

# HR SUMMER UPDATES

## KEY CHANGES

### Working Time Regulation to be Revised

The Working Time Regulations (WTR) are to be amended to update them in light of case law (such as Pereda and Stringer) which has established that workers unable to take their annual leave because of sickness etc. in the current year must be able to carry it forward into the following leave year.

### Flexible Working for all by 2013?

The right to request flexible working looks as if it will be extended to all employees, possibly as soon as late 2013, according to proposals contained in Consultation on Modern Workplaces. The Government proposes various changes to make the scheme's administration more flexible and less onerous for employers.

### DEBUNKING MYTHS: OLDER WORKERS ARE MORE PRODUCTIVE NOT LESS

Findings from the study 'Productivity and Age' has shown that older workers are often more productive, even with physically demanding jobs than younger workers.

To be productive in manufacturing workers need more physical strength, dexterity and agility (which tend to decline with age) than experience and ability to work in a team (which tends to increase with age). But in the service sector, experience and the ability to work in a team are key, so the growth in productivity with age may be even greater.

In many countries, including the UK, employers often cite lower productivity among older workers as a reason to force early retirement. But the research shows that if this were true, ageing populations in many developed countries would be having a negative effect on overall productivity as the proportion of older workers increases.

This study was published in the same week as more research revealed ageism to be endemic in the workplace. Findings from home and care provider, Anchor, show that two fifths of young people aged 18-24 years

say there weren't enough jobs for older people to be in work and 14 per cent claimed older people should retire to make way for younger workers. One fifth believe the over 60s are slower and are less productive than their junior colleagues with one in 20 claiming they should be paid less because they work at a slower pace.

### QUICK LOOK AT RECENT CASE LAW

#### **Publishing company forced to pay uncontracted intern:**

The use of interns has become increasingly common and therefore this case is particularly noteworthy. In a groundbreaking case, a publishing company has been ordered to pay an intern £1,000 in damages after an employment tribunal ruled that she was classed as a worker under the law, despite having no written contract.

Former intern Keri Hudson, 21, who had worked for two months at the My Village web site last year, was awarded £913.22 in national minimum wage back pay and £111.76 in holiday pay from TPG Web Publishing Ltd.

The tribunal heard that Hudson worked for the company on a daily basis from 10am until 6pm and was personally responsible for and in charge of a team of writers. She was also responsible for training and delegating tasks, collecting briefs, scheduling articles and even hiring new interns.

Hudson said that, when the site was taken over by TPG, she was asked to stay on and work for the new firm and was assured her pay would be fixed. After five more weeks of doing so, however, she was informed that she would not now be receiving payment for the work she had carried out. As a result, she resigned and took out a grievance against the company.

The National Union of Journalists, which took her case on under the auspices of its 'cashback for interns' campaign, said that the company told her that "she was not eligible for any pay because they considered her an intern".

The tribunal disagreed, however. It ruled that Hudson was classed as a worker under the law even though she had no written contract. As a result, she was entitled to be paid at least the National Minimum Wage and holiday pay.

The NUJ's general secretary Jeremy Dear said: "Today's judgement sends a clear warning to all employers to pay their interns, abide by the law or face the consequences. It is unacceptable that full-time staff are being sacked, while unpaid interns are being exploited. This is the first case of its kind – if employers continue to break the law it will not be the last."

**Kurumuth v NHS Trust North Middlesex University Hospital** - Fair dismissal of employee with unresolved immigration status:

This was an appeal by the claimant against dismissal of unfair dismissal and breach of contract claims where the claimant's immigration status was in doubt. Appeal allowed on the breach of contract claim but other appeal dismissed.

The claimant was a health care worker, originally from Mauritius. In 1997 she was refused leave to remain in the UK but was allowed to stay pending an appeal. That appeal was not determined by the time

**JOHNSONS,** Chartered Accountants

of her appointment in 2003 but the respondent later requested further information and was dissatisfied with the claimant's response and instigated a disciplinary procedure. She was dismissed as there was no evidence that she had the right to work. In subsequent ET proceedings the dismissal was found to be automatically unfair but no compensation was awarded as she would have been dismissed in any event.

