



## Avoiding Holiday Blues ...Next Year

Hopefully the organisation of your holiday chart ran smoothly over the summer break. If it did not, you might want to consider now putting in place certain strategies that will assist with the competing demands of individuals during the summer months.

### 1. Do You Have A Holiday Leave Policy?

Some employers simply have a clause in each employee's contract stating how much holiday they are entitled to and whom they should give notice to. Others have more complex policies relating to periods of notice to be given for leave and whether it is being distributed on a first come first served basis. The default position under the Working Time Regulations is that workers cannot just take leave whenever they want to. The regulations set out the requirements of notice giving, which equates to a notice period that is twice as long as the period of leave requested. As an employer you have the right to refuse any request.

### 2. Competing Requests

The summer holidays, (indeed any school holidays) are a popular time off choice for parents not only for the purposes of holiday, but also managing childcare. There is a surprising lack of guidance as to how to manage this process. ACAS's advice is simply to be 'fair and consistent'. The key to this is to prepare and to be clear. Preparing now for next year's holiday gives everyone an opportunity to digest any requirements you may have and for those who

are able to make adjustments to their holiday plans to do so in good time.

### 3. If You Have A Policy, Use It

Time and time again employers tell us that they have a policy but that it has not been looked at or applied consistently for many years. This is worse than having no policy at all! If you are going to go to the time and effort of having a policy, then it should be one that is applied and reviewed annually to see if it still meets the requirements of the business. Having a policy that is applied to some and not others simply breeds discontent amongst employees.

### 4. Last But Not Least

It is important to remember that holiday is a break from work and is a Health and Safety issue. The advances in technology are increasingly a barrier to employees having such a break. Sometimes this is as a result of the employer continuing to communicate with the employee, or indeed sometimes the employee who simply struggles to let go of their electronic devices. Employers should have regard to the fact that a worker who can show that they are repeatedly on call during their holiday period, will have useful evidence in any subsequent claim for stress or psychiatric injury resulting from overwork. They could also claim that if a substantial amount of time was taken up dealing with calls or emails from work that they were not in fact on holiday, but were on working time and seek to take the leave off at a later date.

## NEWS IN BRIEF

### Alcohol and Disciplinary decisions

You might consider that smelling alcohol on an employee's breath would be sufficient to dismiss for gross misconduct, but not according to a recent tribunal case. The tribunal decided that a reasonable employer would not treat this as gross misconduct, or even conduct justifying dismissal, in the absence of evidence that it was having an adverse effect on the employee's ability to do their job or a previous warning.

### Disciplinary process need not be correct

In another case, (this time that went to the Employment Appeal Tribunal), a dismissal was found to be fair, even though there had been serious procedural failings at its earlier stages.

The EAT acknowledged that businesses often face practical difficulties when identifying the right people to run the process, or be at the appeal, who is sufficiently independent or senior.

### Reckless employer fails to take advice on redundancies

If employers are proposing to make large scale redundancies, they should ensure they comply with their obligations to consult. In a case where the employer was unaware of its obligations, the Employment Appeal Tribunal described their failure to take appropriate advice as "reckless". Their failure to consult cost them the maximum penalty under the legislation of 90 days pay per employee.

### Increase in the over 50s working

The Dept for Work and Pensions has released new figures, which show that there are more than 8.2 million people aged between 50 and 64 now in work. The figures also show that there are 235,000 more people aged between 50 and 64 in work than there were a year ago.



## Self Employed or Not?

Long before the debate on zero hours contracts, the key issue that was being discussed was whether or not workers who are told and have contracts indicating that they are self employed, would meet that definition if assessed against the legal test. Historically this has been more of an issue in industries such as construction, but tackling the mis-description of workers as self employed is now going to be a key government objective to ensure it receives the tax and National Insurance it is due.

