

Legal update

November 2007

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This update covers the period from September to November 2007.

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Part 1

Statutory dispute resolution procedures

The Queen's Speech on 6 November (and supporting documents) confirmed that the statutory dispute resolution procedures will be repealed and replaced with "a new non-regulatory system" to "encourage early/informal resolution", under the Employment Bill. Further details on the Government's response to the Gibbons Review of these procedures is expected by the end of the year; the earliest date for repeal is thought to be April 2009.

Pending their repeal, the procedures continued to cause headaches for employees, employers and tribunals alike:

- A document will amount to a valid grievance if a reasonable employer would have so understood it given the knowledge the employer had at the time of receipt – but not knowledge acquired subsequently. An absence report stating that an employee had gone home upset after a meeting and had suffered nosebleeds was not a valid grievance, as it was not until after receipt of the grievance that the employee informed the employer that she had been upset about being told that her lack of pay rise was pregnancy-related. However, the absence report might have been sufficient had the employee complained about the pay rise decision beforehand. Employers in receipt of a document which might conceivably indicate a complaint will therefore need to ensure they check what conversations have already taken place with all relevant managers. (*Dick Lovett v Evans*, Employment Appeal Tribunal (EAT))
- An employer's letter informing an employee of a disciplinary meeting will amount to a valid "Step 1 letter" under the statutory procedure even if it fails to set out the alleged conduct and that dismissal is contemplated, but only if those matters were obvious to the employee from the context and surrounding circumstances. For example, in this case the employee had been caught red-handed and admitted conduct which it was well known was strictly forbidden. Likewise the employer may not need to expressly inform the employee of the "basis" of the allegations under Step 2 if this would have been clear from the circumstances. However, the facts in this case were unusual and employers should always aim to provide the required information explicitly rather than rely on implication from the circumstances. (*Homeserve v Dixon*, EAT)
- Unreasonable delay by the employer in following the statutory disciplinary procedure renders a dismissal automatically unfair as it amounts to "non-completion" of the procedure (*Wilmot v Selvarajan*, EAT). Employers need to ensure they act promptly, particularly in hearing an employee's appeal against dismissal.
- The statutory grievance procedure is clearly expressed not to apply to grievances about dismissals. The EAT has recently confirmed that tribunal claims that a dismissal is unfair, wrongful or discriminatory are not subject to the grievance procedure. (*Mowels v Vix Displays*, EAT; *ADM Milling v Hodgson*, EAT) Contractual claims (in the employment tribunal) other than for wrongful dismissal, eg for bonus outstanding on termination, are covered by the procedure. It is important for employers to identify early whether they need to follow the grievance procedure, given the potential consequence of a maximum 50% uplift to compensation awards.
- The tribunals have failed to provide any clarity on what factors are relevant in deciding how much to uplift compensation for breach of the statutory procedures. In one recent case the EAT upheld the tribunal's ruling that an employer's ignorance of the procedure justified imposing only the minimum uplift of 10% (*Cex v Lewis*, EAT), whereas other tribunals have imposed 50% in this situation. The EAT has also ruled that the tribunal

can only consider the extent of the breach of the statutory procedure in deciding the uplift, and not other factors such as the size of employer or other poor conduct by the employer. (*Aptuit v Kennedy*, EAT)

- The procedures require an employer to notify an employee of his right to appeal a disciplinary or grievance decision; the EAT has confirmed this does not need to be done in writing (although this is preferable to avoid disputes as to whether notice was given). (*Aptuit v Kennedy*, EAT)

Adapting contractual grievance procedures

An employer cannot insist on compliance with the express provisions of its grievance procedure where this would be likely to seriously damage an employee's health.

In a recent case the employer's contractual grievance procedure required an employee to raise any grievance in a meeting with his line manager, even where it concerned that manager. The employee had become ill due to a breakdown in her relationship with her line manager and it was reasonably foreseeable that applying the procedure would be likely to aggravate her stress-related illness. The EAT ruled that insisting on compliance with the procedure was a breach of the implied duty of trust and confidence, which it thought could in very exceptional circumstances override an express contractual term (eg where a face to face meeting would be seriously psychologically damaging).

This decision reinforces best practice that grievance procedures should provide for an alternative person to whom to complain about the person who would normally deal with the grievance. It is also an interesting example of how the tribunals are increasingly prepared to use implied terms to temper express ones. (*GMB Trade Union v Brown*, EAT)

Delay to new discrimination legislation

The Queen's Speech did not include the Single Equality Bill, which will amalgamate the various discrimination laws. The Government hopes to include it in the November 2008 Queen's Speech and publish at least some draft clauses in advance.

Part 2

Sex discrimination and equal pay

Equal pay with a man doing a lower rated job

A woman can seek equal pay with a higher paid man doing a job rated lower than her own in a job evaluation scheme. The Court of Appeal (CA) had to rewrite the Equal Pay Act to achieve this outcome, in order to comply with European law. (*Redcar v Cleveland Borough Council*, CA)

Family-friendly leave

Employee must be permitted to end parental leave in order to take maternity leave

Employers must allow employees to alter the dates of pre-arranged parental leave in order to take maternity leave where they unexpectedly become pregnant (*Kiiski v Tampereen*, European Court of Justice (ECJ)). The employee would presumably be entitled to take the parental leave at another time, in the same way as a pregnant worker must be allowed to take her statutory annual leave at a time other than during the period of her maternity leave (*Gomez*, ECJ). Although not covered by the decision, the same approach should probably be taken to non-statutory leave (such as a sabbatical).

