

briefingpages

Issue No.1 February 2005

IN THIS ISSUE:

■ HEALTH AND SAFETY

1. Migrant workers.
2. Work your proper hours day, Friday 25th February.
3. Improving Health & Safety for workers with disabilities.

■ PENSIONS p.ii

Career average revalued earnings.

■ LEGAL p.iv

1. Rolled up holiday pay.
2. Continuing discrimination.
3. Unlawful deductions.

■ NEGOTIATING INFORMATION p.viii

■ HEALTH AND SAFETY

1. MIGRANT WORKERS

The TUC and HSE have produced a brief health & safety guide for migrant workers. This outlines workers' rights, obligations, and employers' duties under health & safety legislation, with contact details for more information. The leaflet is available in Albanian, Arabic, Bengali, Chinese, Czech, Greek, Gujarati, Pashto, Portuguese, Polish, Punjabi, Romanian, Russian, Slovak, Spanish, Tamil, Turkish, Ukrainian and Welsh, as well as English. It can be downloaded at www.tuc.org.uk/h_and_s/index.cfm?mins=403, where there is also a TUC leaflet for people coming to work in the UK, with more general information on their legal rights to work here.

2. WORK YOUR PROPER HOURS DAY, FRIDAY 25TH FEBRUARY

Friday 25th February is the first day in 2005 that those who do unpaid overtime will stop working for free and start getting paid, according to TUC research that found the average UK worker does 38 days of unpaid overtime per year. On this day workers are being encouraged to arrive at and leave work on time, and take a full lunch break, to remind their employer what a good deal employers have for the rest of the year. The TUC is encouraging bosses to take their staff out that day to say thanks for this free work.

To work out how much free work you're doing every year, use the TUC's unpaid overtime calculator at www.worksmart.org.uk/overtime_calc.php and let the TUC know your experiences of long hours working by emailing longhours@worksmart.org.uk. Working excessive hours is bad for your health and when you're doing it for free it's also bad for your wealth. Amicus has been leading the campaign to end the UK opt-out which many employers use to pressure workers into signing away their rights to a reasonable working week. For more details of your rights under the Working Time Regulations, see our website or contact the Research Department for a guide.

3. IMPROVING HEALTH & SAFETY FOR WORKERS WITH DISABILITIES

The European Agency for Health and Safety at Work has produced a factsheet on the workplace safety of people with disabilities, focussing on the key area of how to ensure safety and health, while avoiding discrimination. The factsheet details the rights of people with disabilities to both a fair and safe workplace and explains how a practical application of anti-discrimination legislation and health and safety legislation can benefit both the worker and employer. While employers have legal duties to take action, the factsheet shows how compliance will also have a positive benefit for employers, as a workplace that is accessible and safe for people with disabilities is also safer and more accessible for all employees, clients and visitors.

Containing user-friendly and practical guidance on how the responsibilities of equality legislation can tie in with health and safety responsibilities, it includes: explaining how to incorporate the principle of adapting work and workplaces to people, to provide accessible and safe employment for disabled people; a guide to a disability-sensitive risk assessment; and a checklist on how to provide a safe workplace for disabled workers.

The guide can be downloaded in 20 languages at <http://agency.osha.eu.int/publications/factsheets/53/en/index.htm>. The Agency website has a section for disability issues that contains a database of links to good practice information which can be found at http://europe.osha.eu.int/good_practice/person/disability/

CONTACT DETAILS

Members without internet access can request copies of any of the above documents to be emailed or posted to you by contacting Chris O'Leary, Research Department, 020 7939 7016, Chris.O'Leary@amicustheunion.org

■ PENSIONS

CARE PENSIONS – HOW DO THEY COMPARE TO FINAL SALARY PENSIONS?

CARE pensions have been introduced by a small number of employers in the private sector in recent years, generally to replace Final Salary pension schemes. They have now attracted much greater attention as the Government is consulting on proposals which could see CARE introduced in the Civil Service, NHS and other public sector pension schemes. If this happened it is likely that they would spread more rapidly in the private sector.

