

COOLEHADDOCK

+employment law bulletin

WELCOME

A number of new employment laws have just come into force, by far the most important of which (for larger employers) are the new Information and Consultation Rules, which we discuss in detail below.

And after extreme delay, the government has published its draft version of the new TUPE regulations, with the expectation that they will come into force in October 2005. For the moment, the government is consulting on whether the wording of the proposed Regulations achieves the aims that the government has said it is trying to achieve. We will provide more detail on this once the wording of the Regulations is finalised, expected to be in the mid-summer.

Finally, we summarise a number of tribunal cases which have an impact on the day-to-day running of businesses.

NEW LAWS FROM 6TH APRIL 2005

A number of new laws came into force on 6th April:

- information and consultation: This affects employers with more than 150 employees. We discuss it in detail below.
- Pensions and TUPE: Employees who had access to a pension, and whose employment transfers under TUPE to a new employer, now have a right to a minimum pension from their new employer. The new employer must provide a final salary scheme meeting the minimum standards for contracting out of the pension scheme, or a money purchase scheme in which the employer matches the employee's contributions up to a maximum of 6%
- statutory sickpay increased from £66.15 to £68.20
- statutory weekly rate for maternity, paternity and adoption pay increased from £102.80 to £106
- compulsory union recognition: new rules dealing with defining bargaining units, providing for postal working and other matters relating to elections
- new right for employees not to be dismissed or subjected to a detriment for being summoned for jury service
- new Work at Height Regulations 2005, consolidating previous legislation and implementing the EU Temporary Work at Height Directives. These place obligations on employers whenever there is a risk of a fall liable to cause personal injury. They do not apply to certain activities, including sports, recreation and team-building.

Information and consultation

The Information and Consultation or Employees Regulations 2004 – which come into force on 6th April – are now available online, as are notes from the DTI.

The legislation applies first to 'undertakings' with at least 150 employees, then to those with at least 100 employees from April 2007, and finally to those with at least 50 employees from April 2008.

Subject to a request from a sufficient number of employees, employers are obliged to provide information – and consult with – their workforce over:

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- the recent and probable development of the undertaking's activities and economic situation;
- the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular where there is a threat to employment within the undertaking; and
- decisions likely to lead to substantial changes in work organisation or in contractual relations, including collective redundancies or TUPE transfers.

If an employer fails to comply, an application is made to the Central Arbitration Committee which is empowered to order the employer to comply with the new legislation. If the employer again fails to comply, the Employment Appeal Tribunal can impose a fine of up to £75,000.

The Regulations are at

www.legislation.hmso.gov.uk/si/si2004/20043426.htm, and the guidance notes at www.dti.gov.uk/er/consultation/i_c_regs_guidance.pdf

Redundancy Consultation

Employers are obliged to consult with employees for at least 30 days as soon as they 'propose to dismiss' more than 20 employees on grounds of redundancy (or at least 90 days if it is proposed to dismiss more than 100 employees).

Two important decisions have made this exercise more expensive for employers.

First, the European Court of Justice has held that the 30-(or 90-) day consultation period must take place before any employees are given notice of dismissal. Previously, it had been understood that it was legitimate to give notice of dismissal and carry out consultation during the notice period – thus reducing the length (and, consequently, expense) of the total redundancy exercise.

Second, the Employment Appeal Tribunal has held that the obligation to consult is engaged even when the employer intends to offer alternative employment to the majority of the employees, so bringing to under 20 the number actually dismissed. The EAT's rationale is that the employer is still 'proposing to dismiss' more than 20 employees, even if some or all of them are offered alternative employment after the 'dismissal'.

Confusion over unfair dismissal credits

The Employment Appeal Tribunal has given two inconsistent decisions concerning reductions which should be made to unfair dismissal compensatory awards.

In *Morgans v Alpha Plus Security Ltd*, the EAT stated that tribunals must deduct from the compensatory award all incapacity benefit paid to the successful claimant – which reduces the amount that employers have to pay. To do otherwise would result in a wrongful windfall for the claimant as receiving the benefit is a form of mitigation of loss and must be repaid in full.

