



## On Target

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### Fit Notes to replace Sick Notes

Following recommendations made by the Government's report, 'Working for a Healthier Tomorrow', the Department for Work and Pensions plans to replace the current system of sick notes for those unable to work.




Presently, someone is either deemed fit or unfit for work. Under the proposed new system a doctor will provide a patient with a fit note emphasising what he or she is capable of. Doctors will have the options of advising whether someone is fit for work, not fit for work or fit for some work now. The latter option would be used where a doctor considers that the patient could return to work if some aspects of his or her work were changed, either temporarily or permanently. Also, as doctors are often able to judge when a patient should be able to return to work, it is proposed that they should be able to specify whether or not there is a need to see a patient again when his or her current statement expires.

Where a doctor considers that the patient is fit for some work now, additional information about the patient's condition or the doctor's advice for a return to work must be provided. The doctor will also have the option to suggest appropriate adjustments to assist the employee to return to work. The proposed suggestions are:

- a phased return to work;
- altered hours;
- amended duties; and
- workplace adaptations.

The aim here is to give the employer appropriate information in order to facilitate an employee's return to work where possible. The proposals make it clear that the employer will not be bound to implement suggestions by a doctor for workplace changes. Changes will be at the discretion of the employer and with the agreement of the employee. However, where the employee is disabled for the purposes of the Disability Discrimination Act 1995, failing to act on a doctor's advice would not seem a wise move for an employer who may find themselves at risk of a claim from the employee that they have failed to make reasonable adjustments to accommodate their disability.

The British Medical Association has expressed concern that the proposals represent a fundamental change in the doctor-patient relationship and place additional pressure on doctors.

The details of the proposals have yet to be finalised so some changes are likely before the new medical statements are introduced. This is planned for April 2010, subject to Parliamentary approval. 



#### Meet the team...

Robert G Irons

Bob is a Member of the firm and head of the Employment Team. He advises on complex employment issues and has been singled out for his "sound commercial advice" by Chambers & Partners.



# Archers Law's guide to employment law



## Varying a Contract of Employment

In the current economic climate, many employers are seeking ways to reduce staff costs. For example, both British Airways and British Telecom are reported to have offered staff increased time off work in return for a reduction in pay. However, when considering reorganising the pattern of working, it is important to remember that where this would necessitate adverse changes to an employee's existing terms of employment, the employment contract can only be varied with the agreement of the employee, either by agreeing the changes with each individual affected or, in some cases, through a collective agreement.

If an employer makes a unilateral change to an employee's conditions of employment without the employee's agreement it is generally a breach of contract. In serious cases, the employee would have the right to resign and claim constructive dismissal.

If you are proposing changes to an employee's contract of employment, the first step you take should be to consult fully with them well in advance of the planned changes. Explain and discuss the reasons for the changes before inviting the employee to give his or her views on the draft revised contract. Failure to consult will count against you if an employee rejects the new contract terms and the matter ends up in a Tribunal. However, if there is a sound business reason for the change and you have carried out the necessary consultation and sought out alternative solutions, it will be more difficult for the employee to succeed in a claim against you.

When times are tough and redundancies are likely unless alternative ways of cutting costs are found, a more successful outcome is likely to be achieved when employees fully understand the situation because they have been involved in the decision making process.


Although variations to a contract can be agreed verbally, it is advisable to record any agreed changes in writing.

If the employee agrees to sign the revised contract, all well and good. If agreement cannot be reached, the employer can terminate the original contract, taking care to give the required notice, and offer a new contract to the employee, including the revised terms. If the employee accepts the new contract, continuity is preserved. The termination does not constitute a breach of contract but is technically a dismissal so a disgruntled employee can



bring a claim of unfair dismissal. Where more than 20 employees at one establishment are dismissed but immediately reemployed on revised terms, the employer has a statutory duty under the Trade Union and Labour Relations (Consolidation) Act 1992 to consult with them in advance. Failing to do so could result in the employer having to pay a protective award to each employee, which can amount to several thousand pound per employee.

Employers should note that special rules apply if changes to an employee's terms of employment are as a result of the sale or transfer of a business or a part of one to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply and specific advice should be sought in that instance.

For advice on changing the employment terms in employees' existing contracts, please contact our employment team on 01642 636 500. 



### Meet the team...

Elizabeth Foreman

Liz was promoted to the position of Member in 2009 due to delivering first class client service. She specialises in HR support and is recognised as a leading employment law specialist by Chambers & Partners.



# Archers Law's guide to employment law



## Insolvency and TUPE Update



The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) protect the employment rights of employees when there is a relevant transfer of a business or part of a business. However, the transfer provisions of TUPE do not apply to a relevant transfer following bankruptcy proceedings or similar insolvency proceedings with a view to liquidation, and are under the supervision of an insolvency practitioner. In such circumstances, employees do not automatically transfer to the new owner and any dismissals are not automatically unfair.

