# Business News

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## Holiday Pay and Sick Leave

In the case of Commissioners of Inland Revenue v Ainsworth the Court of Appeal decided that workers on long term sick leave had no entitlement to holiday pay if they had not attended work at all during the relevant holiday year and, therefore, no entitlement to a payment in lieu of accrued but untaken holiday on termination of employment. That decision was appealed to the House of Lords who decided to refer the issue to the European Court of Justice (ECJ).

In January 2008 the Advocate General recommended to the ECJ that :-

- workers should be entitled to accrue paid holiday under the Working Time Regulations 1998 whilst on long term sick leave; but
- workers should not be able to take (or receive payment for) that holiday during such sick leave; and
- workers on long term sick leave should have an entitlement to a payment in lieu of accrued but untaken holiday on termination of their employment even in circumstances where they have been absent on sick leave for the entire holiday year.

It is usual for the ECJ to follow the recommendation of the Advocate General and if they do so workers would have an entitlement to a payment in lieu of accrued but untaken holiday on termination even when they have been on sick leave throughout the holiday year. This differs from the present situation where workers are entitled to a payment in lieu of accrued but untaken holiday on termination only if they attended work for at least some part of the relevant holiday year.

### Inside this issue



## Welcome to Hodge Halsall's First Newsletter For Business & Commercial Clients

This Newsletter is designed to summarize various areas of law that may impact upon your business. It is a periodic publication of Hodge Halsall LLP and is intended for general guidance only. It is not to be construed as a substitute for legal advice. For advice specific to your circumstances please contact your Hodge Halsall representative.

We are interested in your opinion. If you have any suggestions about how we can improve Business News or if you would like us to cover a specific topic please contact: Derek Alman at derekalman@hhlegal.co.uk or call 01704 531991.

For further information on any of the articles in this Newsletter please contact Mark Robinson (markrobinson@hhlegal.co.uk) or Judith Bond (judithbond@hhlegal.co.uk) or call 01704 531991

# Fines for employing illegal migrant workers

With effect from 29th February 2008 a new system of penalties came into effect for employers who employ adults subject to immigration control in breach of the terms of entry or stay. Those who knowingly employ illegal migrant workers face an unlimited fine and/or a prison sentence of up to two years. Those who negligently employ illegal workers can face civil penalties of up to £10,000.00 per worker and which can be imposed without court proceedings.

Civil penalties may be avoided if employers are able to produce and check specified documentation at least once a year for those employees who have limited leave to enter or remain in the UK and provided they :-

- take all reasonable steps to check the validity of the documentation;
- retain copies for at least two years after the workers employment ceases;
- satisfy themselves that any photograph in the documentation is of the relevant employee;
- satisfy themselves that any date of birth in the document is consistent with the appearance of the employee;
- take all other reasonable steps to check that the employee is the rightful owner of the documentation produced;
- retain a copy of the whole of any document which is not a passport or other travel document in a form which cannot subsequently be altered;
- copy specified pages of a passport or other travel document in a format which cannot subsequently be altered.

*Note for employers*

*There will be no defence for an employer who knowingly employs an illegal migrant worker.*

# Tougher sentences for mobile phone drivers

The Crown Prosecution Service has recently published new guidance on what constitutes "dangerous driving" which provide that where driving falls far short of what is safe, prosecutors can press charges of dangerous driving rather than careless driving. The changes are specifically targeted at motorists who drive using hand held mobile phones and who could now face up to two years in prison on conviction. The Director of Public Prosecutions Sir Ken Macdonald commented that the danger posed by driving whilst using a mobile phone was such that "a charge of dangerous driving will now be the starting point for this offence, where there is clear evidence that danger has been caused by its use".

The charge will not automatically follow for those using a hand held mobile whilst driving but is likely to be used for those whose driving whilst using a mobile causes a crash.

# GP assistance

## for employees with stress and other mental health conditions

The number of employment advisors in GP surgeries is to be trebled under a government scheme designed to assist people suffering from stress and other mental health conditions to find and retain employment. The scheme, due to commence during the latter part of 2008, will be designed to provide :-

- an advise and support service for employers (particularly small businesses) designed to assist them in managing and supporting employees with mental health conditions to remain in or return to work. Consideration is also being given to providing support and assistance for GPs in an endeavour to more closely align health care and employment services.
- changes to the process for issuing medical certificates which are currently being developed with employers, healthcare professionals and their representative bodies. The process is designed to focus upon "capacity" rather than "incapacity" and to assist GPs in providing more helpful advice to patients and employers about fitness for work.
- The development of a National Strategy for Mental Health and Work to improve employment opportunities for those of working age with mental health problems.
- Expanding the current pilot schemes placing Jobcentre Plus advisors in GP surgeries including an educational programme for GPs on health and employment issues and focusing specifically on mental health and employment.

# Company Road-Safety Policies

Research carried out by the fleet management company Arval reveals that 53 per cent of companies fail to check that employees using their own cars for work have insured them for business use, only 26 per cent ask employees to produce a valid MoT certificate and a mere 17 per cent enquire about whether private cars used for company purposes have been maintained regularly.

Figures released by the Health & Safety Executive also show that 20 people are killed and 250 seriously injured each week in crashes involving someone driving on work related business leading a number of police forces to indicate an intention to investigate company road-safety more vigorously. From April 2008, when the new Corporate Manslaughter Act comes into force, companies and their directors may face prosecution if found to be involved in causing death through negligence.

