

Legal Update May - Aug 07

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This update covers the period from May to August 2007.

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Part 1

Statutory grievance procedure

One grievance letter will be sufficient to comply with the statutory grievance procedure where ongoing discriminatory treatment

Where there is a continuing failure to make reasonable adjustments under the Disability Discrimination Act or a continuing act of some other form of discrimination, one grievance letter should be sufficient to comply with the statutory grievance procedure according to a recent Employment Appeal Tribunal (EAT) decision. It is not necessary to send a continuous stream of grievances in relation to a continuing complaint, provided that the subject matter is essentially the same eg a failure to offer training or find suitable vacancies. Where there are discrete and separate acts of discrimination, it will be necessary to raise each in a separate grievance letter to ensure compliance with the statutory grievance procedures and to ensure the tribunal has jurisdiction to hear the claim. (*Smith v Network Rail Infrastructure Ltd*)

Minimal evidence required to be given to an employee prior to a stage 2 meeting to comply with the statutory dismissal and disciplinary procedures – but consider ordinary unfair dismissal principles

The EAT has clarified that an employer is only required to set out the basis for the allegation when inviting an employee to attend a disciplinary hearing. An employer is not obliged to provide all the evidence to the employee in advance of the meeting provided that the employee knows the nature of the allegation made against her. In this case, the EAT overturned the finding that the dismissal was *automatically* unfair simply because some evidence was given to the employee during the disciplinary hearing. (*Ingram v Bristol Street Parts*)

Employers should, of course, remember that although a failure to provide an employee with all the evidence of the allegations against him prior to a disciplinary dismissal hearing may not constitute an automatically unfair dismissal for breach of the statutory procedures, such action could give rise to an ordinary unfair dismissal claim under the established principles of fairness.

Employer's meeting note constituted employee's step 1 letter for the purposes of the statutory grievance procedure

A recent EAT decision has established that a note which a manager took recording an employee's grievance constituted the employee's compliance with step 1 of the statutory grievance procedure (SGP). The facts of this case were slightly unusual as it seemed that the parties had agreed that they would work together to record the grievance following the meeting. However, anyone processing grievances should be aware of the possibility that an employer's written record of a grievance raised could, itself, constitute the employee's compliance with step 1 of the SGP thereby enabling the individual to pursue their claim at tribunal directly and also putting the employer at risk of compensation uplift should they fail to hold a meeting and allow an appeal. (*Kennedy Scott Limited v Francis*). This case is something to consider when carrying out, for example, exit interviews at which concerns may be raised and recorded by HR in writing. It will be important to seek confirmation as to whether the individual is intending to make a formal grievance.

A grievance constituted an appeal against dismissal

Another interesting case to be aware of is *Harris v Towergate London Market Limited* in which the EAT held that an employee who failed to use company procedures to appeal the decision to make her redundant, but instead submitted a grievance in relation to the redundancy dismissal, could pursue her unfair dismissal claim at tribunal on the basis that time for submitting a complaint had been extended under regulation 15 of the dispute resolution procedures as she believed that a dismissal procedure was ongoing at the time of the expiry of the normal time limit.

One way of dealing with this would be to ensure that the employer sends a clear message in response to any such correspondence advising the individual that the statutory grievance procedures do not apply where the grievance is that the employer has dismissed or is contemplating dismissing the employee. Further, provided that a reasonable time period has elapsed after the individual had failed to appeal under the company procedures, the employer should inform the individual that the time period for appealing the decision has expired and ensure s/he understands that the decision is final.

Potential repeal of the statutory dispute resolution procedures

The DTI (now known as the Department for Business, Enterprise and Regulatory Reform BERR) consultation "Success at Work: Resolving Disputes in the Workplace" and the supplementary review of the options for the law relating to procedural fairness in unfair dismissal closed on 20 June 2007. One of the measures considered, and which seems an increasingly likely result, is the repeal of the Employment Act 2002 (Dispute Resolution) Regulations 2002. It is anticipated that such a move would be welcomed by businesses, employees and legal practitioners. On 11 July the Prime Minister made a statement on the Government's draft legislative programme in which he indicated that an Employment Simplification Bill will be introduced to "simplify, clarify and build a stronger enforcement regime for key aspects of employment law". The Bill is expected to implement the Gibbons review of workplace dispute resolution which recommended the repeal of the statutory dispute resolution procedures.

