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HR Legal Briefing

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CASES

Maternity leave: EAT sets down guidance on the scope of an employee's right to return to the same job on return from maternity leave.

Under the Maternity and Parental Leave Regulations 1999, an employee is generally entitled to return to the "job in which she is employed before her absence".

In *Blundell v St Andrews Catholic Primary School*, the EAT set down useful guidance on what is meant by the "same" job.

The case involved a primary school teacher who, prior to going on maternity leave, was in her second year of teaching a "reception class". The school's policy was to rotate teachers every two years and, on return to work, Mrs Blundell was offered a choice between teaching year two students or taking on a floating role. Mrs Blundell chose the former option, but subsequently brought a claim against the school on the basis that this role was not the same job as teaching a reception class, and therefore infringed her rights under the Maternity and Parental Leave Regulations 1999.

The EAT held in the school's favour. The Tribunal stated that an employer has to consider three factors when deciding whether a particular post is the "same job": (1) the nature of the job, as provided by the contract of employment; (2) the capacity in which the employee is employed; and (3) the place at which the employee works.

The EAT ruled that where there is variation to the role in practice, the employer is not obliged to "freeze time at the precise moment that maternity leave is taken". Instead employers may have regard to the normal range within which variation in the

job role has previously occurred. In this circumstance the school required teachers to change classes every two years. The EAT concluded that the role teaching year two was not outside the normal range of variability that Mrs Blundell could reasonably have expected, and was therefore the same job. However, the EAT held that the school's failure to ask Mrs Blundell which class she would prefer to teach, in circumstances where it had asked teachers not on maternity leave for their preference, was discrimination under the Sex Discrimination Act 1975.

What do employers need to consider?
The positive message for employers is that if an employee has a fairly generic job description and/or, in practice there has been some flexibility as to the role performed, it is more likely that it will be arguable that the employee has returned to the "same job" even if in fact there are differences.

Fair dismissal of employees for stress-related illness.

In *McAdie v Royal Bank of Scotland*, the Court of Appeal upheld the EAT's ruling that an employer can fairly dismiss an employee on the grounds of incapability caused by a stress-related illness even where that illness is caused in part by the acts or omissions of the employer.

Mrs McAdie had worked with RBS for several years when she was moved to a different branch. She was unhappy about the move and complained of harassment by her manager. She subsequently went on sick leave and brought a grievance about the transfer and the behaviour of her manager. RBS delayed dealing with the grievance, which was not upheld.

RBS attempted to get Mrs McAdie to return to work. However, after more than a year absent, she was dismissed. Mrs McAdie brought a claim for unfair dismissal arguing that the poor handling of her grievance further exacerbated her illness. The Tribunal held that the dismissal was unfair because the illness had been caused by her employer's unreasonable behaviour.

RBS appealed to the EAT, which overturned the Tribunal's decision so Mrs McAdie appealed to the Court of Appeal. The Court of Appeal found for RBS, holding that the fact that an employer contributed to an employee's ill health would not of itself prevent an employer from effecting a fair dismissal. However, the Court of Appeal indicated that in such circumstances the employer would be expected to "go the extra mile" in trying to find alternative work for the employee or allowing a longer period than usual to return to work. The key issue would be whether the employer had acted reasonably in the circumstances.

What do employers need to consider?
This decision is good news for employers. Had the Tribunal's original decision been upheld it would have precluded employers from dismissing employees suffering from stress-related illness attributable in part to the acts or omissions of the employer. However, before an employer dismisses an employee absent with stress, it should consider whether it could be responsible for the stress causing the absence. If so, it will need to "go the extra mile" before dismissing.

Employer ordered to pay £55,000 fine for failure to comply with ICE regulations.

Macmillan publishers was recently fined for failure to comply with the Information and Consultation of Employees Regulations 2004 ("ICE Regulations"). Under the ICE Regulations, Macmillan was required to hold a ballot of relevant employees to elect ICE representatives by a fixed date. Macmillan failed to hold the ballot. The company also failed to respond to a request by the Trade Union, Amicus, which was acting as an employee representative, to provide data on the number of employees in the company. Amicus applied to the Central Arbitration Committee for a penalty to be imposed on Macmillan. The CAC found that while

Macmillan had formal staff consultation mechanisms in place, these did not comply with the strict requirements of the ICE Regulations. The EAT subsequently ordered Macmillan to pay a £55,000 penalty. In deciding the level of the fine, the EAT said that it considered a number of factors, including the gravity of the failure to comply with ICE, the reason for the failure and the number of employees affected by the failure.

What do employers need to consider?
This decision indicates the potential fines faced by employers if they do not take their obligations under ICE seriously. The ICE regulations currently apply to UK based employers with more than 100 employees (50 or more employees from 6 April 2008), and require employers to put into place arrangements to facilitate effective dialogue between workers and management on a range of workplace issues. The first step in this process is for the employer to hold a ballot to elect ICE representatives, which Macmillan failed to comply with. Employers should be aware that their obligations under the ICE Regulation to establish information and consultation procedures will be triggered once they have received a valid request from the workforce. Fines may be issued up to a maximum of £75,000.

Employer entitled to ownership of employee's contacts list after employment ends.

In *PennWell Publishing (UK) Limited v Isles*, the High Court decided that the list of contacts contained in an employee's e-mail Outlook folder on the company's computer system belonged to the employer, despite the fact that the list contained personal contacts.

