

# The Bulletin

News and updates  
from Holmes & Hills LLP  
Winter 2011

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## Long-term sickness and holiday entitlement

### Uncertainty continues for employers after two conflicting judgements are delivered at the Employment Appeal Tribunal (EAT).

Recent judgements of the Employment Appeal Tribunal (EAT) have delivered conflicting guidance regarding the circumstances in which an employee on long term sick leave will be entitled to payment in respect of statutory holiday under the Working Time Regulations (WTR). The cases were heard 2 weeks apart, but uncertainty for employers remains about the correct approach, until hopefully the Court of Appeal clarifies the position (possibly in early 2012).

The WTRs 1998 lay down the basic rules governing entitlement to paid annual leave,

including procedures to be followed by both Employers and Employees concerning minimum notice periods to be given when either holiday is requested, or an Employer seeks to restrict when holiday may be taken during the leave year. What is clear (and not in contention) is that an Employee continues to accrue annual leave entitlement even whilst he/she is on sick leave. The issue of contention raised by the recent EAT cases of *NHS Leeds v Lamer* and *Fraser v Southwest London St George's Mental Health Trust* surrounds the question whether, in order to trigger entitlement to an actual payment, an Employee must notify his/her Employer (during the Leave Year in question) that they wish to take statutory holiday (paid leave) either during the period of sick absence, or subsequently after recovery.

The decision in the case of *Lamer* (heard on 29<sup>th</sup> June 2011) followed the reasoning in earlier cases and concluded that the entitlement to paid holiday of a worker absent on sick leave does not depend on him/her having given notice to take that holiday during the Leave Year in question. In practice this would mean that a worker absent for 2 years would, on subsequent dismissal, be entitled to payment in lieu of holiday pay for the 2 years in question despite having not previously requested the leave.

However, in *Fraser* (heard on 13<sup>th</sup> July 2011) the EAT ruled that a proper interpretation of the Regulations dictated the opposite: an Employee would lose the right to paid leave (or to receive payment in lieu on termination) if such notice was not given during the relevant Leave Year.

The above example highlights the difficulties facing Employers when dealing with issues in the workplace and trying to respond in accordance with the law. Employment law in particular changes almost weekly as new legislation and court rulings come into force.

Despite new powers making it easier for employers to dismiss workers, employers are facing a raft of legislative changes in 2012 - such as the compulsory pension scheme - which we are expecting to increase red-tape, increase costs and reduce employers' willingness to create jobs .

## Charitable causes at Christmas

As in previous years, Holmes & Hills will once again use the Christmas card fund to make a donation to a local charity. This year the firm has chosen to donate £300 to the Farleigh Hospice which offers vital care and support to people with life limiting illnesses in Essex.

The hospice has a large team of nurses, doctors, social workers and volunteers which offer 24/7 care to patients at the Farleigh Hospice home in Chelmsford.

In addition to this they offer support to those who wish to remain in their own home and offer out-patient services and day care to a large number of others. As well as offering vital care to patients, Farleigh Hospice also offer support to the patients' families.

For more information on the hospice and how they help thousands of people across Essex, please visit [www.farleigh.org](http://www.farleigh.org).

By David Dixey - [dd@holmes-hills.co.uk](mailto:dd@holmes-hills.co.uk)

## EDITORIAL COMMENT

Despite confident predictions of a return to growth not so long ago, business leaders are again warning of hard times ahead. Whilst Christmas will bring short-term welcomed relief for many business-to-consumer operations, many companies dealing with commercial clients seem to have little to look forward to in 2012.

If the property sector is to be considered an indicator of confidence and stability, the stagnant commercial lettings market across Essex tells a telling tale. Worryingly, a growing number of commercial premises are being left unoccupied for extended periods as companies are unwilling to incur the cost and risk of moving their operations. Given these conditions, our article 'Lease, licence or tenancy at will?' considers the options available to both landlords and businesses, comparing the advantages and disadvantages of each arrangement.

Given the problems facing businesses, the government is keen to be seen to be supporting SMEs, pushing through positive changes in the law - such as the increase in the length of time an employee must be employed before being able to make a claim for unfair dismissal. Whilst this will make it easier for employers to dismiss employees, such changes will do little to ease employers' concerns given the impending opt-out pension scheme and the raft of complicated and often unclear employment legislation already in existence. In this issue of The Bulletin, David Dixey comments on redundancy, one area of employment law many are calling to be reviewed.

