems. Many disputes can be avoided by careful planning. Staff handbooks and policies should match the needs of your business and be flexible enough to cope with change. We help you stay in touch with the impact of legal developments through our value-added service of regular newsletters, e-mail alerters, seminars and workshops. We also have a dedicated employment law website www.e-employmentlaw.com.

If litigation is inevitable, we aim to minimise its financial and organisational impact. We stay with you on the case from start to finish. Regular contact with tribunals combined with knowledge of your people and business means we present your case to best effect.

We recognise that the needs of every client are different. Some clients need extensive advice on all aspects of the employment relationship; others have sophisticated human resources departments who use us as a sounding board or to undertake specific tasks such as drafting a personnel policy. We work with you to establish the best and most cost-effective approach for you. We always try to understand your business and working practices – visiting your workplace if necessary. Most importantly, we deliver on our promises.

If you would like to discuss what our Retail Employment Law Group can offer you, please contact Margaret Davis.



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