CARE like Final Salary is a type of 'defined benefit' pension scheme i.e scheme members are promised a defined level of pension when they retire or leave on a formula generally related to their salary and years of service.

CARE stands for 'Career Average Revalued Earnings', a name which gives a clear indication of what it entails. In calculating the pension the earnings you have in each year of your employment or career are taken into account and an average of all of them is calculated.

In order to maintain the value of pension earned each year the earnings are revalued up until the time that you retire or leave. Revaluation will generally either be in line with inflation or national average earnings increases.

In a Final Salary scheme by contrast, all years of service are linked to a scheme-determined definition of each member's 'final salary'. Generally it is only salary just before you retire that influences the pension.

Assessment

In final salary schemes members whose salary rises fastest during their careers get a better return from the scheme than those whose salary rises at a slower rate.

In a CARE scheme all members may get a pension which is argued to be fairer as it reflects the earnings throughout members careers.

Actuaries generally expect that the earnings of members of a pension scheme will rise faster than inflation, usually by 1.5-2% each year. These assumptions are based on historic national trends though they are to an extent modified by factors specific to the particular organisation involved.

It is clear that a CARE pension with revaluation based only on inflation would produce pensions which were substantially less and which would be a lot cheaper than a final salary pension scheme with the same accrual rate (the fraction of salary earned by each year of service e.g 1/60 or 1/80).

For example, consider a person who retired after 20 years in a pension scheme during which their earnings had increased each year by 3.5% whilst inflation had increased by 2%. A CARE pension revalued by inflation but with the same accrual rate as a Final Salary scheme would deliver a pension which was 10% lower. The loss would increase as the length of service increased or if the rise in their earnings was more rapid.

If the CARE pension is based on revaluation in line with national average earnings then the projected outcome will depend on how earnings increases in the particular organisation compare with the national average figures.

In the NHS context the Government Actuary has calculated that CARE, with inflation revaluation, would cut the average pension by approximately 19% and with average earnings it would be cut by 7%.

The Government has said that it is not introducing CARE to save money or reduce pensions and has suggested that it would be prepared to have different, generally higher, accrual rates if CARE was introduced.

In the NHS this has been looked at in a framework of the accrual rates as might be offered in a CARE Scheme as would be equivalent to a 1/60 final salary scheme (as it is suggested that the NHS pension might in any case be switched to such a level of accrual). Another way of expressing 1/60 is 1.67%. The Government Actuary has suggested that a CARE pension revaluing by inflation might offer an accrual rate of 2.05% and one revaluing by earnings an accrual rate of 1.8%.

This public sector approach is very different from that we have experienced in the private sector where CARE has usually been offered at the same accrual rate as Final Salary as a planned way of cutting pensions and employer contributions.

The choice of revaluation basis is also important in terms of the relative effects of those who stay to retirement and those who leave employment early. Where members do leave early they are left with deferred pensions which are increased only in line with price inflation. In a CARE scheme based on earnings revaluation they will do less well relative to people who stay but with price revaluation they will be treated equally.

In the Civil Service the Government has proposed that CARE be based on an increased accrual rate (as yet unspecified) but with revaluation based on prices and this is argued as being fairer to those who leave before retirement. In the NHS the Review has leaned towards revaluation in line with earnings arguing that this will encourage people to prolong their careers in the NHS. In the private sector revaluation in line with prices is usually picked with a view to reducing the cost of the Scheme but the public sector approach appears to be going to adjust the accrual rate so this motive will not be relevant.

A key attraction of CARE to employers is that it reduces the impact of salary increases on pension costs. In a Final Salary scheme any increase in pay affects the whole of employees pension entitlements but in a CARE scheme it only affects the value of pension in future years. It greatly reduces one of the risks that employers with final salary schemes currently have.

In Final Salary schemes it is often the case that not all pay is pensionable. One reason for this is that variable items of pay, such as shift or overtime, are excluded as they may not still feature in 'final 'pay. In a CARE scheme this argument does not apply and a much stronger argument can be made for all pay being pensionable.

