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Solutions 70

Your monthly news update from Croner
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# National Minimum Wage clampdown on employers

The Department for Business, Innovation and Skills (BIS) recently announced the formation of HM Revenue & Customs' (HMRC) new Dynamic Response Team to work on high-profile and complicated National Minimum Wage (NMW) cases investigated by HMRC.

One particular area to be targeted will be employers who pay migrant workers below the NMW in an attempt to undercut competitors. The new team is to be funded from a £70 million government fund raised by the introduction of a levy on migrants and students coming to the UK from outside of the European Economic Area, in addition to their normal visa application fee. Since April 2009, around 14,000 workers have had to be paid arrears of the NMW.

The NMW is reviewed every year by the Low Pay Commission and the NMW rates of pay have increased every year on 1 October since the NMW was introduced on 1 April 1999.

The current rates are £5.80 per hour worked for those aged 22 and over, £4.83 for those aged 18–21 and £3.57 for those aged 16–17. There have been some press reports of a Government proposal to introduce the rate of £5.80 from the age of 21, instead of the current age of 22, although this has not yet been confirmed.

Even though many employers are aware of the NMW rates of pay, there are still some areas where mistakes can occur. One particular misunderstanding is over the pay of apprentices. Apprentices are only exempt from the NMW if they are either under the age of 19 or during their first year of apprenticeship. However, for the employer to rely on the exemption, the apprentice does have to follow a recognised training course. When the actual course ends, employers then usually have to pay the NMW. Without a recognised training course (such as an NVQ course), it is difficult for an employer to show that the training of a worker is exempt from the NMW, as basic "on-the-job" training is not enough to qualify for the NMW exemption. NMW compliance officers visit employers to inspect their records and interview apprentices and other staff to find out whether the actual working arrangements have a genuine formal training element.

Employers in the hospitality industry have also been recently targeted by compliance officers. A particular area which is checked is the distribution of tips and gratuities. Since a change in the law from 1 October 2009, employers can no longer rely on any form of tip or gratuity to make up the NMW for their workers, even if these are paid through the payroll.

A recent Code of Best Practice published by BIS states that each employer should take steps to ensure that their workers understand clearly the firm's procedures for the distribution of service charges, tips and gratuities. The Code also sets out guidance for businesses to explain to customers how service charges, if any, are operated.

**In this issue:** February 2010 changes to the Compensatory Award and Guarantee Pay ▪ Expert view ▪ Event diary ▪ Case law update ▪ Ask an expert

# February 2010 changes to the Compensatory Award and Guarantee Pay

For the first time ever, the maximum limit on the compensatory award for unfair dismissal claims will decrease from 1 February 2010 from £66,200 to the new limit of £65,300.

The limit has been reduced because of a fall in the retail prices index (RPI). The limit is based upon September's RPI by comparison with the index for September in the previous year.

The limit on the amount of guarantee pay payable to an employee in respect of any day also decreases from £21.50 to £21.20. The guarantee payment is paid to an employee when a whole working day is lost and unpaid, when he or she would normally work. Instead of the normal rate of pay, the employee is entitled to be paid at the current rate of guarantee pay for the first five days of lay off in any three-month period.

## April 2010 increases to Statutory Payments

Employers who operate their own payroll need to keep an eye on the April changes every year when the increases to statutory payments, such as Statutory Sick Pay, Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay come in.

Although, technically, still subject to parliamentary approval, the following rates of pay from April 2010 were recently announced.

- Statutory Sick Pay will remain unchanged from 6 April 2010 at £79.15 per week.
- Statutory Maternity Pay is six weeks' pay at 90% of the employee's average weekly earnings followed by a further 33 weeks' pay at £124.88 per week or 90% of average weekly earnings, whichever is lower.
- Statutory Paternity Pay is £124.88 per week or 90% of average weekly earnings, whichever is lower. An employee can take one or two weeks. If taking two weeks' leave, they must be taken together.
- Statutory Adoption Pay is 39 weeks' pay at £124.88 per week or 90% of weekly earnings, whichever is lower.

For employees earning £97 or more per week in 2010–11, the above rate of Statutory Sick Pay will apply from 6 April 2010. For Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay, the above rates will apply for complete pay weeks beginning on or after 4 April 2010.