They are also concerned about workers getting the basic protections that if they are employees they are legally entitled to, such as the National Minimum Wage. A recent survey from the Citizens Advice Bureau indicated that there are a large number of enquiries made to them about the issues of self employment. Each of those people may be losing on average £1,288 a year in holiday pay and are paying additional National Insurance that they would not have to if they were classified as employed.

There are several ways workers can be classified employees; self employed or workers and there can be considerable overlap. Employees have an obligation to do the work personally rather than being able to send a substitute. As an employer you are obliged to provide the work and the employee is obliged to accept the work. Another key aspect of employment status is the control that the employer will have with the way the employee carries out the work.

The self employed enjoy no statutory employment rights although they may be protected by discrimination law. They have considerable freedoms over what they do and when.

The worker status falls somewhere between the two and although they are not entitled to as many statutory rights as employees, they do have some key legal rights including protection from discrimination and entitlement to the National Minimum Wage.

Although some people have contracts indicating that they are self employed, the key issue for the courts and tribunals is not just what is written down, but how the individuals have treated the relationship. It is therefore important that employers establish the correct relationship with their staff and label it accordingly to avoid problems in the future. Annual reviews of self employed/worker relationships might also be useful to check if they have strayed into the employee category.



## Work Experience – The View from the Other Side

Here at Gullands, we are committed to providing work experience to children from local schools. Recently some of those children have been responsible for drafting our tweets on [Gullands\\_HR\\_Law](#) and we would like to share with you this article written by one of them, to give you some insight as to how they feel about work placements.

“There are many fears and pressures that you face as a teenager and one of them is becoming independent and getting a job. This can be scary, even if it is just a part time Saturday job. This is because it feels like you are finally becoming part of the “adult world”.

However this fear is only a minor thing. Adults still need to constantly be encouraged

and reminded into finding work placements. This is important because work at a younger age equips people with skills and familiarises and educates them on experiences that they will face later on in life. It normally takes a while for a young person to be comfortable in a workplace but this exposure helps to prepare them for as many opportunities as possible.”

We would highly recommend taking on work experience. The workforce of the future is a good investment and you might just learn something along the way yourself.

Thank you to Grace from Maidstone Grammar School for Girls

# Part Time Working

Despite the fact that nearly a quarter of the total work force are part timers, there are often issues for employers with those contracts that do not reflect what the employer perceives as a full time norm.

The Part Time Workers (Prevention of Less Favourable Treatment) Regulations preserve the right for part timers not to be treated less favourably than a comparable full time worker.

A part time worker is in law one who is paid wholly or in part by reference to the time that they work and having regard to the custom and practice of the employer, is not identifiable as a full time worker.

The first element of this definition is key to being covered by the Regulations. A worker who is paid entirely on a piece work basis, or in stage payments, will not be covered by the regulations even if they work for fewer days or shorter hours than others in the same work place. This consequently may exclude a number of seasonal or casual labourers.

The second element of the definition needs a more in depth look at the nature of other workers within the organisation. Different jobs may have different expectations of what it will be to work full time. An office job may well involve seven or eight hours a day, five days a week. By contrast a full time teacher is required to be able to work 195 days in any school year.

The core right conferred by the Regulations is the right for them not to be treated by their employer less favourably than the employer treats comparable full time workers. The key questions are:-

1. What is the treatment complained of?
2. Is that treatment less favourable?
3. Is that less favourable treatment on the grounds that the worker is part time?
4. If so, is the less favourable treatment justified?

The Government's guide to part time worker's rights talks of things such as pay rates, holiday, training and career development and redundancy selection as being the sort of treatment that are covered by the regulations. Of course part time worker's rights need to be pro rata to the hours that they work where appropriate. Where it is not possible to pro rata, employers need to consider whether they can either objectively justify withholding the benefits from part time workers, or alternatively find a means of pro rataing some other financial equivalent to them.