The amount of salary progression a person has during their career is the key determinant of whether they would be better served by a Final Salary and CARE scheme, which delivered the same average value of pension. Those with short or broken careers, many of whom may be women, may have as a result less career progression and therefore tend to benefit from CARE.

A disadvantage of CARE is that it makes pensions more difficult to calculate and that the pension may not bear a predictable relationship to the level of pay before retirement. Individuals may or may not have a clear idea as to how their career and pay will progress. At a collective level the Union, faced with a CARE proposal, will need to form a view as to the likely career movement of all of its members. This may not be straightforward if pay systems are set to change, as is the case in the NHS with the roll-out of Agenda for Change.

■ LEGAL

1. ROLLED UP HOLIDAY PAY

Workers are entitled, in each leave year, to four weeks paid holiday. "Rolling up" refers to when an employer claims that their obligation under the Working Time Regulations to pay for 4 weeks holiday is covered by some existing part of pay which is paid throughout the year, and just during periods when the worker is off on holiday. The other aspect of this is that the employee who has "rolled up pay" will usually not be paid at all for any period which they actually do take off work. (Amicus have argued that a failure to pay people while they are off on holiday discourages holiday being taken, and thus subverts the health and safety imperative behind the Working Time Directive which brought this right in.)

The issue of "rolling-up" holiday pay is turning into one of the most controversial aspects of the Working Time Regulations. A number of different courts have been deciding whether an employer can pay rolled up holiday pay by including an allowance for the holiday period in the weekly or monthly wages or whether the payment has to be made during the holiday itself.

The Scottish courts, in particular, have been concerned that the arrangement of rolling up holiday pay could lead to situations in which workers were discouraged from taking holidays. The English courts, initially took the same view, but latterly, in contrast, have looked at the issue of rolled-up holiday pay from a more contractual perspective and have said that a rolled-up rate of holiday pay cannot count towards holiday pay if it is unilaterally imposed in breach of contract. This leads to the presumption that it can be included if agreed between employer and employee. (This assumes an equality of bargaining power between employer and employee which Amicus believes does not usually exist.)

The Marshalls Clay Products v Caulfield case essentially agreed with the English court that there could be rolled up pay in certain circumstances. However, the Court of Appeal is concerned about the possible conflict between contractual agreements and violation of the worker's right to be paid annual leave under the Working Time Directive. It has therefore sought clarification of the issue from the European Court of Justice.

A number of joined cases in the EAT (**Smith v Morrisroe & Sons**) have now provided further helpful guidance on the Marshall decision by listing ways in which the employer and the employee can establish mutual agreement for genuine payment for holidays. What they need to show is that this represents a true addition to the contractual rate of pay for time worked. They can do this by expressly providing for rolled-up holiday pay in the contract, identifying the amount allocated to holiday pay in the pay slip and keeping records of holidays taken.

The Amicus legal team will update you on the European Court's decisions in this area in a later edition of the Activist.

2. CONTINUING DISCRIMINATION

In cases where discrimination is claimed, the submission of an employment tribunal application must be done within three months less one-day, beginning with the date when the discriminatory act complained of, was done.

Where discrimination is continuing, there might be a possibility of extending the time limit, however this should not be relied on and the **3 month rule should be kept to wherever possible.**

The question of time limits is of even more vital importance taking account of the new statutory disciplinary and grievance procedures. From October 2004 it is now necessary to commence the internal grievance procedure before a claim can be submitted as not to do so will result in the automatic reduction of any award made by the employment tribunal. You should also bear in mind that for us to support an ET claim, the Regional Officer should be notified well in advance of the time limit, leaving the officer at least a month before the time limit to involve a solicitor via the union's internal procedures.

WHAT IS CONTINUING DISCRIMINATION?

The key principles are set out under the Race, Sex and Disability Discrimination legislation as follows:

- (a) Any **act that extends over a period** is to be treated as done at the **end** of that period
- (b) Where the inclusion of **any term in a contract** renders the making of the contract unlawful, that act shall be treated as **extending throughout the duration** of the contract
- (c) A **deliberate omission** is treated as done **when** the person in question decides upon it

When dealing with issues involving continuing discrimination it is useful to highlight the following cases.