# Construction firm fined after worker injury

A construction company from Gateshead has been ordered to pay £4500 after one of its workers was seriously injured when a fork-lift truck telehandler he was operating overturned.

The incident took place on a site at Holly Hall, Sandhoe, near Corbridge, in Northumberland on 16 July 2008. A 39-year-old worker was lifting roof trusses onto the roof of the development when the fork-lift truck telehandler that he was operating overturned. The machine fell onto its side, throwing him against the machine's window and controls.

He had not been given training to use the machine by his company and was not wearing a seat belt when the incident happened. He suffered multiple fractures to his right arm, leaving him with limited mobility in his shoulder. He still requires medical treatment and is unable to return to his job.

The investigation by the Health and Safety Executive (HSE) found that while the company had produced a risk assessment and a system of work for lifting the roof trusses, neither were sufficient. It had failed to identify the dangers that workers would face.

His employer pleaded guilty to breaching s.2(1) of the Health and Safety at Work, etc Act 1974, which covers the duty of the employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of the employees. The company was fined £4500 and ordered to pay costs of £2342.20 and a victim surcharge of £15.

After the case, HSE Construction Inspector John McGill, said that the company failed to ensure "[that their employee] had the necessary training to use the machine and had not reviewed its processes to ensure that unauthorised personnel did not have access to specialist machinery on site."

Expert View by Gillian Dowling, Employment Technical Consultant

# Discrimination update — looking at awards for injury to feelings

In all types of discrimination cases, it is possible for the employment tribunal to make an award to complainants for compensation for injury to feelings.

It is an award that can be made, even if no other award is made and it is not available in unfair dismissal cases, except whistleblowing.

The actual amount of the award is dependent on the evidence and it is up to the complainant to show the degree of hurt suffered as a result of the discriminatory conduct. The nature and extent of the injury will be considered by the tribunal, including issues such as anger and distress. Other factors to be considered are whether the act of discrimination was a one-off incident or whether there was a campaign of harassment over a period of time. The detrimental impact on the complainant, including the effect on the person's health, which may include time off work for stress or depression, will also be taken into account.

Over the years, guidance to assess the level of the award has been handed down from the courts and tribunals. As a starting point, the Employment Appeal Tribunal (EAT) in the 1997 case of *HM Prison Service v Johnson* stated that awards for injury to feelings should be compensatory, seen as just (or fair) for both parties and not as a punishment (ie for the employer). Feelings of indignation over the poor conduct should not be allowed to inflate the award.

Then, in 2002 the Court of Appeal set out further guidelines for awards in the case of *Vento v Chief Constable of West Yorkshire* (No. 2). Ms Vento won her claim of sex discrimination against the police force on the grounds that her post as a probationary police officer had not been confirmed, in circumstances where a hypothetical male comparator would have been. She claimed that she had been bullied and subjected to sexual

harassment after the breakdown of her marriage. The employment tribunal found that she had been subjected to a series of incidents when fellow officers criticised her conduct, personal life and her character in an unwarranted, aggressive and demoralising manner. The Court of Appeal noted that "translating hurt feelings into hard currency is bound to be an artificial exercise". Courts and tribunals have to make a "sensible assessment" based on the available material.

Originally, Ms Vento was awarded £65,000 by the employment tribunal as compensation for injury to feelings. This was reduced to £30,000 by the EAT and then to £23,000 by the Court of Appeal. The reduction to the award was made partly because it was out of line with the majority of other reported cases at the time, as well as with the guidelines laid down by the Judicial Studies Board for general damages reported in personal injury cases (which also cover losses as a result of physical disabilities).

The judgment in the *Vento* case also set out specific bands of compensation, which have been regularly relied upon since then, to set levels of award for compensation for injury to feelings. Often referred to as the "Vento guidelines", the bands were as follows.

- The top band should normally be between £15,000 and £25,000 to be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
- A middle band of between £5000 and £15,000 should be used for serious cases.
- Awards of between £500 and £5000 were considered appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Awards of less than £500 should be avoided altogether, as they risk being regarded as too low to be a proper recognition of injury to feelings.

