

# COOLEHADDOCK

## +employment law bulletin

### WELCOME

#### Age Discrimination

From October 2006, all employers will be subject to new age discrimination laws. The government has just issued a first draft of the new laws for consultation.

In summary, the proposals:

- ban age discrimination in terms of recruitment, promotion and training;
- ban all retirement ages below 65 – except where objectively justified;
- require employers to inform employees in writing, and at least 6 months in advance, of their intended retirement date. This will allow people to plan for their retirement;
- remove the current upper qualifying age for unfair dismissal and redundancy rights;
- impose a duty for employers to consider an employee's request to continue working beyond retirement; and
- impose a requirement for employers to give written notification to employees at least 6 months in advance of their intended retirement date.

This will allow people to plan for their retirement.

#### Maximum Workplace Temperature

As temperatures soar, we are receiving more and more enquiries about whether employers can be sued because employees are claiming they are suffering from ill-effects caused by the temperature.

Surprisingly, although the law sets out minimum temperatures for the workplace, there is no clear legal maximum.

Regulation 7 of the Workplace (Health, Safety and Welfare) Regulations 1992 provides that “during working hours, the temperature in all workplaces inside buildings shall be reasonable.”

July 2005  
employment law

contents

page 1

Age Discrimination  
Maximum Workplace  
Temperature

page 2

Maximum Workplace  
Temperature  
Discrimination  
Agency Workers  
... a recent example where  
the agency was not liable

page 3

Holiday Pay Ruling  
Redundancy Dismissals  
Fresh from Acas

page 4

Fresh from Acas

Last year, following a request from USDAW for a maximum temperature to be created, the government stated that it would not introduce a maximum workplace temperature as it would be too impractical.

The World Health Organisation has stated that the maximum temperature for 'comfortable' working (which, of course, is different from the maximum temperature for 'safe' working) is 24 degrees Celsius.

Perhaps the best guidance is a call from the TUC, in 2003, for a maximum workplace temperature of 30 degrees (or 27 degrees for those doing strenuous work).

If temperatures in your workplace are approaching these levels, you need to think seriously about ways to manage risks such as fatigue, dizziness, dehydration and asthma. Failure to take reasonable steps (which would include introducing portable air conditioning machines, fans, providing free water or allowing longer breaks) might result in civil liability if an employee suffers ill-health.

## Discrimination

Since discrimination laws were introduced 30 years ago, when Claimants recover money in discrimination claims, tribunals have awarded large sums of money against the employer and a token few hundred pounds against the discriminating / harassing employee, if the Claimant brings his/her claim against both the employer and the individual discriminator.

Last month, in *Way & IntroCate Chemicals v Crouch*, the Employment Appeal Tribunal has held that it is legitimate to make both employer and discriminator responsible for the full amount, so that employees can recover their full compensation from the discriminator if the employer is insolvent.

The practical ramification for employers is that they can seek a contribution from the discriminator for a percentage (if not all) of the award. Tribunals, when

making the award, should specify the percentage blame for apportionment between the discriminator and the employer, and the employer (once it has paid the full amount) can recover the discriminator's contribution from it.

## Agency Workers

Employment tribunals have, in recent years, regularly been finding implied contracts of employment between agency workers and end users.

However, such workers often claim against either the end-user or the agency, leaving them with a practical difficulty if the party they did not claim against is found to be their employer.

Now the Employment Appeal Tribunal has in *Astbury v Gist Ltd* recommended tribunals exercise their own power to join parties so that the other party – the agency or end-user – is added as respondent to allow a fuller review of the employment relationship and more scope for a remedy.

## ... a recent example where the agency was not liable

In *Bunce v Skyblue*, the Court of Appeal has upheld a tribunal's finding that an agency worker was not employed by the employment agency through which he worked as his contract stated he was not an employee and there was a fatal lack of mutuality of obligation.

Mr Bunce argued that the agency had day-to-day control which it delegated to the end-user, but the Court of Appeal rejected this argument, instead holding that the correct approach is to examine the level of day-to-day control exerted by the agency in practice rather than theory.