Even in the legal services sector there are challenging times ahead with the effects of the Legal Services Act - set to dramatically increase competition in the industry - yet to take full effect. Whatever challenges your own business and industry are facing, Holmes & Hills will be on hand to offer advice and support where necessary. In addition to this we will be organising a number of events throughout 2012 - covering construction, property, employment and planning law, to name but a few - for our clients and contacts to take advantage of. In the meantime we wish you a merry Christmas and all the best for the New Year.

By Daniel Sturman - [dcs@holmes-hills.co.uk](mailto:dcs@holmes-hills.co.uk)



## Lease, licence or tenancy at will?

In a difficult commercial and property market, businesses and landowners must carefully consider which legal document they choose to govern their business premises. Whether it is a lease, licence or tenancy at will, each arrangement offers landowners and businesses a number of advantages and disadvantages.

### Leases:

As the most common form of arrangement, the majority of business owners will be familiar with the advantages and disadvantages of occupying a lease. The main key element of any lease is that the occupier is granted exclusive possession by the landlord. This allows them to exercise the rights of the landowner and exclude both the landlord and third parties from the land. However, this does not prevent the landlord from reserving certain rights such as services over the property. Even if there is not a lease in writing, a lease can still come into effect if exclusive possession is granted.

For landlords, one of the main advantages of using a lease is that, upon the expiration of the term of a business lease complying with either section 43(3) of the Landlord and Tenant Act 1954 ("the 1954 Act") or which has been contracted out of the security of tenure provisions, the Landlord will be entitled to possession of the property. The obvious advantage here is that this protects the landlord against any potential claims from the tenant that they are entitled to remain at the property after the term has expired.

Additional benefits of a lease include the option of inserting break clauses to the benefit of both parties – allowing them to re-visit the lease and possibly bring it to a premature end - and having the obligations of each party listed in the document, providing clarity to both sides.

### Licences:

A licence is a permission given by the licensor to the licensee to use the licensor's land, but it does not create an estate in land as does a lease. Where a licence differs greatest from a lease is that the licensee will not have exclusive occupation of the land in the same way as a tenant.

The advantages of a licence include that it is generally a much shorter legal document to negotiate and agree, meaning legal fees are likely to be less compared with leases which can take considerably longer to complete.

Under a licence an occupier is granted slightly more security than an occupier under a tenancy at will (see below) as usually the landlord will be required to give a notice of the intention to end the licence. However, a licensee will not have the same degree of control over the land as it would under a lease. If the licence is properly drafted the licensee will not have security of tenure under Part II of the 1954 Act. Security of tenure would give a tenant under a

business lease the automatic right to request a new lease on similar terms as before - leaving the landlord to rely on statutory grounds to evict.

The major risk posed to landowners choosing to issue a licence is that in the event that a licensee has exclusive possession, the document, despite being labelled a licence, may be challenged in court by the licensee and found in fact to be a lease. If the arrangement has lasted for more than six months and the licence is found by the court to be a lease, then the tenant would have security of tenure under the 1954 Act.

Unlike occupiers under a lease, stamp duty land tax will not usually be payable by the licensee.

#### Tenancy at will:

Where there is a tenancy in existence and under that tenancy either party may determine it at any time, this is called a tenancy at will. A tenancy at will may be difficult to distinguish from a licence to occupy.

Tenancies at will are often used where there is a rush for a tenant to take occupation of the premises and the parties are still negotiating the terms of the lease that will eventually follow. Intended as a temporary arrangement care must be taken when drafting as it could be deemed as a periodic tenancy which requires a longer notice period. The tenant under a tenancy at will does not have security of tenure.

Determination of a tenancy at will can be brought about by the landlord demanding possession or the tenant giving up occupation. The landlord need not give a time limit and may state that the premises be given back immediately.

The advantages of a tenancy at will are that it is a short document that can be drafted and completed quickly and cheaply. To the benefit of the landlord there is no security of tenure and allows short notice to be given in the event the landlord wants to regain possession. Whilst there is no stamp duty payable on a tenancy at will, they are a temporary arrangement and geared in favour of the landlord.

In the event that the tenancy at will is not drafted correctly the arrangement could be deemed to be a periodic tenancy and therefore a longer period of notice would need to be given by the landlord to determine it and security of tenure would be granted to the tenant.