In this appeal, the claimant's principal argument was that the Tribunal ought to have decided her immigration status. The EAT rejected that submission as, although the ET had misdirected itself on the issue of the burden of proof, they must take "a non-pernickety and non-fussy approach" and the ET's analysis was consistent with the reasonableness approach. They also confirmed that there was no error of law in the ET's approach in reducing the compensation to zero.

**Martin v Devonshires Solicitors** - Dismissal of employee who raised 'false' grievances was fair:

Ms Martin began employment with Devonshires Solicitors in 2006. She raised a grievance in 2008 alleging that various partners at Devonshires were aware of her previous sex discrimination claim against her former employer and that she had been subjected to harassment and victimisation as a result. Devonshires dismissed the grievance and its appeal, concluding that it had been made in bad faith, with malevolent intent and with no basis in fact.

Soon after she raised her grievance, Ms Martin went on sick leave for stress, during which period she raised seven similar further grievances. Devonshires obtained two medical reports, one from a consultant psychiatrist and another from an occupational health consultant. These divulged that Ms Martin had a history of mental illness and suffered from a persistent depressive disorder, experiencing paranoid hallucinations during psychotic spells.

Having notified Ms Martin that her employment may be terminated due to the breakdown of mutual trust and confidence, Devonshires wrote to Ms Martin dismissing her with immediate effect. The grounds for her dismissal included the possibility of further relapse, Ms Martin's lack of awareness of her condition, the time and money spent on handling the grievances and the stress that she would suffer on facing the colleagues against which she had made the allegations on her return to work.

Ms Martin brought claims in the Tribunal against Devonshires for sex discrimination, disability discrimination, victimisation and unfair dismissal, all of which were dismissed. The Tribunal held that Devonshires would have treated other employees who made similar false allegations in the same manner, regardless of their disability, and accordingly there was no direct discrimination. The Tribunal also stated that there was no requirement for Devonshires to continue to employ Ms Martin, despite their duty to make reasonable adjustments in light of her disability, and the victimisation claim was dismissed.

The employee appealed the decision relating to her victimisation claim and unfair dismissal claim. On appeal, the EAT upheld the Tribunal's decision, finding that the circumstances surrounding the manner in which the complaint was made meant that it was "properly and genuinely separable" from the fact that Ms Martin's allegations related to discrimination. The particular features of her complaint which led to the decision to dismiss included the falseness and seriousness of the allegations, the number and frequency of the allegations, Ms Martin's refusal to accept that the allegations were false, the risk of repetition and further disruptive and unmanageable conduct as a result of her mental illness and the cost and time in having to deal with her complaints. Therefore, her claims of victimisation and unfair dismissal were dismissed.

#### TOP TIPS ON HOW TO BE PREPARED FOR AND MANAGE AN EMPLOYMENT TRIBUNAL

1. When dealing with employees ensure a paper trail of the actions you are taking exist even when you don't believe there is a major problem i.e. document meetings, confirm in writing, etc.
2. With disciplinary issues ensure that a full investigation is conducted, the hearing is fair and dismissal is only a last resort when you are sure of your facts; give the right to appeal.
3. Make sure that you have a clear written disciplinary procedure which is available to all employees.
4. If you receive an ET1 from for a Tribunal case don't delay in submitting your (ET3) response.
5. Ensure you meet all the tribunal office requirements and deadlines without fail.
6. Act professionally throughout in all communications whether written or verbal using external support where necessary.

#### SURVEY INFORMATION

##### **Company cars remain popular but costly benefit**

Company cars remain a popular benefit, with almost three-quarters of the 450 employers surveyed by XpertHR offering employees either a company car or a car allowance.

According to the company cars survey 2011: cars are a popular but costly benefit. Around seven in 10 organisations provide cars on the basis of job need, while around six in 10 offer cars as a perk to senior employees.