But just a week later, in *Voith Turbo v Stowe*, the EAT stated that tribunals should not deduct earnings received by an unfairly dismissed employee in his new employment, where that employment falls during a notice period. Thus, under this approach, the employer ends up overcompensating the employee.

These inconsistent decisions are unhelpful as they will lead to greater scope for argument when trying to settle unfair dismissal claims.

Tribunal delays

The Court of Appeal has ruled in *Bangs v Connex South Eastern* that delays by tribunals in giving their decisions will not of itself normally be a ground of appeal.

In this case, there had been a 14-month gap between the Employment Tribunal hearing the evidence and issuing the written decision.

The Court of Appeal – differing from the Employment Appeal Tribunal's position – made it clear that no appeal arises just because of the extreme delay.

Assessing health and safety...

The Health and Safety Executive has launched a new web-based tool to allow small and medium-sized businesses to assess how well they are managing their health and safety performance.

Users need to register to use the Health and Safety Performance Indicator, but there is a demo version to try out first. The tool uses multiple-choice questions and covers a range of topics including manual handling, repetitive tasks, hazardous materials, working at heights, stress, the types of incidents over last three years and the total number of incidents per year.

Details at www.hspi.info-exchange.com.

... and fresh H & S support

Also new from the HSE is Workplace Health Direct, a pilot occupational health, safety and return-to-work support service for SMEs.

The HSE is currently looking for partners interested in delivering local problem-solving services in pilot projects to test its Workplace Health Direct model. Full details at www.hse.gov.uk/workplacehealth/index.htm.

Religious discrimination

A Muslim worker dismissed after going to Mecca to take part in the hajj is the first individual to succeed in a claim under the Employment Equality (Religion or Belief) Regulations 2003.

In *Khan v NIC Hygiene*, the Leeds employment tribunal found he had been unfairly dismissed, had suffered discrimination and awarded him £10,000.

Mr Khan had applied in writing to use all his annual leave for the pilgrimage and was told by his manager to assume it had been approved. When he returned six weeks later, he was sacked.

Discrimination

The courts have confirmed, in a recent test case (*Igen v Wong*), that it is for employer to disprove allegations of discrimination once a prima facie case has been shown.

Under recent changes to the law, if an employee can show that discrimination might have taken place (which often needs no more than showing that the employer acted unreasonably), then it becomes up to the employer to provide an explanation for its conduct that is in no way whatsoever related to sex, race, religion, disability or sexual orientation.

If the employer fails to come up with a convincing explanation for its conduct, then a tribunal will automatically find there has been discrimination.

Continuity of employment

The Employment Appeal Tribunal has, in *London Probation Board v Kirkpatrick*, considered a specific aspect of whether employer and employee can agree periods of continuity of employment.

Mr Kirkpatrick was dismissed and reinstated two months later following an internal appeal. A month later he was dismissed again, which meant that unless the reinstatement ensured continuity of employment, he was out of time to bring a claim based on the original dismissal and lacked one year's qualifying service in respect of the second.

The EAT held that it is open to employer and employee to arrange that absence from work counts towards continuity of employment, and a reinstatement would qualify as such an arrangement. Furthermore, it is legitimate for the 'arrangement' to be agreed after the dismissal - that is, following an internal appeal.

Minimum wage goes up

The National Minimum Wage goes up from £4.85 per hour to £5.05 in October, and to £5.35 from October 2006. The youth rate, for 18-21-year-olds, rises to £4.25 this October and to £4.45 in October 2006.

Lords to hear age case

Normally, employees cannot claim unfair dismissal if over the company's normal retirement age, known as the 'upper qualifying age'.

The House of Lords is soon to hear the test case of two men who claim they were unfairly dismissed when over the normal retirement age. They are claiming the upper qualifying age is discriminatory on grounds of sex because more men try to work beyond 65 than women – thus the inability to claim unfair dismissal affects, proportionately, more men than women.