In 2009, the Vento guidelines were increased by the EAT in the case of *Da'Bell v NSPCC*. Mrs Da'Bell won her employment tribunal claim for disability discrimination over her employer's failure to make reasonable adjustments when the recommendations of her doctor and the occupational health manager were not implemented. The employment tribunal had awarded £12,000 for injury to feelings, within the middle band of the Vento guidelines, which the NSPCC appealed against, but was unsuccessful.

The top band is now from £18,000 to £30,000, the middle band is from £6000 to £18,000, and the lowest band up to £6000.

## Top business issues

Every month we will bring you the top issues from callers to our telephone advice lines. These were the top issues in January.

| Tax & VAT | Employment | Legal | Health & Safety |
|---|---|---|---|
| 1. Capital Allowances — transitional period calculation for annual investment allowance. | 1. Conduct matters. | 1. Contractual issues. | 1. Accidents recording and reporting. |
| 2. Entrepreneurs' relief — minimum shareholdings, minimum period of ownership and inter-spouse transfers of shares and/or assets. | 2. Sickness absence — both long- and short-term absence. | 2. Company law. | 2. Risk assessments. |
| 3. Filing dates for returns and new penalty regime for failure to notify and errors on returns. | 3. Disciplinary matters. | 3. Property matters, including leases. | 3. H&S Policy implementation. |

Event diary

Legislation

For more information or to book please contact:

Employment on
01455 897193

or Health & Safety on
01455 897192

Fax: 01455 897026

All our courses can be designed to meet your specific requirements and are available on an in-house basis.

## Event diary — Open Course Schedule 2010

### Health & Safety

| Course title | Duration | Date | Location |
|---|---|---|---|
| Health & Safety in the Workplace Level 2 | 2 days | 3–4 February | Botleigh Grange, Southampton |
| Health & Safety in the Workplace Level 2 | 2 days | 10–11 February | Saint Petrocs, Truro |
| Manual Handling Training for the Trainer | 2 days | 17–18 February | Mercure London City Bankside |
| Health & Safety in the Workplace Level 2 | 2 days | 23–24 February | The Caledonian Hotel, Tyne & Wear |
| Manual Handling Training for the Trainer | 2 days | 10–11 March | Beardmore Hotel, Glasgow |
| Health & Safety in the Workplace Level 2 | 2 days | 17–18 March | Holiday Inn Reading West |
| Level 1 Award in Food Safety (catering) | 1 day | 30 March 2010 | Croner Consulting, Hinckley |

| Croner Consulting offers a four-day IOSH Managing Safely course. | |
|---|---|
| 1–4 March Croner Consulting at Hinckley | Cost: £600 + VAT |

| Croner Consulting offers a three-day Introducing Health & Safety Level 3 course. | |
|---|---|
| 23–25 March Mercure London City Bankside Hotel | Cost: £500 + VAT |

### Employment

| Course title | Duration | Date | Location |
|---|---|---|---|
| Role of the Supervisor | 1 day | 1 February | Croner Consulting, Hinckley |
| Essential Employment Law | 1 day | 9 February | Holiday Inn Leeds, Garforth, Leeds |
| Essential Employment Law | ½ day | 18 February | The Dunsilly Hotel, Antrim |
| Managing Investigations | 1 day | 25 February | Aztec Hotel & Spa, Bristol |
| Essential Employment Law | 1 day | 4 March | Ramada Swansea |
| Role of the Supervisor | ½ day | 11 March | The Garfield House Hotel, Glasgow |
| Role of the Supervisor | ½ day | 18 March | Doubletree by Hilton Aberdeen City Centre |
| The Differences in Legislation between NI & ROI | ½ day | 25 March | The Dunsilly Hotel, Antrim |
| Essential Employment Law | 1 day | 30 March | Holiday Inn, Heathrow |
| Managing Investigations | 1 day | 1 April | The Liner Hotel, Liverpool |