In relation to the related reform of s.98A of the Employment Rights Act 1996, which would become necessary should the Dispute Resolution Procedures be repealed, the Government set out three options. The first was to revert to the position before the introduction of the 2004 procedures, the second to repeal section 98A in full (but provide for alternative findings reflecting the balance of procedural and substantive unfairness in the dismissal) and the third (and, most radical!), was to reverse the *Polkey* decision in full and revert to the "no difference" rule. Option one which "*would reinstate the Polkey decision such that procedural failings would normally render a dismissal unfair, but compensation could then be reduced in proportion to the likelihood that the dismissal would have gone ahead anyway*" would seem to have the advantages of clarity, as it would revert to a position that was well understood by both employers and employees. (See [here](#))

Victimisation

Guidance from the House of Lords on victimisation

In an important House of Lords (HL) decision, overturning the Court of Appeal, the HL held that the Council had subjected a group of catering staff claiming equal pay to unlawful victimisation when it wrote to them warning that if they persisted with their claims, the Council would be forced to consider redundancies and might be unable to offer paid school meals. The case raised interesting issues about the balance which must be struck between the respondent's legitimate desire to achieve a settlement on the one hand with the potential detrimental treatment suffered by the claimants as a response to bringing proceedings on the other hand.

The previous test had focused on whether the conduct complained of fell within the description of an "honest and reasonable" attempt to compromise the proceedings. The HL considered that the letters were carefully written, the tone was rational and they contained much that was sensible. However, the focus cannot be solely on whether the actions of the employer were honest and reasonable. The statutory reference to detriment is fundamental. The employer should avoid doing anything that might make a reasonable employee feel that they are being unduly pressurised to concede their claim. Treatment will only amount to a detriment if a reasonable employee might regard it as detrimental. The question of whether the borderline has been crossed is a question of fact for the tribunal. In this case, the HL held that the letter was effectively a threat and the Council had gone beyond what was reasonable in protecting its interests in the existing litigation.

Practical advice for employers when seeking to settle – employers should be able to take steps to negotiate settlements or point out the possible consequences of a claim succeeding. However, the employer's actions must not cause the claimant to suffer a detriment which would seriously jeopardise their right to pursue a claim. Here, the Council was criticised for its direct approach to the claimants rather than pursuing the matter through legal advisers. Consider carefully the implications of writing to employees who are involved in discrimination proceedings as warning about the commercial consequences of successful litigation, even where given in a rational and sensible manner reflecting the genuine concerns of the company, could constitute unlawful victimisation.

Employers should also be extremely careful about raising these types of issues in the context of without prejudice discussions, traditionally a forum for communicating openly with the other party to a dispute with matters being privileged from disclosure to the court or tribunal. Matters discussed on a "without prejudice basis" could be disclosable if, for example, the complainant is able to demonstrate that there was, in fact, no "dispute" between the parties or if the "unambiguous impropriety" exception to the without prejudice rule applies in the context of a genuine and legitimate complaint of sex discrimination or victimisation ie where the party would be seriously disadvantaged if they could not refer to the matters discussed (see *BNP Paribas v Mezzoterra* [2004] IRLR 508) – so care should be taken.

General publications



Government consultation document on Single Equality Act - The Government has issued a Green Paper, Discrimination Law Review – A Framework for a Fairer Future: Proposals for a Single Equality Bill for Great Britain. The consultation document contains proposals for amendments to the law and the creation of a Single Equality Act. The consultation period closes on 4 September 2007.

Equality Act guidance published - The Department for Communities and Local Government has published guidance on Parts 2 and 3 of the Equality Act 2006, which deal with measures to outlaw discrimination. Part 2 deals with discrimination on grounds of religion or belief, and Part 3 relates to sexual orientation discrimination.)

Part 2

Sex discrimination

Guidance on the correct pool for indirect sex discrimination purposes

A female police officer failed in her tribunal claim that she had been subjected to indirect sex discrimination by the operation of a policy that required disclosure of personal relationships with work colleagues, as the policy was justified. She appealed to the EAT on the grounds that the tribunal had failed to identify correctly the pool for comparison and erred in finding that the policy was justified. The EAT agreed that the tribunal had erred by focusing on the disadvantaged, rather than the advantaged group.

The task of identifying the relevant pool can be difficult and is often, in practice, determinative of the case. Useful guidance was given in this case on how to identify the correct pool for comparison purposes. The EAT applied the House of Lords decision in *Rutherford v The Secretary of State for Trade and Industry (No. 2)* [206] IRLR 551 which confirmed that the starting point should be the whole group to which the provision, criterion or practice is applied. For example, *Rutherford*, which concerned the question of whether provisions precluding unfair dismissal claims by those over the age of 65 were lawful, held that the correct pool was the whole working population and not just those to whom "retirement had some meaning". Similarly, the EAT held that the correct pool here, was the whole of the Chief Constable's workforce as the policy was directed at everyone employed in the police authority. To determine disparate impact, consideration should be given first to the advantaged group i.e. whether a considerably smaller percentage of women than men are able to satisfy the relevant condition. In this case, the EAT considered (obiter) that the individual would have been unlikely to be able to show a disparate impact on women even if the pool were confined to all constables, as she had contended. (*Faulkner v The Chief Constable of Hampshire Constabulary*)

Justification for difference in treatment – EAT overturns tribunal's finding of indirect sex discrimination

