

HAYTON WINKLEY SOLICITORS

# Employment Law—the ever increasing minefield

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**Burnside Hotel, Bowness on Windermere  
Tuesday 6th October 2009 at 6.30 pm**

A presentation by Gail Escolme from Hayton Winkley Solicitors  
on the ever changing aspects of employment law.

Hosted by Windermere & Bowness Chamber of Trade

**H**ayton  
**W**inkley  
Solicitors


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## EMPLOYMENT LAW

THE EVER INCREASING MINEFIELD




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## INTRODUCTION

- ACAS CODE OF PRACTICE – what's the difference?
- Maternity and Paternity – what's new?
- Contracts of Employment – make them work for you
- Lay off and short time working
- Pensions – the onus shifts
- ISA – new rules when employing young people or vulnerable adults
- Round up of case law

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## ACAS CODE OF PRACTICE

**Statutory Disciplinary and Grievance Procedures repealed**  
**New system from 5 April 2009**

Now – no obligation to follow set procedure

BUT failure to follow the recommendations of the new ACAS code when practical and reasonable to do so may result in an uplift if the Claimant is successful in bringing a claim.




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### ACAS CODE OF PRACTICE

General principles to be observed in every case under the new Code are:-

- **Both sides** should deal with issues promptly and without unreasonable delay; and
- Act consistently
- **Employers** should:
  - Carry out a proper investigation before acting
  - Tell employees the basis of any problem and give them an opportunity to put their case before a decision is made
  - Allow employees to attend a formal disciplinary or grievance meeting
  - Give employees an opportunity to appeal against any decision

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### ACAS CODE OF PRACTICE

**Steps to take are as follows:-**

- Deal with all issues promptly
- Investigate thoroughly
- If Disciplinary meeting needed – invite employee to a meeting and inform him that he can be accompanied.
- No unreasonable delay
- Make decision and communicate it to employee in writing
- Offer right of appeal if relevant

**Crucial that all managers understand the procedure**




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### ACAS CODE OF PRACTICE

**Financial Implications?**

- Unreasonable failure to follow procedure by either party may result in the tribunal increasing or decreasing any award made by up to 25% at their discretion.
- So no automatic adjustment for failure to follow the Code but likely to be penalised if you don't.




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## ACAS CODE OF PRACTICE

### Grievances

#### Grievance procedures should be:-

- Simple
- Informal where possible
- In writing if not
- Be accessible to employees so that they are aware of and understand the procedure.
- Make special allowances for individuals whose first language is not English

#### Grievances should be dealt with by:-

- The employee letting the employer know the nature of his grievance without unreasonable delay
- The employer acting consistently ensuring that all cases are treated alike

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## ACAS CODE OF PRACTICE

- Investigations should be made where appropriate
- Hold a meeting to discuss the grievances and allow the employee to be accompanied
- Allow the employee to explain his grievance at the meeting and state how he thinks it should be resolved
- Following the meeting write to the employee without unreasonable delay setting out decision and offering the right of appeal if appropriate.




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## MATERNITY – WHAT'S NEW?

- Antenatal Appointments
- Risk Assessments
- KIT days
- Holidays




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### MATERNITY – ANTE-NATAL APPOINTMENTS

- All pregnant employees have the right to take paid time off for antenatal care
- Antenatal care is not just restricted to medical examinations – it can also include:- Relaxation classes; Parenting classes; Any other class that is medically advised

#### Eligibility

- Employee must inform you that she is pregnant and that she has an antenatal appointment.
- For second and subsequent appointments you can ask the employee to produce :
  - A MAT B1 confirming her pregnancy
  - An appointment card showing an appointment has been made

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### MATERNITY – RISK ASSESSMENTS

- Employer is under a specific duty to prevent a new or expectant mother from being exposed to risk after she has notified him in writing that she is pregnant, has given birth within the last 6 months or is breast feeding.
- No obligation under this duty to protect if not informed.




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### MATERNITY – RISK ASSESSMENTS

#### Following a risk assessment

If risks are identified – some steps that may be taken:-

- Alter the worker's working conditions or hours if it is reasonable to do so
- Offer suitable alternative work if available.
- Suspend employee from work as long as necessary to protect her health and safety or that of her child.
- If suspended employee would be entitled to her pay at the normal rate for as long as the suspension continues

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## MATERNITY – RISK ASSESSMENTS

The list of agents processes and working conditions that could be a specific risk is non-exhaustive but includes:-

- Shocks, vibrations or movement (e.g. Travelling in an off road vehicle)
- Manual handling of loads
- Mental and physical fatigue (e.g. Standing for long periods)
- Extremes of temperature
- Emissions from display screen equipment
- Biological agents
- Chemical agents
- Failure to carry out a risk assessment may amount to a detriment entitling the worker to claim discrimination or negligence as well as being in breach of statutory H & S regulations.