## Holiday Pay Ruling

The right to four weeks' statutory paid holiday under the Working Time Regulations 1998 does not continue to accrue while an employee is off on long-term sick leave, the Court of Appeal has ruled in *Commissioners for the Inland Revenue v Ainsworth*.

This overturns both the Employment Appeal Tribunal's decisions in *Kigass Aero Components v Brown* (2002) and also in *List Design v Douglas* (2002), in which it was held that non-payment of statutory holiday entitlement amounts to a non-payment of wages under Part II of the Employment Rights Act 1996.

As a result of overruling *List Design*, claimants can now only claim compensation for unpaid statutory holiday for a maximum of one year, rather than under the 1996 Act which allowed claims to go all the way back to 1998.

## Redundancy Dismissals

The courts have handed down two important decisions on redundancy dismissals.

In the first case, *Fisher v Hoopoe Finance Ltd.*, the Employment Appeal Tribunal reaffirmed the well-known rule that an employer must give an employee sufficient details of alternative available jobs (such as salary) to allow the employee to make an informed decision as to whether to accept it. However, the EAT went further and hinted that the failure by an employee to indicate interest in alternative vacancies, or to ask for salary details, might amount to contributory fault which would reduce an unfair dismissal award.

And *Bowyer v Siemens Communications*, the EAT held that if a tribunal thinks the real reason for dismissal was not redundancy (i.e. there was no real redundancy situation, and the employer has dismissed for another reason), then the tribunal is not allowed to reduce the unfair dismissal basic award by the amount of any 'redundancy payment' made at the time. This will normally have no practical effect, since it will instead be

taken off the compensatory award. However, it will make a difference if there is a nil compensatory award (because the employee will still get his basic award), or if the compensatory award exceeds the cap of £56,800.

## Fresh from Acas

Good practice advice on the Information and Consultation of Employees (ICE) Regulations, which also came into effect on April 6, is amongst the latest guidance from Acas.

Prepared in collaboration with the DTI, CBI and TUC, it offers a brief overview of the legislation and offers help to both employers and employees through a series of units dealing with issues such as 'subject matter', 'methods and structure', and 'employee representation'.

Also new are:

- an updated version of the Representation at Work advisory booklet, which covers representation of individuals with personal issues, consultation, works councils, collective bargaining, workforce agreements and joint working groups.
- a revised version of Tackling Discrimination and Promoting Equality, an employers' good practice guide which includes a sample equality policy and helpful checklists.
- an e-Learning Guide on Working Parents, covering maternity, paternity and adoption rights and pay, parental leave, time off to help dependants, and the right to request flexible working.
- an updated A-Z of Work, an online handbook offering an overview of key employee relations topics aimed primarily at organisations without specialist HR resources but also useful as a quick aide memoire and starting point for sources of further guidance.
- other updated information leaflets, namely: communicating with your employees, contracts of

employment, controlling labour turnover, dealing with grievances, discipline at work, induction training.

- an updated online Guide to Pay, covering topics including statutory maternity, paternity and adoption pay, equal pay, redundancy pay, and protection from unauthorised deductions.
- an online Parents at Work guide, highlight rights such as time off for antenatal care and dependents, flexible working, maternity, paternity and parental leave. a booklet on Recruitment and Induction
- a .pdf case study highlighting “an Acas joint working approach to training line managers and supervisors” at Patak’s, the Indian food producers. The study examines work practices, employee representation and worker attitudes.
- a booklet on Recruitment and Induction.
- a Q&A on Discipline, Dismissal and Grievances
- a leaflet on Flexible Working
- a leaflet on Employing Older Workers

All are available from [www.acas.org.uk](http://www.acas.org.uk) – you need to register (for free) to gain online access to some Acas publications.

## For further information please contact:

Stephen Loosemore or Malcolm Fitzgerald at  
5 The Steyne, Worthing, West Sussex BN11 3DT  
tel: 01903 213511 fax: 01903 237053

Nigel Desoutter at  
14 Carfax, Horsham, West Sussex RH12 1DZ  
tel: 01403 210200 fax: 01403 241275

**This newsletter is a guideline only to recent changes in employment law. You are advised to seek Legal Advice from our Employment Group on any specific queries you may have.**