The union, GMB, had not indirectly discriminated against certain female members when it reached a settlement in order to prioritise future pay protection, held the EAT. GMB's decision to prioritise pay protection had a disparate impact on the women. However its decision was justified as a proportionate means of achieving legitimate aims (including integrating various workers into a single pay structure while avoiding privatisations, job losses and cuts in hours). The claimants criticised the union for delay in dealing with the equal pay claims, failing to give advice, refusing to support litigation and failing to provide sufficient information about the various options but they failed to persuade the EAT that the union's means were disproportionate. Further, the allegation that the union had victimised them by not supporting their equal pay claims was rejected partly because the individuals had instructed solicitors in relation to their claims and GMB could not, in those circumstances, continue to act for them. Unions are inevitably required to assess competing interests and, as the union had established legitimate objectives, the EAT seemed to suggest that it was a high hurdle to clear to establish that the means used to achieve that aim were disproportionate. (*GMB v Allen*).

Race discrimination

Employer's liability for the racial harassment of its employees by third parties

A recent EAT decision raised a couple of interesting points in relation to the tort of racial harassment introduced in 2003 (s.3A Race Relations Act 1976). The case concerned a white woman of British/English nationality working in the Council's Housing Department who brought a complaint against the Council's alleged policy of ignoring racist comments made by customers

At issue was the status of obiter comments in *Pearce v The Governing Body of Mayfield* in which the House of Lords suggested that the actions of the pupils towards their teacher could not give rise to liability on the part of the school for discrimination (casting doubt on the earlier decision of *Burton v De Vere Hotel*).

The EAT considered *Pearce* in the light of the new harassment provisions and held that it was certainly possible that if, as a matter of fact, it were shown that there was a policy of ignoring racist remarks, the tort of harassment could be made out. The obiter comments in *Pearce* did not, in the EAT's view, preclude an employer from liability for harassment by a third party. Further, if the Tribunal found, as a matter of fact, that there had been a policy of not challenging racist remarks, this policy could itself constitute racial harassment. (*Gravell v London Borough of Bexley*)

Age discrimination

High Court refers questions to ECJ on lawfulness of UK default retirement age

The European Court of Justice (ECJ) is asked to rule on whether the Framework Directive covers national rules, such as the Employment Equality (Age) Regulations 2006, which permit employers to dismiss employees aged 65 or over by reason of retirement.

The Directive states that it "*shall be without prejudice to national provisions setting down retirement ages*". The National Council on Ageing, operating as the Heyday group, argues that this only allows Member States to leave existing provisions relating to retirement ages in place, not to introduce new provisions relating to retirement ages as the UK arguably did with the Age Regulations. Further, Heyday argues that retirement dismissals are not objectively justified as a proportionate means of achieving a legitimate aim (such as workforce planning) as it cannot be proportionate to exclude all retirement dismissals from the scope of the Regulations and the Government's proposed justifications are not sufficiently specific to meet the standard required by law.

Guidance is requested from the ECJ on the justification defence and the extent to which it differs in relation to direct and indirect discrimination. The case is unlikely to be heard until next year and judgment may not be issued until 2009. (*R (on the application of the Incorporated Trustees of the National Council for Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* - known as the "Heyday challenge")

We are still awaiting the ECJ decision on a similar case in which the Advocate General's opinion was that the Framework Directive did not preclude a national law permitting compulsory retirement ages in collective agreements (*Palacios de la Villa v Cortefiel Servicios SA* (C-411/05) see our February e-bulletin [here](#)).

It is, perhaps, unlikely given the AG's opinion on the similar case of *Palacios*, that the ECJ will rule that the UK retirement provisions are unlawful but such an outcome is possible. Some private companies have already abolished a mandatory retirement age. A report by the Employers Forum on Age states that employers who do not enforce a fixed retirement age are happy with their decision. The report highlights the benefits of lower expenditure on the retirement process as well as the lower risk of legal challenge. (See [here](#)). In the meantime, the retirement provisions of the Age Regulations still stand and tribunals seem reluctant to stay age discrimination claims pending the outcome of the Heyday challenge (see *Johns v Solent SD Ltd*).

Family-friendly leave

New publications

DTI issues guides on pregnancy and work - the DTI has issued two guides on pregnancy and work, one aimed at employees, the other at employers. (See [here](#) and [here](#))

DTI consultation on additional statutory paternity leave and pay - the DTI has issued a further consultation paper on the implementation of statutory paternity leave and pay, which is intended to be implemented in two years time. The scheme allows mothers to pass some of their statutory maternity leave (and pay) to fathers if the mothers want to return to work during either OML or AML. This is likely to prove popular with families where the mother earns substantially more than the father. The government proposes to allow fathers to 'self-certify' that their child's mother is returning to work early and passing maternity entitlements over to them. He will be required to give eight weeks' notice. Consultation on the implementation of the scheme closed on 3rd August 2007. (The consultation document is available [here](#))