## Legislation

| Area | Legislation | Details | Date |
|---|---|---|---|
| Medical information | Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 | Legislation to change the format and content of medical statements to enable the doctor to say that the patient “may be fit for some work now” to facilitate the patient’s return to work. | April 2010 |
| Discrimination | Equality Bill | The aims of the Bill are to consolidate existing discrimination law, introduce positive action on recruitment for under-represented groups, make it unlawful to prevent employees from discussing their pay, extend discrimination by association to all aspects of discrimination, enable the Secretary of State to order employers with 250 or more employees to publish information on pay (subject to further consultation and not to come into force before 2013), introduce wider powers for employment tribunals to make recommendations in discrimination claims, create a single equality duty on public sector employers to include duties in relation to gender reassignment, age, sexual orientation and religion or belief, and extend age discrimination law to the provision of goods and services. | 2010 |
| Additional Paternity Leave | Additional Paternity Leave Regulations 2010 | Additional Paternity Leave will be available for fathers at 20 weeks after the birth of the child for a maximum of 26 weeks, if the mother returns to work. The remainder of the mother’s Statutory Maternity Pay will be paid to the father. Legislation to be passed by April 2010, with effect for parents of babies due on or after 3 April 2011 | April 2010 |
| Agency Workers | Agency Workers Regulations 2010 | Temporary agency workers will be entitled to equal treatment after 12 calendar weeks in the same job, but this will not apply to occupational pension schemes or occupational sick pay. | 1 October 2011 |

# REACH update — Part 1

## Introduction

Many of our clients will have been affected by the impact of the REACH Regulations on their activities. We asked our in-house experts Dr Peter Ruifrok and Alan Best (contributors to the Croner book, the "Essential Guide to REACH") to give an overview of how the complex work towards registration was progressing.

Clearly, progress is being made in some areas, but there are many ongoing delays against a background of looming deadlines, and these have the potential to seriously disrupt business and to increase costs. In a two-part article, we look at the current key issues around REACH and offer solutions on how to overcome problems that businesses may be facing.

## Registration

If 2008 was the year of pre-registration, then 2009 was the year of the SIEF (Substance Information Exchange Forum) and 2010 will become the year of registration. The estimated number of full registration dossiers to be submitted this year has dropped from initial estimates as high as 30,000 to just below 10,000.

However, despite the decrease in numbers of expected registrations, only around 2000 lead registrants are known, so 80% have still to make this important first move. Many of the SIEFs are still not working properly, or are having heated debates about cost sharing, and are working towards a fast looming registration deadline of 1 December 2010. Given that the ECHA (European Chemicals Agency) will need three months to process each dossier, then the effective date for submissions is 1 September 2010.

It is also likely that many first dossier submissions will contain errors, which will have to be corrected and this further extends processing times. The ECHA software now has many more functionalities and IUCLID and REACH-IT will assist you in preparing a dossier to the required standard. However, you may still need expert help to work through it effectively. Once submitted and accepted with a registration number as proof, you are not completely off the hook: ECHA will randomly scrutinise around 5% of dossiers for compliance in each tonnage band, while the competent authorities in member states can choose to scrutinise all dossiers should they so wish.

Many companies have expressed concerns that they appear to be tied to an only representative who is not performing as expected. This is about to change, and late in the first quarter of the year it will become possible to change this in REACH-IT.

Croner offers expert advice and a free, no-obligation, initial assessment of your company's individual needs, so, if the following applies to you, please feel free to contact us for an informal first discussion.

- You are a member of a SIEF working towards a registration deadline of 1 December and are experiencing problems.
- You need help in using the IUCLID and REACH-IT tools to prepare a registration dossier and to catch up on time lost.
- You need guidance on how to successfully replace an only representative.

Our commitment is to ensure that our advice is tailored to the needs of your individual business and that it will be pragmatically focused so that REACH compliance is achieved in a timely, cost-effective way.

In Part 2 of this article in next month's Solutions, we will look at enforcement and the EU Regulations covering classification, labelling and packaging.

*If you are interested in our REACH consultancy services, please contact the Health and Safety Helpline on 0844 561 8143.*

# Employer fined after roof fall onto concrete

### An Oldbury man has been fined £3500 after one of his workers fell 26 feet through a roof onto a concrete floor, breaking several bones.

On 8 October 2008, a 29-year-old worker from Oldbury and a colleague were working on the roof of industrial units at Camelot Way in Small Heath, Birmingham. They were employed as subcontractors by an Oldbury based company, who had been contracted to repair the building.

While the worker was on the roof, he lost his balance on a crawling board and fell through the roof. He suffered a broken leg, ankle, wrist and nose in the fall.

Health and Safety Executive (HSE) Inspector Mike Ford said that the worker "was lucky to survive falling 26 feet through the roof, landing on the concrete floor below. The equipment provided to these men and the system of work used was completely inadequate. The precautions taken to ensure their safety fell far short of what is acceptable."