A recent case, *Oakland v Wellswood (Yorkshire) Ltd.*, concerned a 'pre-pack' administration. In a pre-pack, the profitable parts of the company are transferred to a new company set up for the purpose of continuing all or part of the trade of the insolvent company. The new, viable company often takes on employees and assets of the old company, which is liquidated after the transfer.


Mr Oakland was a director of Wellswood (Yorkshire) Ltd (Wellswood), which traded as a wholesaler in fruit and vegetables. By mid-2006, the company was in financial difficulties. It approached a major creditor, Gilbert Thompson (Leeds) Ltd. (GTL), as a potential buyer and sought the advice of an insolvency practitioner. It was agreed that administration was the appropriate course of action. GTL was not willing to purchase the old company as a going concern but decided to incorporate a new company as a wholly owned subsidiary of GTL. The new company would acquire the assets of the old company and five of its seven employees, including Mr Oakland.

On 6 December 2006, the sale of the assets to the new company

was completed and administrators were appointed to the old company, Wellswood.

The new company subsequently dismissed Mr Oakland, who brought a claim of unfair dismissal. The Employment Appeal Tribunal (EAT) held that the administration had been instituted with a view to the eventual liquidation of the old company's assets and therefore he had not automatically transferred to the new company when it had taken the assets of Wellswood. Rather he had simply been offered a new contract with the new company and the transfer provisions of TUPE did not apply in his case. Oakland could not therefore bring a claim of unfair dismissal because he did not have sufficient qualifying service (1 year) with his new employer to bring a claim.

The case later went to the Court of Appeal's who confirmed that in fact the correct position is that an employee's continuity of service is preserved when the acquiring company in a pre-pack sale takes on an employee of the old company. Unfortunately the Court of Appeal did not express a definitive view regarding whether or not the insolvency exemption from TUPE applies automatically to a company in administration or to a pre-pack sale. However, the Court expressed the view that a strong argument could be made that it does not.

TUPE remains a complex area of law and the decision in this case has added a further tier of confusion. Employers who may be selling or acquiring a business which could potentially involve the transfer of staff are urged to take legal advice from one of our Employment Law Experts. 



### Meet the team...

Leanne Nash

Leanne trained with the firm and specialises in employment law and debt recovery. She has advised on matters including dismissals and disciplinary issues, grievances, working time and discrimination.

# Archers Law's guide to employment law




## The Gender Pay Gap

The gender pay gap is the term used to describe the difference between the earnings of men and women. It is determined by calculating the overall pay of women as a percentage of that of men. The pay gap is the difference between this and 100 per cent. So, for example, if women's pay is 80 per cent of men's, the pay gap is 20 per cent.

At present, private sector employers are only under an obligation to disclose gender pay information if requested to do so as part of a questionnaire under the Equal Pay Act 1970 or during Employment Tribunal proceedings. However, the Equality Bill contains a power to require employers with more than a specified number of employees to report on the gender pay gap. The original provision was for those with more than 250 employees to provide this information but a reduction in the number to 100 has been mooted.




Initially, organisations with more than the specified number of employees will be 'encouraged' to volunteer information on the average pay of male and female workers. To this end, the Equality and Human Rights Commission will carry out a consultation in order to develop a system of pay reporting for the private sector. If by 2013 it is clear that a voluntary reporting system has been ineffective in narrowing the gender pay gap, which many expect it will be, legislation will be brought forward to force disclosure. The Equality Bill also bans secrecy clauses which prevent staff from disclosing their salaries to colleagues.

A recent survey of senior Human Resources professionals revealed that only 29 per cent of organisations had conducted gender pay audits and only five per cent had actually reported their findings. Employers would therefore be well advised to carry out an audit sooner rather than later and to ensure that any discrepancies are remedied so as to reduce the risk of equal pay claims in the future. 

## Government Plans National Minimum Wage for Apprentices

The Government has announced that it has asked the Low Pay Commission to set a National Minimum Wage (NMW) for apprentices.

Currently, apprentices under age 19 do not qualify for the NMW. Neither do those over age 19 who are in the first 12 months of their apprenticeship.

There is a guaranteed rate of pay for Learning and Skills Council apprenticeships and this was increased from £80 to £95 per week from 1 August 2009. However, if the proposals go through the pay due to apprentices is likely to increase again and, as the increase will be calculated by reference to an hourly rate, may be substantial. 

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### Meet the team...

Laura Glenn

Laura is a Member of the Institute of Legal Executives and specialises in Employment Tribunal claims.