John Rutherford and Samuel Bentley, who were 67 and 73 respectively when they lost their jobs in the clothing business, lost in the Court of Appeal last year. However, the House of Lords has said this is a complicated issue of great public importance, and so has agreed to hear the case.

Equality commission plan

The Government has unveiled details in its Equality Bill for a single 'one-stop' Commission for Equality and Human Rights, bringing together the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission.

It is proposed that the CEHR would take over in October 2007 and its remit would include the new discrimination areas of age, religion and belief, and sexual orientation.

The Bill also includes new powers to outlaw discrimination on grounds of religion and belief.

Family flexibility

Ministers are seeking views on a range of proposals through the Work and Families: Choice and Flexibility consultation exercise on balancing work and family.

Areas on which input is sought include:

- extending the period of statutory maternity pay, maternity allowance and adoption pay
- improving dialogue between employers and employees during maternity leave
- allowing mothers to transfer some leave and pay to the father
- extending the existing right for an employee to request flexible working to new groups, such as parents of older children and carers of sick and disabled adults

Details at <http://www.dti.gov.uk/er/workandfamilies.htm>.

Closing date for responses is May 25.

Vicarious liability

Employers can be vicariously liable for breaches of statutory duty as well as breaches of common law obligations – subject to the wording of any given statute – the Court of Appeal has ruled in *Majrowski v Guy's and St Thomas NHS Trust*.

The court went on to hold that there was nothing in the wording or policy of the Protection from Harassment Act 1997 to prevent an employer being vicariously liable for harassment by employees, as long as there was a sufficiently close connection with employment.

The decision means an employee can sue an employer for damages for harassment by a co-worker. Although not clearly defined in the Act, 'harassment' probably includes workplace bullying or a series of unreasonable instructions. This offers a cause of action for the employee which was not previously available and, in practice, may mean employers face harassment claims when there is no element of sex or race (or other) discrimination involved. It will also mean employees have six years to bring a claim in the civil courts (rather than three months to bring a claim in the employment tribunal) and may be eligible to receive legal aid for the claims (which is not available for tribunal claims).

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.

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

Unfair dismissal awards

It is legitimate to award interest for unfair dismissal, the Employment Appeal Tribunal has ruled in *Melia v Magna Kansei* – as long as the sum is described as 'an adjustment for delayed receipt' rather than 'interest'!

For many years, it was accepted that – unlike in discrimination cases – interest was not recoverable for unfair dismissal, but now the Employment Appeal Tribunal has held that it is 'just and equitable' to give an increase for delayed receipt at 2.5% since tribunals already give discounts for accelerated receipt at that rate.

This did not therefore technically amount to interest, said the EAT, but the net result is much the same. The 'uplift for delayed payment' element remains subject to the upper cap – claimants are not eligible for £56800 plus an uplift.

Evasive questionnaire replies

Employees often send formal statutory questionnaires to employers as a precursor to a discrimination claim. These enable the employees to obtain information from the employer – often putting the employer to substantial effort to answer – and can be used in evidence in a tribunal. If the employer fails to provide adequate responses to the questionnaire, the tribunal take this into account when deciding the case.

The Employment Appeal Tribunal has now held, in *Dattani v Chief Constable of West Mercia Police*, that evasive, incorrect, or nil replies to questions asked in a discrimination case can lead to an inference of discrimination, even if the questions were not raised under the statutory procedures. The EAT held, on policy grounds, that "a respondent, asked a direct question in writing ... who fails to respond, or does so evasively, ought to be treated in the same way irrespective of whether a question has been asked under the statutory procedure".

This emphasises the importance of responding to correspondence and providing full and frank answers at an early stage. Putting off a full response now can have serious consequences later.

Tribunal on the move

The London (Central) employment tribunal is, from April 2005, sitting at:

Victory House
30-34 Kingsway
London WC2B 6EX

Phone and fax numbers stay the same.

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.