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Employment law update Winter 2014

While we have certainly seen a reduction in new legislation this year, employment law never stops changing. Two issues have dominated the employment law agenda this year: holiday pay and shared parental leave. On the cards for 2015 is further devolution of powers for Scotland and a general election, so the changes don't show any signs of stopping. In our final update for 2014 we have summarised some of the key developments in 2014 and what to look for in 2015. If you want to know more about how these developments may impact on your organisation please register for one of our Round-up events or contact a member of the team.

Holiday Pay

The saga of holiday pay may have temporarily reached a resolution in 2014. The EAT in the *Bear Scotland* case ruled that non-guaranteed overtime should be included in calculations of holiday pay. Although this was a financial blow for employers, the EAT restricted the extent to which employees can claim backdated holiday pay by creating a three-month window which may limit historic liability. None of the parties involved intends to appeal the decision. While this is helpful in some ways, it still leaves us with a great deal of uncertainty. Employers should take steps to assess the extent of any historic liability and work with their IT specialists to adjust their payroll and benefits systems to ensure that holiday pay is calculated correctly in the future.

Lock was another case that dealt with the calculation of holiday pay and in particular whether commission should be included. Following the CJEU ruling in May, the case will be heard by the Leicester Employment Tribunal in February 2015 to decide how this will work in practice. We will, of course, keep you updated on any developments.

To find out where this leaves you on all the different aspects of holiday pay, please come along to one of our Round-up events where Caspar Glyn, one of the UK's leading employment QCs, will be giving his insight into the various decisions.

Shared Parental Leave

One of the biggest employment law changes this year was the introduction of shared parental leave (SPL). Parents of babies born or adopted on or after 5 April 2015 will be eligible. SPL allows mothers to bring their maternity leave to an end after a minimum of two weeks and then opt into SPL. The parents of the child can then share the remaining 50 weeks of leave and may be entitled to Shared Parental Pay (SPP). The requirement is that parents make an SPL request at least 8 weeks before the first day of leave. This means that employers should expect requests from mid-February onwards. For more information on SPL, please see our [implementation guide](#).

We are starting to see a change in momentum with a number of large employers (including CMS) offering the same level of enhancement to parents taking SPL as they currently offer mothers taking maternity leave. Government guidance states that employers are not obliged to offer enhanced rates, yet many are choosing to do so, not purely for legal reasons but rather to be seen as an employer of choice. If enhanced SPP becomes the norm for large employers then this will have a significant impact on take up.

Parental Leave

With so many changes afoot with shared parental leave, employers may have missed the changes due to take place to *parental*

leave which are also due to come into effect in April 2015. Parental leave entitles parents to take 18 weeks unpaid leave per child. Currently, this leave must be taken before the child's 5th birthday or before a disabled child's 18th birthday. From 5 April the age limit will be removed, and all parents will be entitled to 18 weeks of leave until the child's 18th birthday. Parents of school-age children wishing to take additional time off may in the future request blocks of parental leave in addition to annual leave as a means of covering school holidays.

Tribunal fees/devolution of ETS in Scotland

The introduction of tribunal fees in July 2013 and the corresponding drastic reduction in claims has been a watershed moment in employment law. The highly anticipated government review of tribunal fees, initially promised in autumn 2014, is unlikely to take place until after the general election.

Fees have certainly been controversial. This year the High Court rejected not one but two challenges launched by Unison over the introduction of tribunal fees. In both cases the High Court held that there was not enough evidence to support Unison's claim that tribunal fees were a barrier to justice. Unison was granted permission to appeal both challenges and will seek to join the appeals and get an expedited hearing before the Court of Appeal.

Following the No vote in the Scottish independence referendum, Lord Smith of Kelvin recently published his report on devolution for Scotland, which included devolving "...all powers over the management and operation of all reserved tribunals." This would allow the Scottish government to reduce the level of tribunal fees.

Collective consultation on redundancies

In 2013, the EAT once more upset the prevailing wisdom by changing the definition of establishment by ruling in the *Woolworths*

case that where at least 20 multi-site redundancies are proposed, collective consultation requirements apply. This is despite the fact that the redundancies might be taking place in multiple geographical locations. This case was referred to the CJEU and, along with similar Northern Irish and Spanish cases, was heard on 20 November 2014. The Advocate General will publish an opinion about the case on 5 February 2015. While the Advocate General's opinion is not binding on the CJEU, it will hopefully indicate which way the court is leaning.

Refining the concept of disability discrimination

2014 saw the first EU case (*Karsten Kaltoft v. Kommunernes Landsforening*) dealing with obesity in the sphere of workplace discrimination, raising the question of whether the scope of discrimination may be extended to cover obesity. The Advocate General stated that the link between obesity and disability only applied to the severely or morbidly obese. See our [Law-Now article](#) for a further discussion of the Advocate General's opinion. On 18th December the CJEU broadly followed this opinion and held that in certain circumstances obesity can fall within the concept of disability but there is no general principle of non-discrimination on grounds of obesity as such. In another case, the Court of Appeal strongly rejected the idea that employers are obliged to make reasonable adjustments for non-disabled employees who have a relationship with a disabled person. For more details on associative disability, please see our earlier [Law-Now](#) discussing *Hainsworth v Ministry of Defence*.