By Daniel Sturman - dcs@holmes-hills.co.uk

## Leaving with inheritance

Whether inheritance is passed down in the form of monies, shares or property, assets inherited by a single partner before or during a marriage can quickly become the focal point of divorce proceedings where they amount to a sum of any significance.

Nevertheless, the treatment of inheritance during divorce proceedings can be shrouded in uncertainty. There are no clearly defined rules set out in Family Law as to how any inheritance should be dealt with for the purpose of financial settlements and in addition to this, under s25 of the Matrimonial Cases Act 1973, Judges have discretionary powers which can cause further ambiguity.

The over-riding factors a Judge considers when deciding upon the overall value of a financial settlement is whether that settlement is fair and just for both parties and whether it will meet the long term needs of both parties following the divorce. In cases where the value of assets in the matrimonial pot is relatively low, a Judge is more likely to consider it necessary to include inherited assets in a settlement to ensure each parties' long-term needs are met.

Where the value of matrimonial assets is of a reasonable level, Judges can use their discretion to ring-fence all or part of an inherited estate from being included in a divorce settlement. In deciding whether this is appropriate a Judge will consider how the inheriting partner treated the assets in question once received. Using inherited money as an example, if this has been held with other monies which are jointly owned it may be difficult to argue during divorce proceedings that the inherited sum be considered separate for the purpose of a settlement.

Where an inherited estate has been used to the benefit of both partners – such as to fund or maintain a certain standard of living for the family – it is even less likely a Judge will consider it necessary to preserve what is left of these assets for the benefit of the inheriting individual at the expense of their partner. Should the matrimonial home form part of an inherited estate, or be funded by the estate, a family law court Judge is unlikely to exclude this as an asset of the marriage except for in the most exceptional of circumstances.

By Helen Harris - hmh@holmes-hills.co.uk

## Right to refusal

### Redundancy and alternative job offers

Redundancy is one of the many areas of employment law where there is a lack of clarity over how the courts will apply principles to the facts of individual cases. Fortunately, the principles involved in considering whether an employee has been unreasonable in refusing an alternative job when facing redundancy have recently been reviewed.

When making redundancies employers can offer employees suitable alternative employment which, if accepted, removes the employee's right to a redundancy payment. However, employees have the right to refuse an offer of alternative employment and maintain their right to a redundancy package if the employee considers the offer unreasonable.

Employees cannot maintain their right to a redundancy payment by unreasonably refusing the offer of alternative employment or by accepting a position and then unreasonably terminating it during the trial period.

Often the main point of contention in redundancy cases is whether the employee was reasonable in refusing the alternative employment offered to them. Under sections 141(2) and 141(3)(b) of the Employment Rights Act 1996 a tribunal must consider:

- (1) whether the alternative jobs offered by the employer would be suitable employment for the employee, and
- (2) whether any refusal of these jobs by the employee was reasonable.

Assessing the suitability of a role is highly subjective as it is the suitability of

the role for the particular employee in question, rather than for a general collective or type of employee, which must be determined. This assessment must therefore consider the extent to which each aspect of the role/s on offer match the employee. This includes taking into account:

- the tasks required to be undertaken as part of the role
- the terms of employment including wages, holiday entitlement and working hours
- the level of responsibility and status
- location and commuting requirements

The alternative jobs on offer do not have to be equivalent to, or even broadly the same as the employee's current role in order to be considered suitable. However, the greater the difference between the two positions the harder it may be for the employer to prove suitability of the job for the employee.

In considering the separate issue of whether an employee is reasonable in refusing an employer's offer of suitable alternative employment, a tribunal will determine whether the employee's reasoning for the refusal was sound and justifiable from the employee's point of view at the time the offer was refused.

Importantly for employers, 'from the employee's point of view' means employees would be able to refuse a reasonable offer on the grounds of his or her personal perception of the role on offer and as such, a refusal may be considered permissible even if others would not have thought his/her reasons were justified.

By David Dixey - dd@holmes-hills.co.uk

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## Climbing the ranks of the region's best law firms

Holmes & Hills have been ranked among the best solicitors firms in the region by The Legal 500 - a directory of the UK's most highly recommended legal services firms. Published in September, Holmes & Hills are recognised for their expertise in Planning law.

