

COOLEHADDOCK

+employment law bulletin

Welcome

It's been a busy few months. We're now less than one month away from the new age discrimination laws coming into force. Employers who are retiring senior executives, many of whom will have notice periods extending beyond 1st October 2006, already need to be thinking about the obligations to tell employees of their right to request not to retire.

New TUPE has been in force since April 2006. Avid readers of the small print in the broadsheets may have spotted the vote recently to revoke new TUPE on grounds of its over-complexity. The vote was defeated in the House of Lords by a narrow 79:77 margin.

Since businesses now have to provide copies of contracts of employment before a transfer, it may add value to a business being sold to update contracts before a sale. This is something we may be able to assist with – if so, please contact us.

Family-friendly changes

The Work and Families Act 2006 has received the Royal Assent and from next year extends to the carers of adults the right to request flexible working.

The Act also introduces, from April 2007:

- nine months' Statutory Maternity Pay, Statutory Adoption Pay and Maternity Allowance, with the commitment to extend this to 12 months by the end of the current Parliament
- a new right to an additional period of paternity leave which will be introduced at such time as the pay entitlements are extended to 12 months
- a 'keeping in touch' day which – where employees and employers agree – allows women on maternity leave to go to work for a few days without losing the right to maternity leave or pay

The Act is at <http://tinyurl.com/p94wf>

Disability guidance

New guidance on the meaning of disability within the Disability Discrimination Act came into force on 1 May and can be downloaded as a PDF or Word document from <http://tinyurl.com/l28gd>.

The old guidance will continue to apply to claims arising from acts of discrimination which took place before 1 May 2006.

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Outsourcing and TUPE

The House of Lords has in *Celtec v Astley* held that where there is a TUPE transfer

- it must take place on a specific date rather than over an extended period
- employees and employers are not entitled to agree or arrange for the transfer to occur on any date other than the true, legal date of transfer

the ruling, which follows last year's European Court of Justice ruling on the issue, arose from a complex case concerning the transfer of a large number of civil servants in the early 1990s from the Department of Education to Training and Enterprise Councils and their later continuity of employment status when made redundant.

The disappearing dismissal

The Employment Appeal Tribunal has held in *G4S Justice Services v Anstey & Simpson* that employees dismissed for misconduct BEFORE a TUPE transfer, but reinstated by the transferor (i.e. seller or outgoing contractor) AFTER the transfer date, are deemed to have been transferred and the dismissals disappear.

So even though they were dismissed on the date of the transfer, under a legal fiction they are regarded as having been employed when the transfer took place. Thus the transferee (i.e. buyer or incoming contractor) takes over legal responsibility for them.

Retirement age transfer

A 'normal retirement age' does not transfer under TUPE, the Court of Appeal has ruled in *Cross v BA*, a case involving staff transferred when British Airways took over British Caledonian in 1988.

At British Caledonian the 'normal retirement age' was 60; at BA it was 55. When the claimants were retired at 55, they claimed unfair dismissal arguing that their British Caledonian retirement age had transferred to BA under TUPE.

The Court of Appeal confirmed that a 'normal retirement age' is not a contractual retirement age and is accordingly not among the 'rights, powers, duties and responsibilities' that transfer under TUPE.

The claimants could not therefore argue that their 'normal retirement age' was frozen at 60 by the transfer and as they had reach BA's retirement age of 55 they were not entitled to claim unfair dismissal.

Outsourcing fears

One in five British workers fears their job will be outsourced to countries with cheaper labour, according to a survey of 5,000 workers by consultants Watson Wyatt.

Some 40 per cent feel their job is more at risk of 'offshoring' that it was three years ago, with those working for companies with a history of overseas outsourcing more likely to feel insecure (36 per cent) than those employed by firms with no such track record (11 per cent).

A third of staff working for firms where 'offshoring' was already established were less motivated than they were three years ago against only 18 per cent of those employed where the practice was not used.

Details at <http://tinyurl.com/nvvhv>

Lords dismiss Rutherford appeal

The House of Lords has dismissed the appeals of former garment workers John Rutherford and Samuel Bentley, who were prevented from claiming unfair dismissal by the upper qualifying age in the Employment Rights Act 1996. This states that employees over normal retirement age (normally 65) cannot claim unfair dismissal, allowing employers to dismiss the over-65s with impunity.

Both men were over 65 and had argued that the upper qualifying age had an adverse impact on a higher proportion of men than women, because more men wanted to work past 65. This was indirectly discriminatory contrary to EU Article 141.

However, the House of Lords has now held that the men used the wrong statistics and those that were produced supplied no evidence of adverse impact. The men's appeals were dismissed and the upper qualifying age is confirmed as lawful.

This means that the hundreds of claims brought by workers aged 65-plus – and put on hold by tribunals pending the outcome of the Lords appeal – will now be dismissed. This long-term impact of the case is limited, since from October 2006 the upper qualifying age will be abolished and employees will be entitled to claim unfair dismissal irrespective of their age.

Key discrimination ruling

A coach driver who claimed discrimination on racial grounds after being sacked following his election as a British National Party councillor was not unlawfully dismissed, the Court of Appeal has ruled in *Redfearn v Serco*.

Serco had argued that while Mr Redfearn's association with the far-right party had not affected his ability to do his job, there were concerns about the impact on other – predominantly Asian – staff and customers.

Mr Redfearn's claim was upheld by the Employment Appeal Tribunal, on the basis that the reason for dismissal was linked to race issues – even if not his own race. This ruling led to great concern amongst HR practitioners, as a natural extension was that the employers might be found liable for race discrimination if they dismissed an employee who was guilty of racially harassing workforce colleagues.