## MATERNITY - KIT DAYS

### Keeping in Touch Days.

- Why? General rule – an employee cannot remain on maternity leave during a week in which she works for the employer. Beginning work will bring her leave and pay allowances to an end.
- Hence KIT Days. Employees entitlement to maternity leave and pay will not be jeopardised where she agrees to work for 10 days or less whilst on maternity leave.



## MATERNITY - KIT DAYS


### Work may take any form, e.g:

Usual job; Training; Attending conferences; Team meetings; Staged return to work

- Any part of a day worked, even 30 minutes, will count as a whole day for KIT day purposes.
- The work must be by agreement between the parties.
- The employee is entitled to be paid for any work done on KIT days. Payment may be by agreement between the parties.

### MATERNITY - HOLIDAYS

- Holiday entitlement continues to accrue during maternity leave – but cannot be taken during maternity leave
- Practical problems if maternity leave stretches over two different leave years
- Employee must take her leave accrued in the 1<sup>st</sup> leave period before she goes on maternity leave to ensure she doesn't lose it.
- Talk to employee about leave in good time.




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### PATERNITY

**Eligible employees are entitled to either 1 or 2 whole weeks paid paternity leave**

- Leave must be taken:
  - As either 1 or 2 WHOLE weeks; and
  - Within 56 days of the date of birth.
- The employee can choose whether he takes 1 or 2 weeks.
- Earliest start date – date of birth.




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### PATERNITY

**Eligibility:-**

- Employee must have been continuously employed for 26 weeks before the end of the 15<sup>th</sup> week before the EWC.
- Be the biological father or the mother's husband, civil partner or partner
- Have or expect to have responsibility for the upbringing of the child

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## CONTRACTS OF EMPLOYMENT

- All Employees are entitled to a Statement of Particulars of Employment within 8 weeks of their start date.
- Contracts of employment can be written, oral or a combination of the two. However it is better for all terms to be in writing.




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## CONTRACTS OF EMPLOYMENT

### Varying the Employment Contract

- Contract is a legally binding agreement – the parties are bound by it's terms.
  - Likely over time either party may seek to vary the contract.
- Contractual terms can be varied by:-**
- Virtue of a contractual right
  - Agreement (either express or implied)
  - Employer unilaterally imposing a change

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## CONTRACTS OF EMPLOYMENT

### Contractual right to vary

- Express clause in the contract allowing the employer to vary it; or
- Contract is sufficiently broadly drafted so that the proposed variation falls within its scope.




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## CONTRACTS OF EMPLOYMENT

- Flexibility clauses must be drafted with care – any ambiguity will be interpreted in favour of the employee.
- General right to vary terms – limited to changes of a minor or non-fundamental nature.
- For avoidance of doubt contract to allow the right to amend specific clauses, e.g. To change number of hours worked
- Ultimately even with an express contractual right, variations must be reasonable and non discriminatory – either directly or indirectly.

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## CONTRACTS OF EMPLOYMENT

### Variation by mutual agreement

Safest way to seek to vary a contract.

- Express Agreement**
  - Can be orally or in writing – but better to have it in writing
  - Need consideration – i.e. Pay rise for agreeing to amendments
- Implied Agreement**
  - Terms often change without express agreement e.g. New methods of working, taking on new duties




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## CONTRACTS OF EMPLOYMENT

### Unilateral Variation by Employer

If employer has no contractual right to vary or employee is unwilling to agree the employer has 2 choices:-

- Abandon proposed changes
- Insist on enforcing them

It is no defence for the employer to show that he had sound business reasons for imposing the change or that he acted unreasonably in the circumstances (though this may be a defence in an unfair dismissal claim)

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## CONTRACTS OF EMPLOYMENT

Where the breach is fundamental the employee has several options:-

- Continue to work under the new terms (whilst making his objection to them clear) and seek a remedy for breach of contract
- Continue to work under old terms and refuse to work under the new ones
- Resign and claim constructive dismissal