This latest accreditation identifies Holmes & Hills as a "Leading Firm" of solicitors and reflects the firm's efforts to provide the highest standard of legal advice and support across a range of legal service areas.

The Planning & Development team is headed by David Whipps, the firm's senior partner. David is closely supported by his team, Jo Lilliott and Steven Hopkins.

Mr Whipps said "The Legal 500 is a highly sought after legal accreditation and my team and I are very pleased that we have been recognised as leading providers of planning advice and support in the region. Our strong client base continues to grow and we have ambitious plans for the future of the team."

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# Litigation on a global scale

With the prevalence of international trade, there is a growing number of claimants entering into litigation with Defendants based overseas. Nevertheless, there are a number of difficulties that may arise as a consequence of a Defendant's location. Serving the Claim Form in the first place can be one such issue.

### Methods of Service

The Civil Procedure Rules 1998 ("CPR") govern the conduct of litigation in the Courts of England and Wales. Part 6 of those rules deals with permitted methods for service of the Claim Form, both within and outside the jurisdiction. The rules provide that service outside the UK is permissible by any method set out in a number of specified European Regulations and international treaties and conventions or "by any other method permitted by the law of the country in which it is to be served."

In the recent case of *Bacon v Automattic Inc and Others*, the question came before the High Court as to whether it had jurisdiction to permit service of a Claim Form out of the jurisdiction by email.

In that case, the Claimant had issued proceedings against three Defendants who were all domiciled in the USA. The Claimant sought an Order requiring the Defendants to disclose details of individuals responsible for publishing statements that the Claimant considered were defamatory. The Claimant applied for permission to serve the Claim Form by email at addresses previously provided by the Defendants.

In his judgment, Tugendhat J noted that service out of the jurisdiction by an alternative method had been the subject of conflicting views in previous cases. However, Tugendhat J held that service could be affected by alternative means because CPR 6.15 gives the Court discretion "where it appears ... that there is good reason to authorise service by a method or at a place not otherwise permitted by this

Part," to "make an order permitting service by an alternative method or at an alternative place."

Finding that service out of the jurisdiction could be affected by alternative means, the judge agreed with the Claimant's submissions that a comparison could be drawn with the permissible methods for service within the jurisdiction set out in CPR 6.3(1)(d), the effect of which is that service in the jurisdiction can be affected by email provided the party who is to receive service has indicated in writing to the serving party that he is willing to accept service by email and has provided an email address at which he can be served.

Having held therefore that he could order service upon the Defendants in the USA at the email addresses provided, the judge went on to say: "in future Claimants should put before the Court evidence as to whether that method is permitted by the law of the Country in which the Claim Form is to be served (or a good reason for not doing so), since if it is, service by an alternative method will be unnecessary"

### Implications

Parties wishing to serve legal documents by email will, in the first instance, need to confirm whether it is permissible to do so under the laws of the country in which service is to be affected. If it is, then they will be permitted to serve English proceedings by email under CPR 6.40(3)(c).

If it is not permissible under the laws of the relevant country then, where the Claimant can show there is good reason to do so, it will be possible for the Claimant to obtain a Court Order permitting overseas service by email.

Contracting parties may therefore wish to insist on their counter party providing an email address and to include an express provision in their contract (perhaps by including it within their standard terms and conditions) that their counter party agrees to accept service of legal documents at the email address they have provided.

By **Sam Bawden** - [scb@holmes-hills.co.uk](mailto:scb@holmes-hills.co.uk)

## Holmes & Hills' Charity Bike Ride 2011

This September saw Holmes & Hills organise its 6th annual Charity Bike Ride. Around 100 riders took part, setting out from Holmes & Hills' office in Halstead to complete either a 25 or 50 mile route which would take them around Halstead and a number of the surrounding villages.

Riders of all ages and abilities took on the challenge and to thank them for their efforts Holmes & Hills provided a complimentary BBQ, drinks and cakes in the gardens of their Halstead office. In addition to stopping for refreshments at the designated pit stop in Little Yeldham, it has to be said some riders also took advantage of a number of the pubs along the way.

A special mention must be given to Mark Bailey of Greenfields Community Housing who completed the 50 mile route in a very impressive 2 hours and 21 minutes.

Despite the best efforts of the great British weather the ride was as successful as ever, raising £2,706.55 for St Helena Hospice. Holmes & Hills would like to once again thank all those who supported the event by helping out on the day, taking part or generously donating.