The Court of Appeal has now reversed EAT's decision on the grounds that the claim had been a misuse of the Race Relations Act 1976, Mummery LJ holding that "...Mr Redfearn was no more dismissed 'on racial grounds' than an employee who is dismissed for racially abusing his employer, a fellow employee or a valued customer".

Repayment clauses

The Court of Appeal has decided that 'repayment clauses' in compromise agreements, where employees are required to pay back the full amount paid to them if they breach any of the provisions, are unlawful.

In *CMC Group plc v Zhang*, Mr Zhang settled his claim against CMC for US \$40,000. The agreement contained a clause which stipulated that the full sum would become immediately repayable if any of the terms – including a non-derogatory statement clause – were broken.

CMC issued proceedings for the return of the US \$40,000 after alleging Mr Zhang had made a number of derogatory statements.

The Court of Appeal decided that the fixed damages of \$40,000 for breach of the non-derogatory statement clause was grossly excessive, when any actual financial loss flowing from such a breach might be negligible.

The repayment clause was therefore a penalty clause, i.e. a clause which sought to impose liability beyond any realistic valuation of a claim, and therefore was not enforceable. Whilst CMC was free to claim damages from Mr Zhang, it had to establish actual financial losses and could not simply claim back the full \$40,000.

Minimum wage – a rise ...

The government has accepted the Low Pay Commission's recommendations that from October the adult minimum wage be increased to £5.35, the rate for 18-21 year-olds to £4.45, and the rate for 16-17 year-olds to £3.30.

Details and the Commission's 2006 Report can be seen at <http://www.lowpay.gov.uk>

... and a ruling

The Employment Appeal Tribunal has ruled in *HM Revenue & Customs v Leisure Employment Services Ltd* that the £6 a fortnight deducted from holiday camp staff's wages as a contribution towards gas and electricity costs was in breach of the national minimum wage legislation.

Were it possible to count the £6 as part of the employees' wages, the employer would have been paying the minimum wage. But if the £6 was deducted when the wage was being calculated, then the employees were paid less than the minimum wage.

The EAT held that employers are not allowed to take such deductions into account, and accordingly the employees had not been paid the minimum wage.

Holidays consultation ...

The Department of Trade and Industry is consulting on plans to increase the right to paid holiday to 28 days a year – the current 20 days plus eight bank holidays, although these would not need to be taken on the days on which they fall.

Views on the potential benefits and impact of increasing statutory annual leave entitlement for those working a five-day week – with pro-rata changes for part-timers – are being sought until 22 September.

The consultation paper and other information from <http://www.dti.gov.uk/consultation/page30026.html>; email annualleave@dti.gsi.gov.uk for details of the meetings as they become available.

... and leave unused

More than 60 per cent of British managers do not use their full annual holiday entitlement and thereby lose a total of 19 million days a year, research by the Chartered Management Institute has found.

Of those, more than 30 per cent blame a heavy workload, 25 per cent worry about unmet deadlines, and 17 per cent find it hard to let go of their workplace responsibilities. And even when they do take a break,

25 per cent of managers check their work email inboxes and voicemails and 13 per cent call the office.

When asked if they would prefer to swap less annual leave for another benefit, one in five chose flexible working, 17 per cent opted for cash, and 8 per cent suggested gym membership.

Survey details at <http://tinyurl.com/ogkfa>

Whistleblowing ruling

In *Boulding v Land Securities*, the Employment Appeal Tribunal has set aside an employment tribunal decision to dismiss a whistleblowing claim on a submission of no case to answer and remitted the case to the same tribunal to hear the rest of the evidence.

The EAT, HHJ McMullen QC presiding, ruled that even though the burden of proof in whistleblowing claims – as in all discrimination cases – lies in the claimant, much of the relevant evidence may emerge from the respondent's side. To cut the hearing short accordingly denied the claimant the opportunity to cross-examine the respondent and seek to elicit such evidence.

Breach of contract claims

The Court of Appeal has held in *Fraser v Hlmd Ltd* that the excess over £25,000 in a tribunal breach of contract claim cannot be recovered in the civil courts, ending 12 years of uncertainty over the issue.

When lodging his employment tribunal claim for breach of contract, Mr Fraser had expressly reserved the right to pursue the excess over the £25,000 limit in the High Court. His tribunal claim succeeded, leaving him with a £55,000 shortfall on the full value of his claim.

The Court of Appeal held, following a strike-out claim by the defendant, that

- Mr Fraser's wrongful dismissal claim had merged into the tribunal's judgment and his cause of an action therefore ceased to exist independently
- accordingly, he no longer had any cause to pursue, even for the excess over £25,000
- a claimant may not avoid the operation of a cause of action estoppel merely by purporting to reserve the right to make a future second claim

The Court also urged the Employment Tribunal Service to make it clear in future guidelines that where there is a wrongful dismissal claim, the excess over £25,000 can no longer be pursued through the High Court.

Costs award – warning to employers

Employers often write letters threatening to make costs applications against employment tribunal Claimants, even though they know it is very rare for costs to be awarded against the losing party in either the employment tribunal or Employment Appeal Tribunal.

Recently, the Employment Appeal Tribunal sent a message to employers who write such threatening letters, by awarding costs against an employer who had lost an appeal. In *Sims Ltd v McKee*, one of the main factors the EAT took into account when deciding to award costs was that the employer's Response Form had included a threat to apply for costs and so, as the judge held, they could hardly complain when the other side were awarded legal costs.

In another case, the Employment Appeal Tribunal decided that a tribunal's jurisdiction to award costs when an employer fails to enter a Response Form does not cover the employee's costs of preparing and proceeding with issuing a Claim. The EAT reasoned, in *Sutton v The Ranch*, that as employers are under no obligation to enter a Response, they cannot technically breach any rule if they fail to do so.

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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.