A further report recently published by the Parliamentary Advisory Council for Transport Safety (Pacts) emphasized that companies requiring staff to drive excessively on business may be held liable if accidents occur. Rob Gifford, director of Pacts commented :-

"Historically, the police response to an accident would be to go to the scene and try to find out if there was someone there who should be prosecuted. But now, by digging a bit deeper, they may find there is a manager putting pressure on a member of staff to fulfil too many appointments in one day".

By comparison there are approximately 200 fatal injuries to staff in the work place each year and an estimated 800 to 1100 which occur on the road.

*Note for employers*

*It is essential that evidence is obtained from staff to ensure that all those using their own cars for company business :-*

- *have a valid and up to date driving licence*
- *are insured for business use*
- *have a valid Mot certificate*

*Appropriate consideration should also be given to the hours that staff are being asked to put in on the road.*

# Tenants and the Disability Discrimination Act 1995

Section 22(3) of the Disability Discrimination Act 1995 makes it unlawful to discriminate against a disabled person by evicting them from premises of which they are a tenant. The extent of protection provided by the Act has recently been highlighted by a Court of Appeal decision in London Borough of Lewisham v Malcolm.

The tenant was schizophrenic although his disability was controlled by medication. He applied to buy his flat under the statutory right to buy but before the process was completed he had stopped taking his medication and his behaviour become erratic. He let his property to tenants, lost his security of tenure and his landlord served him with a Notice to Quit and began possession proceedings. The tenant filed a defence under the Act claiming that he had only given up possession as a result of his erratic decision making and as a consequence of his disability.

The main issue for the Court to determine was whether Section 22(3) of the Act applied to protect a tenant with a disability who had lost his security of tenure and who had become a tenant under a contractual tenancy and against whom the Landlord, having served a Notice to Quit, had brought possession proceedings. If the 1995 Act did not apply the Landlord had an absolute right to possession. The Court of Appeal accepted that the tenant was disabled within the meaning of the Act, that the mental impairment that constituted the disability had a substantial adverse effect on the tenant's ability to carry out normal day to day activities and, as a consequence, the possession proceedings were dismissed.

*Note for Landlords:*

*The decision does not prevent possession claims against and eviction of disabled tenants under Section 21 of the Housing Act 1988 but rather the Disability Discrimination Act provides a defence where the possession claim has been made for a reason related to the qualifying disability of the tenant. This is undoubtedly, however, a complex area and legal advice should be sought in such situations.*

# Women's Desks are dirtier


According to a study by microbiologist Doctor Charles Gerba, of the University of Arizona, women have three to four times the number of bacteria in, on and around their desks, phones, computers, keyboards, drawers and personal items at work as men do. Doctor Gerba noted that "….women seem to have more "stuff" in their offices, from make up bags to pictures of family and purses on their desks. When examining the dark recesses of the desk drawers lurking among the long forgotten snacks, mouldy bananas and stale make up there were seven times more germs hiding out in women's desks than in mens. Doctor Gerba noted "I was really surprised how much food there was in a woman's desk. If there is ever a famine, that is the first place I will look for food".

The worst overall office germ offender, however, is men's wallets. These were found to be four times germier than women's purses mainly because they were kept in back pockets "….where it is nice and warm and a great incubator for bacteria".

An office phone was found to be home to 25,127 microbes per square inch, the desk surface 20,961 and a keyboard had something in the region of 3295 germs per square inch. A consistently cleaned toilet seat by comparison contained a mere 49 germs per square inch.

Absence from work due to illness costs British business around 11.8 billion pounds each year. The serious side of the research found that an infected person would leave a trail of viruses on every surface they touch – and some viruses can survive on surfaces for up to three days.

Recommendations arising from the research include :-

- use a disinfectant wipe once a day on desk, phone, computer mouse and keyboard
- don't store food in drawers
- use hand sanitation and wash hands regularly
- view desk hygiene as a regular task.

# Who owns an email contact list on a work computer?

The High Court have recently considered the issue of ownership of an email contact list kept by a journalist on his work computer. The list included both personal and business contacts which the employee had before joining the employer. The employee left to set up a rival business and removed the contact list from his work computer. No express clause existed in the employee's contract of employment detailing what was to happen to the list if he left and there were no restrictive covenants in place preventing the employee from working for a competitor at the end of his employment. In the absence of such post termination restrictions the employer needed to be able to establish ownership of the email list in order to prevent the employee from taking the content of the list and using it to compete.

The employee argued that the list was his and the employer countered that the list had been prepared and supplemented during his employment with them on computers belonging to the employer and was, therefore, the employer's property. Although the employer conceded that the parts of the list that pre-dated the employee's employment with them remained his property.

The High Court held that, where such a list is contained within a programme which is part of the employer's computer system, the data base and list of information contained thereon belongs to the employer and, in those circumstances, the employee was not able to copy the list for use outside of or after employment. The employer was entitled to ownership of the list and granted an injunction preventing its use by the employee.

*Note for Employers:*

*Ensure that all email policies are incorporated into an employee's contract of employment and that such policies clearly identify what property is considered to belong to the employer particularly in relation to information stored on computers, email systems and mobile phones.*

*PennWell Publishing (UK) Ltd v Isles and others*



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