Mr Isles was a journalist who was employed by PennWell. During his time with the company, Mr Isles had created and maintained a contacts list in an Outlook folder in the company's computer system. Mr Isles left the company in order to set up a competing business, and PennWell sought to prevent Mr Isles from taking the contacts list with him. However, it was discovered that Mr Isles had downloaded the contacts list from PennWell's computer system onto a personal laptop. PennWell applied for an injunction for the return of the contacts list.

Mr Isles argued that the contacts lists belonged to him. He claimed that the list comprised personal contacts he had built-up over his working career and during his time as a journalist, as well as contacts he had made while at PennWell. He argued that he had only transferred his own list onto PennWell's computer system for personal use.

The Court noted that while PennWell had an e-mail policy in place which indicated what property would be considered to belong to the company, it could not rely on the policy as it had not been effectively communicated to employees.

However, the Court found in favour of PennWell and granted the injunction. The Court held that an address list contained in software which forms part of the employer's e-mail system and is backed-up by the employer belongs to the employer. Therefore an employee would not be entitled to remove or make copies of such a database. However, the Court went on to say that if Mr Isles had kept a separate private address book and selectively copied into it those contacts which he considered to be journalistic and long-term contacts, he would have been entitled to keep the information.

What do employers need to consider?
This case demonstrates that employers will usually be entitled to ownership of information or data created by an employee during the course of their employment. However, the case also highlights the importance of having a clear e-mail policy regarding ownership of information (including contacts lists) stored on company computer systems, and of ensuring that such a policy is effectively communicated to

staff. Employers would also be well advised to make adequate provision for confidentiality and return of property in employment contracts.

House of Lords upholds finding of victimisation in equal pay case.

In *St Helens Borough Council v Derbyshire and others*, the House of Lords overturned the decision of the Court of Appeal and reinstated the Tribunal's finding that letters sent by the employer, St Helens Borough Council, to the applicants amounted to victimisation.

The case involved several hundred catering staff employed as part of the Council's school meals service, who had brought equal pay claims against the Council. While a majority of the staff accepted settlement, some 39 individuals continued with their claims. Two months before the claims were due to be heard, the Council sent out a letter to all staff warning of the impact that continuing the application would have on them. The Council also sent a letter to each of the applicants stating it was "greatly concerned" about the outcome of the claim.

The applicants were successful in their equal pay claims. However, they also brought separate proceedings for victimisation contrary to the Sex Discrimination Act 1975 on the basis that while pursuing their equal pay claims they had been subject to adverse treatment. The House of Lords agreed with the Tribunal's finding that the letters sent by the Council had caused distress to and had an intimidating effect on the applicants who had chosen to continue their claims.

What do employers need to consider?
The decision in *St Helens* underlines the importance placed on employees' rights to enforce their statutory rights under equal treatment legislation, and should serve as a warning to employers to take care to avoid doing anything that might make a reasonable employee feel intimidated into ceasing their claim. In *St Helens* the objection was not to the Council's attempt to secure a settlement, but rather to the manner in which it had pursued this aim. The House of Lords acknowledged that employers may take reasonable steps to settle claims but should not penalise employees who are attempting to exercise their statutory rights.

NEWS

Increase in Annual Leave Entitlement

From 1 October 2007, the statutory minimum holiday entitlement for full time employees will increase from 20 to 24 days' paid leave per annum. Part-time workers' entitlements will be increased pro-rata. This is the first of a 2-stage increase aimed at eliminating the effect of employers including eight days' public holiday as part of the minimum 20 days currently stipulated in the Working Time Regulations 1998. Currently, there is no statutory entitlement to leave on public holidays in addition to the minimum of 20 days' leave. The second stage of this increase, which would bring workers' holiday entitlement up to 28 days' paid leave per annum, has been delayed until April 2009 when EU regulations mandating the increase come into force.

Age Discrimination Legislation Update

Almost one year after the introduction of age discrimination legislation, the CIPD has issued a report on the impact of the new laws entitled "Age and Recruitment: The State of Play". According to the report, businesses have been slow in responding to their new statutory obligations. The DTI has said that over 600 cases were brought in the first six months after the legislation came into force, the majority of which were connected to the recruitment stage. There are a number of steps employers can take to avoid falling foul of the new legislation, and the CIPD report contains useful practical guidance for employers. Please contact a member of the Covington & Burling team for further information.

EOC Publishes Final Report on Gender Equality

Prior to becoming part of the new Commission for Equality on Human Rights on 1 October 2007, the EOC has published its final report on gender equality entitled "Completing the Revolution". The report indicates that, despite some progress, gender gaps remain in the workforce. Particular gaps exist among part time workers, where female employees earn on average 38% less than their male counterparts, while retired women's income is currently 40% less than men's. The EOC launched a "Gender Agenda" campaign highlighting key areas for action to bring about equality within the next 10 years.

Proposal for a Regional Minimum Wage

Press reports have indicated that the government is considering drawing-up plans for a minimum wage to vary region by region across Britain. Such a move would introduce a more flexible minimum wage system, which would entitle workers to receive a higher minimum wage in areas of the country such as London and the South East where living costs are higher. We will keep you updated of any developments in forthcoming briefings.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our EU Employment Group:

Peter Cooke	+44.(0)20.7067.2041	pcooke@cov.com
Hilary Prescott	+44.(0)20.7067.2008	hprescott@cov.com
Genevieve Michaux	+32.2.549.5247	gmichaux@cov.com
Philip Davies	+44.(0)20.7067.2024	philipdavies@cov.com