(a) An act extending over a period

In **Owasu v London Fire & Civil Defence Authority**, the Applicant brought two sets of complaints against their employer, claiming a failure to promote on several occasions over a period of five years. The applicant also claimed not to have been given the opportunity to act up whenever the opportunity arose. The Employment Appeal tribunal said that successive failures to promote were in the nature of one-off events and not continuing, but it was held that the employer was maintaining a practice, which effectively excluded the applicant from the opportunity to act up and constituted a continuing act.

This approach has been followed in the recent case of **Hendricks v Commissioner of Police of the Metropolis** where the Court of Appeal considered a complaint by an

ethnic minority police officer alleging discrimination comprising 100 incidents extending over 10 years. The Court concluded that the focus of enquiry should be on whether there was an ongoing state of affairs, in which incidents were linked to one another, as opposed to isolated specific events.

As this is case law below the House of Lords it cannot be guaranteed to apply at a later date, so it is best to stick to the 3 month rule above.

(b) Any term in the contract

Two cases illustrate the point. In **Barclays Bank v Kapur**, the House of Lords considered the position of applicants whose employers failed to take account of service overseas in the calculation of pension benefits under the UK Pension Scheme. The more recent case of **Calder v James Findlay Corporation** concerned the exclusion of female employees from a mortgage subsidy scheme made available to male employees. In both cases the contractual terms themselves were discriminatory and subsisted for the duration of the contract and therefore a continuing act.

(c) A single act within continuing consequences

A particular example of this can arise where a person requests a job share, or return from maternity leave on a part time basis, only to be refused. But, in **Sougrin v Haringey Health Authority** a complaint by a nurse that a failure to upgrade her on the grounds of race leading to continuing financial loss was rejected by the Employment Appeal Tribunal and the Court of Appeal on the basis that it was a one-off regrading decision, which had continuing consequences, but did not constitute a policy.

The situation here highlights the problems with distinguishing between separate acts taking place where there is an ongoing state of affairs and separate acts, which are merely the repetition of a single act. In this example, each refusal comprised a separate act of discrimination, because the matter had been reconsidered on the second occasion in response to the second request.

INTERACTION WITH THE NEW PROCEDURES

The **Employment Act 2002 (Dispute Resolution) Regulations 2004** provides that a grievance is a complaint by the employee about action, which his employer 'has taken or is contemplating in relation to him'. 'Action' is defined as any act or omission, and this might cover for example a decision by an employer not to promote an employee such as in the case of **Owasu**, or a reconsideration of a request for part-time working, which is then refused. See **Cast v Croydon College** for reference.

EXTENSION OF TIME LIMITS IN DISCRIMINATION CLAIMS

Under the new Regulations, if an employee claims discrimination, it will be in relation to 'action' as defined, and the statutory disciplinary and grievance procedures will apply. Where the procedures are complied with, the normal time limit for bringing a claim is extended by a further three months. It is important to use the Grievance Procedures especially where it is believed that the action taken is on the grounds of unlawful discrimination or for a reason other than that upon which the employer is relying. Union policy is NOT TO RELY ON THE EXTENSION. The Regional Officer is still expected to submit the potential tribunal claim to our solicitors 28 days before the time limit. The solicitors will deal with any extension if it is necessary and will keep in touch with the Officer if the matter is ongoing, so *please involve your Officer as early as possible*.

Where the discrimination claimed is alleged to be continuing, or falling within (a) or (b) above, it is likely to be characterised by the existence of a contemporaneous policy or practice. Therefore, the time limit will begin to run from the last act complained of.

Under the new procedures, a Step 1 letter or dated statement setting out the basis of the grievance must be sent, providing the employer with 28 days to respond. A waiting period of 28 days will follow before submission of the Employment Tribunal Application.