It has often been the case that Bank and Public holidays have caused some confusion for employers. As most bank holidays fall on a Monday, part time workers who regularly work on days that are not inclusive of a Monday are likely to be at a disadvantage. Perversely those who do work on Mondays will in fact be better off than their comparable full time workers. Given full time workers have no right to be treated less favourably than part time workers, this would not be against the law! The issue of comparison is a complex matter on which advice should normally be sought as there is a great deal of case law on this.

Even having established less favourable treatment, the employer is still left with the possibility of justification. Guidance talks about showing good reason why it would be necessary to treat them differently, for instance, failing to provide health insurance for part time employees because the costs involved are disproportionate to the benefits to which they are entitled.

Justification must consist of showing that the treatment is necessary to achieve a business objective and it is an appropriate way of achieving that objective.



## Quick reference section

**Statutory minimum notice periods**  
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years' service the notice period does not extend beyond 12 weeks.

### National Minimum Wage

From October 2015	
16 – 17	£3.87
18 – 20	£5.30
21+	£6.70
Apprentices	£3.30

### Statutory Sick Pay

From April 2015  
£88.45 per week

### Shared Parental/Maternity/ Paternity/Adoption Pay

Basic rate from April 2015  
£139.58

### Statutory Holiday

5.6 weeks for a full time employee.  
This can include bank and public holidays.

### Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 weeks' pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years.  
Maximum week's pay is capped for dismissals after 6th April 2015 under the Statutory Scheme at £475.00.



# Gullands team up with 360 Employment Evolution for seminar

Gullands Solicitors and recruitment consultancy 360 Employment Evolution are jointly hosting a free employment seminar, on Wednesday 21 October 2015, from 8am, at The Friars in Aylesford, ME20 7BX. The seminar will include talks on: managing consequences, back to basics (discipline, performance management etc.) and apprenticeships.

Gullands' partner Amanda Finn comments: "We are thrilled to be teaming up once again with 360 Employment Evolution for this seminar. Their understanding of recruitment



along with our expertise in employment law will make for a really informative session, an invaluable opportunity for employers."

To book your complimentary place, please contact Lizzie Smith at l.smith@gullands.com

# Health & Safety Lawyer Joins Gullands

Gullands Solicitors has recently appointed health & safety and dispute resolution lawyer Andrew Clarke.



Andrew led the health & safety group at his previous firm and he has advised employers facing prosecutions or enforcement by the Health and Safety Executive (HSE) for over twenty years. Andrew has dealt with numerous fatal and serious injury cases, advising clients at the scene following an incident, on HSE requests for interviews, disclosure and representing clients where cases proceed to court or if there is an inquest.

Andrew will work with partner John Roberts who leads the criminal, health & safety and regulatory team at Gullands. The team advises employers on health & safety and similar offences such as breaches of food hygiene, waste, asbestos or environmental law regulations.

Andrew will also be advising on health & safety compliance, risk management, health & safety aspects of commercial transactions and contracts and responding to formal Notices and Warnings. The team's regulatory work crosses all sectors from farming to manufacturing and construction. Andrew gives presentations to employers on minimising their exposure to claims and prosecutions and will be addressing the International Institute of Risk and Safety Management in October on new sentencing guidelines and minimising exposure to claims and prosecutions. Watch for details of future Gullands health & safety seminars and events.

Andrew comments: "I am delighted to be joining Gullands and looking forward working with regulatory crime partner John Roberts to increase the firm's prominence in regulatory criminal work, especially health & safety. Gullands has the unusual strength of being a modern full service firm for individual and commercial clients, but with true criminal and regulatory expertise, which we can now offer to businesses in trouble with regulators and enforcers like the HSE."

If you have a health & safety or regulatory issue you would like to discuss please call Andrew on 01622 689733 or email a.clarke@gullands.com



# Gullands video guides

Gullands' partner Amanda Finn has produced a short video guide on the minimum each employer should have in place regarding employment contracts and policies.

To view go to [www.gullands.com/business/employment-law](http://www.gullands.com/business/employment-law)

## CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.



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