During the HSE investigation, it also emerged that his colleague had not received adequate training to carry out the job, also putting him in danger.

The contractor pleaded guilty to breaching regulation 4(1)(c) and 6(3) of the Work at Height Regulations 2005 and to breaching s.3(2) of the Health and Safety at Work, etc Act 1974, which covers the duty of self-employed persons to conduct their undertakings in such a way as to ensure, so far as is reasonably practicable, that they and other affected persons (not being employees) are not exposed to risks to their health or safety. They were fined £3500 and also ordered to pay £1408 in court costs.

Case law update

# Oakland v Wellswood (Yorkshire) Ltd

liquidation

1. shutting down of a business, using its assets to pay off its liabilities

## Wellswood Ltd was in financial difficulties and went into administration.

The objectives of putting a company into administration are:

- to rescue the company as a going concern
- to achieve a better result for the company's creditors as a whole than would be more likely if the company were to be wound up, without having been in administration first, or
- to sell any property for secured or preferential creditors.

The administrators decided that they could not rescue the company and sold some of the assets, including the lease of the old business premises, to a new company, Wellswood (Yorkshire) Ltd. Some employees of the old company were taken on by the new company, including Mr Oakland. However, his employment was later terminated and he made an unfair dismissal claim. The new company relied on Regulation 8(7), Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which states that there is not a transfer when the transferor (old company) is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor. The argument was that, as there had not been a TUPE transfer, Mr Oakland did not have the one year's service to claim unfair dismissal. The Employment Appeal Tribunal stated that, where administrators continue to trade the business as a going concern, TUPE will apply to protect the employees, but in this particular case, as the administrators were planning to liquidate the assets of the old company by way of a creditors' voluntary liquidation, TUPE did not apply.

The Court of Appeal found that Mr Oakland did have continuity of service to bring his claim of unfair dismissal, not under TUPE but under s.218, Employment Rights Act 1996, which states that the transfer of any business does not break the continuity of employment of any employee who transfers with it. Although the Court of Appeal did not address directly whether or not Regulation 8(7) TUPE applied when companies were in administration, it indicated that it was unlikely.

## Ask an expert

Each month, one of our employment experts will be answering a question in this section. If you have an employment question that you would like our experts to answer, please e-mail it to **cronerinfo@croner.co.uk.**

**Q: A member of my staff is undergoing treatment for cancer and frequently misses work because she feels unwell. It is 14 months since her first treatment. I run a small business. I have had to recruit someone else to cover some of her work and I cannot afford to keep her job open as well. What should I do?**

**A:** This employee's condition is defined as a disability under the Disability Discrimination Act 1995 (DDA). One of the important legal considerations is your duty under the DDA to consider reasonable adjustments for this employee. This must be explored fully before a decision is taken to dismiss your employee, or you may face a claim of disability discrimination at an employment tribunal.

To help you consider reasonable adjustments, you should obtain the employee's written consent to approach her doctor for a medical report. You should ask for information from the doctor on the likely duration of the treatment and possible adjustments to be made in the workplace.

Once you have received this report, you should arrange a meeting with the employee to consider if you can agree any changes to the working pattern and maximise her working hours as best you can. This might include changing the times, hours of work or even duties. You might also agree to increase the times or frequency of breaks. These are all likely to be considered reasonable adjustments.

As it appears that she is fit to attend work between treatments, it may not be possible to dismiss her at this stage, as this may be considered to be less favourable treatment under the DDA. The new recruit should only be a temporary replacement for extra cover, rather than a replacement for the employee receiving the cancer treatment. However, as the employee is likely to receive just Statutory Sick Pay when off sick (unless you offer full contractual sick pay), some of the savings of her wages costs may go towards the pay of the new recruit. If these reasonable adjustments become unworkable, you will have to contact us for further advice.

## Contact us

If you have any questions about the topics covered in Solutions please call 0800 634 1700, or e-mail cronerinfo@croner.co.uk.

Alternatively, call the number on your advice line card to speak to a consultant, or if you are not currently a client, call 0800 634 1700 for further information on how Croner can help your business.

If you would prefer your monthly copy of Solutions to arrive via your inbox, e-mail us and we will send you an electronic copy every month instead.

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