Discrimination claims falling within (c) should be regarded as one-off acts and require the sending of a step 1 letter in every case prior to submitting the employment tribunal application after the 28-day waiting period. Where a number of separate incidents are concerned, it is wise to consider the submission of a step 1 letter in relation to each of the acts complained of as well as a separate employment tribunal application following the 28-day waiting period. The Tribunal should then be invited to consolidate the claims.

FURTHER GUIDANCE

Further guidance on the matters raised in this note should be sought from your Regional Officer, especially if the member is deterred from taking a grievance because of a fear of serious harassment or harm as a result.

3. UNLAWFUL DEDUCTIONS – EMPLOYMENT TRIBUNAL JURISDICTION

Section 13 of the Employment Rights Act 1996 specifies that, in general, employers should not make deductions from workers' wages unless those deductions have been authorised by the worker's contract or the worker has agreed to those deductions in writing.

However, section 14 of the ERA contains a number of exceptions, which provide that deductions can be made:-

- to recover an overpayment (section 14(1));
- where the worker has taken part in a strike or other industrial action (section 14(5)).

Following on from two cases, **Sunderland Polytechnic v Evans and SIP (Industrial Products) v Swinn**, many Tribunals had interpreted section 14 very broadly; arguing that they could not hear any claim in which an employer merely raised an argument there had been an overpayment or industrial action, without investigating whether the worker had actually been overpaid or taken part in industrial action as a matter of fact. This meant that claims, if members wished to pursue them, had to be commenced in the County Court.

Forcing claims to go via the County Court is not only costly and slow, but denies members the opportunity of an increased award of damages under the Disciplinary and Grievance Regulations where the employer failed to deal adequately with the member's grievance about the unlawful deduction of wages before the ET claim.

In the Union's cases of **Gill v Ford Motor Company Limited** and **Wong & Others v BAE Systems**, the Employment Appeal Tribunal has decided that this approach is incorrect. The EAT has established that where a worker raises section 14 the Employment Tribunal must investigate whether, as a matter of fact, an employee has been overpaid or has taken part in industrial action. An employer simply alleging that this is the case will be insufficient.

Since the Disciplinary and Grievance Regulations came in to force the member will have to take an internal grievance re the deduction before going to ET. Ideally their grievance letter should set out the alleged deductions in full, and should make clear that they did not consent to the deductions and they were not in relation to an over payment or industrial action.

INFLATION FIGURES

2004	RPI (Jan 1987=100)	RPI	RPIX	CPI
Jan	183.1	2.6	2.4	1.4
Feb	183.8	2.5	2.3	1.3
Mar	184.6	2.6	2.1	1.1
Apr	185.7	2.5	2.0	1.2
May	186.5	2.8	2.3	1.5
June	186.8	3.0	2.3	1.6
July	186.8	3.0	2.2	1.4
Aug	187.4	3.2	2.2	1.3
Sept	188.1	3.1	1.9	1.1
Oct	188.6	3.3	2.1	1.2
Nov	189.0	3.4	2.2	1.5
Dec	189.9	3.5	2.5	1.6

2003	RPI (Jan 1987=100)	RPI	RPIX	CPI
Jan	178.4	2.9	2.7	1.4
Feb	179.3	3.2	3.0	1.6
Mar	179.9	3.1	3.0	1.6
Apr	181.2	3.1	3.0	1.5
May	181.5	3.0	2.9	1.2
June	181.3	2.9	2.8	1.1
July	181.3	3.1	2.9	1.3
Aug	181.6	2.9	2.9	1.4
Sept	182.5	2.8	2.8	1.4
Oct	182.6	2.6	2.7	1.4
Nov	182.7	2.5	2.5	1.3
Dec	183.5	2.8	2.6	1.3

2002	RPI (Jan 1987=100)	RPI	RPIX	CPI
Jan	173.3	1.3	2.6	1.6
Feb	173.8	1.0	2.2	1.5
Mar	174.5	1.3	2.3	1.5
April	175.7	1.5	2.3	1.3
May	176.2	1.1	1.8	0.8
June	176.2	1.0	1.5	0.6
July	175.9	1.5	2.0	1.1
Aug	176.4	1.4	1.9	1.0
Sept	177.6	1.7	2.1	1.0
Oct	177.9	2.1	2.3	1.4
Nov	178.2	2.6	2.8	1.6
Dec	178.5	2.9	2.7	1.7

UNDERSTANDING INFLATION

The inflation rate is calculated from the prices of a range of different goods and services selected to represent average spending patterns in the UK. The Office for National Statistics monitors changes in these prices each month, and uses this to work out an average increase for the year. The different items in the 'basket' of goods and services are given different weights, so that things we spend more on, such as housing, motoring and food, are given more importance.