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## CONTRACTS OF EMPLOYMENT

### Last Resort for employer

- Imposition of new contract
- Employer terminates old contract and immediately offers new contract including the variations.
- If the employer gives the correct notice of the termination he will avoid a wrongful dismissal claim
- Termination of an existing contract will be a dismissal for unfair dismissal purposes - but employee unlikely to be awarded much by way of compensatory award if he is successful in bringing a claim

**Always better to agree variation to terms of employment!**

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## LAY OFF AND SHORT TIME WORKING

- Lay off – when employees are not provided with work and the situation is expected to be temporary
- Need contractual right to do so – unless – there is an implied right by virtue of custom and practice
- In absence of express or implied right both parties may agree




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## LAY OFF AND SHORT TIME WORKING

### Guarantee Payments

- An employee has a statutory right to a minimum guarantee payment (currently £21.50 per day) for every workless day where the employer cannot provide him with work



- However - unless there is an express term in the contract the employer must pay **full contractual pay**

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## LAY OFF AND SHORT TIME WORKING

### Exceptions

An employee is not entitled to guarantee pay if:-

- The employer does not provide work as a result of a strike
- He has been offered suitable alternative work and has unreasonably refused
- He does not comply with the employer's reasonable requirements which are made with a view to ensuring that his services are available, e.g. A requirement to phone in to find out about the availability of other alternative work

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## LAY OFF AND SHORT TIME WORKING

### Short time working

- When an employee is laid off for a number of contractual days each week or for a number of hours during the working day
- Must have express or implied right to do so to be able to reduce pay
- If an employee is laid off or put on short time working for 4 consecutive weeks - or for 6 weeks in a period of 13 weeks he can give the employer written notice of intention to apply for a redundancy payment - subject to eligibility

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## PENSIONS

### Personal accounts regulations 2012

- All employees enrolled in employer's pension scheme
- If no scheme exists, employees automatically become members of new government pension scheme
- Employee minimum 4% of salary contribution
- Employer minimum 3% contribution plus 1% tax relief




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## PENSIONS

### Key requirements:-

- Employers must auto enrol all jobholders in a pension scheme if they are aged between 22 and state pension age and earn more than £5035.
- A contribution of 8% of band earnings (between £5035 and £33540) must be paid with the employer paying at least 3%
- Job holders can opt out of the scheme, and, if they do so, no contributions need to be made on their behalf

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## PENSIONS

- Employers must re-enrol job holders who opt out at least every 3 years
- Job holders include temporary staff and agency workers
- Employers will be able to choose to use a "good quality" private scheme, a new Government personal accounts scheme or a combination of the two

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**ISA**  
The Independent Safeguarding Authority

  
Independent Safeguarding Authority

- Role – to prevent unsuitable people from working with children and vulnerable adults
- From 12 October 2009 Vetting and Barring Scheme comes into effect.
- From July 2010 all new employees, those moving jobs and volunteers who want to work with children or vulnerable adults can register with ISA.
- From November 2010 they must be ISA registered – from then on it will be illegal to employ new people who are not ISA registered

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**CASE LAW UPDATE**



- **Stringer** - Holidays DO continue to accrue for entire period of sick leave and employees must be allowed to take them either during the sick leave or upon their return – or be paid in lieu if the employment ends.
- **Hey Day** - It is legal to force an employee to retire at the age of 65 – BUT – the Government will be reviewing this in 2010!




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**CASE LAW UPDATE**



- **Coleman – Disability Discrimination by Association**  
Claimant primary carer for her disabled child – found that she had been treated less favourably because of this – ECJ confirmed the Directive prohibits less favourable treatment on the grounds of disability of a closely associated person – being appealed.
- **Mayr – IVF** – held that women whose had been fertilised but not implanted are not “pregnant”. However dismissal relating to IVF treatment will amount to sex discrimination
- **Nnachi** – Failure to carry out risk assessment on pregnant employee amounts to sex discrimination

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## CASE LAW UPDATE

### • Seldon – Age Discrimination

Setting retirement age of 65 for employees not discriminatory but would be for partners unless objectively justified

### • English – Sexual Orientation

Employee was repeatedly called a faggot – held that homophobic banter could amount to unlawful harassment – even when the harasser knew that the victim was not gay and even when the victim knew that the harasser knew he was not gay!




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## CONCLUSION

- If in doubt seek advice!
- Have a contract that sets out the terms of employment – preferably more than a statement of particulars which you must have at the very least!
- Have a handbook containing non-contractual policies which both you and your employees can refer to if in doubt
- Even 1 part time employee could cost you a lot of time, money and stress if you get it wrong!

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## CONTACT DETAILS

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