Small Business, Enterprise and Employment Bill – Whistleblowing and Zero-hours

Two particularly interesting changes due to be made by the Small Business, Enterprise and Employment Bill 2014 -15 involve amendments to the laws surrounding whistleblowing and zero-hours contracts. As part of the call for

evidence on whistleblowing, the Bill establishes that prescribed persons will be required to produce annual reports of the disclosures made to them by whistleblowers on an anonymous basis. (See our [Law-Now article](#) from July 2014 where we discuss the government's intentions and reasoning behind the proposed changes.)

In addition, one of the most public changes that will come about next year as a result of the Bill is the improved regulation of zero-hours contracts (due to commence in October 2015). The second reading of the Bill took place on 2nd December where it was decided that the government will prohibit employers from restricting zero-hours workers from working for other businesses. (See our [Law-Now article](#) from June 2014 which discusses the debate surrounding this hot topic.)

Fit for Work Service

The new government-funded Fit for Work Service (previously known as the Health and Work Service), which will provide occupational health assessments and assist employees to return to work after an absence of 4 weeks or more, is expected to be fully operational by May 2015. The Service is designed to complement existing occupational health services, but will inevitably involve training for HR and OH managers who deal with sickness absence. Of particular interest to employers is the £500 tax break which will be available to assist employers to implement a recommendation made by the Service.

Election manifestos

With the General Election scheduled for 7 May 2015, a number of employment law reforms have been proposed by all the main political parties. To find out more about how the political landscape may affect employment law, register for one of our Round-up events. Some of the issues we will be discussing include: The Labour Party's plans to reform the employment tribunal system to ensure the cost

of bringing a claim does not deter potential claimants, The Liberal Democrats' proposals to increase paternity leave from two to six weeks and The Conservative Party's plans to pass a British Bill of Rights to potentially replace the Human Rights Act 1998.

What to look out for

A few cases to keep an eye on in the upcoming months include *Woodhouse v West North West Homes Leeds Limited* and *Griffiths v Secretary of State for Work and Pensions*. In *Woodhouse*, the EAT ruled that the dismissal of an employee who brought repeated grievances and unfounded tribunal claims regarding complaints of race discrimination did amount to victimisation under the Equality Act 2010. The case contrasts the earlier (and altogether much more employer-friendly) case of *Martin v Devonshire Solicitors* where similar circumstances produced the opposite result. It is difficult for employers to deal with serial grievances especially if they also lead to tribunal claims and the individual remains in employment. Where this type of difficult situation arises which doesn't always fit conventional remedies, workplace mediation can help. For anyone that missed the details on our new workplace mediation service which we launched in October then please see our [website](#) and our [mediation brochure](#) for more details.

The *Griffiths* case on the other hand is certainly very helpful for employers dealing with policy triggers and disability-related absence. The claimant argued that there was a failure to make reasonable adjustments following a warning for exceeding the absence trigger despite her absences being related to her disability. The EAT said that the duty to make reasonable adjustments was not even engaged in this case because there was no substantial disadvantage to the claimant: a non-disabled employee would also have been treated in the same way. The case is expected to be heard in the Court of Appeal on 10 February 2015.

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Another decision to look out for in early 2015 is the result of the UK Government's legal challenge to the European Union CRD IV package provisions on bankers' bonuses. The provisions cap the amount of bonus that can be paid to certain "material risk takers" and allow the European Banking Authority to

identify risk takers. The provisions also require certain institutions to publicise material risk takers' salaries. The Advocate General issued an opinion on 21 November which said that the UK Government's challenge should be rejected and the action dismissed. Although this opinion is not binding, it is likely that the CJEU will follow this reasoning.

Contact us



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Invitation: Employment Round-up 2015

The CMS employment team is delighted to invite you to our Annual Round-up event for 2015 across our offices in London, Aberdeen, Edinburgh and Glasgow.

Each of our 2015 Round-ups will cover key cases and the latest legal developments, in addition to an interactive session on Shared Parental Leave and an analysis of the General Election impact on employment law. We are also delighted to announce that Caspar Glyn QC will be sharing his thoughts on recent developments in Holiday Pay.

The Round-up is free, although places are limited. Please do circulate this invitation to any of your colleagues who may be interested in attending. Please click on the relevant link below to register your interest, and we will contact you to confirm your place.

Agenda:

- Key cases and developments
- Shared Parental Leave: Practical Insights
- Manifesto Watch: The 2015 General Election - Impact on Employment Law
- Guest speaker: Caspar Glyn QC - Holiday Pay

Aberdeen: Tuesday, 27 January 2015

Registration and refreshments: 2.30pm

Seminar: 3pm - 5pm

Click [here](#) to reserve a place at our Aberdeen Round-up.

[Add to calendar](#)

Edinburgh: Wednesday, 28 January 2015

Registration and breakfast: 8.30am

Seminar: 9am - 11am

Click [here](#) to reserve a place at our Edinburgh Round-up.

[Add to calendar](#)

Glasgow: Thursday, 29 January 2015

Registration and breakfast: 8.30am

Seminar: 9am - 11am

Click [here](#) to reserve a place at our Glasgow Round-up.

[Add to calendar](#)

London: Wednesday, 4 February 2015

Registration: 4pm

Seminar: 4.30pm - 6.30pm followed by drinks

Click [here](#) to reserve a place at our London Round-up.

[Add to calendar](#)