BASE LENDING RATE FOR JANUARY 2005 IS 4.75 %

AVERAGE EARNINGS – INCLUDING BONUSES

2004

2004	Whole Economy			Manufacturing			Public Sector		
	Average Earnings Index	Single Month	3 Month Average	Average Earnings Index	Single Month	3 Month Average	Average Earnings Index	Single Month	3 Month Average
Nov	109.8	4.1	3.8	109.4	4.1	3.8	109.4	4.1	3.8
Oct	117.8	4.2	4.1	116.6	3.4	3.3	121.7	4.8	4.6
Sept	117.2	3.9	3.8	116.1	3.2	3.4	121.2	4.4	4.2
Aug	108.6	3.6	3.7	108.8	3.8	3.7	109.1	2.9	3.4
July	116.2	3.3	3.8	116.2	3.9	4.1	119.7	3.6	4.2
June	116.5	4.3	4.4	116.0	4.1	4.4	119.8	4.5	4.4
May	116.0	4.2	4.4	115.9	4.4	4.1	119.0	4.6	4.3
April	115.8	4.6	4.3	115.5	4.8	3.9	118.6	4.1	4.3
Mar	115.7	4.3	5.2	116.1	3.2	3.5	118.2	4.3	4.3
Feb	114.3	3.9	4.9	114.7	3.6	3.5	117.8	4.4	4.3
Jan	117.1	7.3	4.7	114.0	3.6	3.5	117.1	4.1	4.2

2003

	Whole Economy			Manufacturing			Public Sector		
	Average Earnings Index	Single Month	3 Month Average	Average Earnings Index	Single Month	3 Month Average	Average Earnings Index	Single Month	3 Month Average
Dec	113.2	3.4	3.4	113.6	3.4	3.4	116.9	4.3	4.4
Nov	113.7	3.3	3.6	113.3	3.5	3.4	116.4	4.2	4.8
Oct	113.0	3.6	3.6	112.8	3.2	3.2	116.1	4.7	5.4
Sept	112.8	3.7	3.6	112.5	3.5	3.2	116.1	5.5	5.6
Aug	112.4	3.5	3.4	111.9	2.9	3.1	115.6	6.0	5.5
July	112.3	3.6	3.4	111.8	3.2	3.1	115.4	5.3	5.1
June	111.7	3.2	3.0	111.4	3.1	3.0	114.7	5.3	5.0

The three-month average figures are the changes in the average seasonally adjusted index values for the last 3 months compared with the same period a year ago.

Full-time average earnings by occupation

	£pw		£pw
All workers	514.90	Admin & secretarial	353.80
All male	567.40	Skilled/craft	433.20
All female	428.20	Services	295.10
Managers	770.60	Sales	296.90
Professionals	684.60	Operatives	389.10
Associate Professionals	548.70	Other manual jobs	313.20

The table above gives estimates of full-time average weekly earnings by occupation. It is based the figures from the New Earnings Survey 2003, updated by the AEI.

The National Minimum Wage

The National Minimum Wage Regulations 1999 (Amendment) (No 2) Regulations 2004 was introduced on 1 October 2004.

- The minimum wage for 16-17 year olds is £3 per hour
- The adult worker's rate rises by 7.8% from £4.50 per hour to £4.85 per hour
- The youth rate, for 18 to 21 year olds, rises by 7.9% from £3.80 per hour to £4.10 per hour

The regulations can be viewed on the HMSO website www.hmso.gov.uk

For more information on inflation go to
www.statistics.gov.uk or www.incomesdata.co.uk