Delay to improvement of parental rights

The Government will not be implementing its planned extension of statutory maternity pay, maternity allowance and statutory adoption pay (from 39 weeks to 52 weeks) and introduction of additional paternity leave and pay in April 2009. No firm implementation date has been set, but the earliest date now seems likely to be for babies due on or after April 2010. The Government's announcement is at <http://www.hmrc.gov.uk/statutory-notice/paternity-leave-pay.htm>.

Part-time and flexible work

The Queen's Speech

The Queen's Speech on 6 November (and supporting documents) announced that flexible working rights, currently available to parents of children aged under 6, will be extended to parents of older children. An independent review into this extension has been commissioned and recommendations for the cut-off age are expected in Spring 2008. The options being considered seem to include extending the right to parents of children aged under 9, 12 or 17.

Race discrimination

Amendment to race law imminent

The Government has confirmed in Parliament that it will shortly be presenting regulations to amend the Race Relations Act 1976 in light of the European Commission's opinion that it fails to implement European law fully. The changes are likely to enable claims to be brought by individual victims of instructions to discriminate (rather than by the Equality and Human

Rights Commission only), and to amend the definition of indirect discrimination (probably to cover practices which have not yet been applied to anyone but would put a racial group at a disadvantage).

Disability discrimination

When to assess disability

A tribunal should take into account a claimant's condition after an alleged discriminatory act but prior to the tribunal hearing in deciding whether a claimant's impairment is likely to last 12 months (in order to satisfy the definition of disability).

At the date that a job offer was withdrawn on medical grounds, there was no evidence that the applicant's impairment was likely to recur, but it subsequently did recur within the 12 month period, and the claimant was therefore able to claim disability discrimination. (*McDougall v Richmond Adult Community Centre*, EAT) This contradicts previous EAT caselaw which established that the assessment of disability should be done as at the date of the discriminatory act. It seems odd that someone whose claim would have been dismissed had the tribunal heard it shortly after the act complained of can succeed, in effect due to the time the tribunal procedure takes. However, given that an employer can in some cases be liable for discrimination even where it is ignorant of the individual's disability status, employers should already be erring on the side of caution and assuming that applicants or employees with medical conditions may be disabled.

Meaning of "normal day-to-day activities"

To qualify as disability, an impairment must affect "normal day-to-day activities"; statutory guidance states that this term does not include specialised activities involved in a particular type of work or hobby. The EAT has now ruled that, in order to comply with EU law, it must be interpreted as including activities which are "relevant to participation in professional life". In this case the claimant's dyslexia amounted to disability as it substantially affected his performance in an assessment for promotion. (*Paterson v Commissioner of Police of the Metropolis*, EAT) Assessments and examinations are not peculiar to a particular type of job (more so to reaching a senior level); it remains to be seen whether impairments only affecting skills needed by one specific type of job will now also be covered.

Extension to time limit for claim where employee reluctant to admit disabled

A tribunal may extend the three month time limit for submitting a disability claim where a claimant is genuinely reluctant to acknowledge that he is disabled, eg where it is a mental illness, or where the physical injury is on the margin of being perceived to be disabling. It was also relevant that the employer itself disputed whether the claimant was disabled, and that it had unreasonably expedited the dismissal procedure, thereby giving the individual less time to consider his position. (*Department of Constitutional Affairs v Jones*, CA)

No duty to make reasonable adjustments simply because employee claims to be disabled

An employee's claim to be disabled (with post-traumatic stress disorder), which was not supported by any evidence despite the employer's requests and enquiries, did not fix the employer with knowledge of his disability and therefore it had no duty to make reasonable adjustments. (*Jama v Alcohol Recovery Project*, EAT)

Trial period unlikely to be reasonable adjustment for disabled employee

The EAT has doubted whether a trial period working at home can in itself be a reasonable adjustment that an employer can be required to make for a disabled employee. However, an employer who fails to offer a trial period may struggle to prove that (permanent) home-working is not a reasonable adjustment. The same applies to consultation with an employee – it is advisable in order to determine what adjustments are reasonable, but is not in itself part of the duty to make reasonable adjustments. (*The Environment Agency v Rowan*, EAT)

New resources

The British Dyslexia Association has produced a Code of Practice for Employers setting out guidelines on ensuring compliance with disability discrimination law when dealing with dyslexia. Details are available at <http://www.bdadyslexia.org.uk/downloads/The%20BDA%20Code%20of%20Practice%20for%20EmployersSept07.pdf>.

Religious discrimination

Rastafarians protected by discrimination law

Rastafarianism is a philosophical belief protected by the religious discrimination regulations. This is an issue that has been debated in some quarters, but the EAT in a recent case accepted without question the employer's concession to this effect. (*Harris v NKL Automotive*, EAT)

Employers will need to consider days off for Rastafarian festivals and whether and how to accommodate the practice of wearing hair in dreadlocks in appearance codes. Details of the festival dates and other practices are set out in Appendix 2 of the Acas Guidance, available at http://www.acas.org.uk/media/pdf/f/l/religion_1.pdf.

Age discrimination

State compulsory retirement provisions must be justified

National laws setting out compulsory retirement ages will be unlawful under EU law unless objectively justified by a legitimate aim. The future of the UK default retirement age will now turn on whether the UK Government can show it is objectively justified. This may not be established until 2009. In the meantime UK employers may be willing to bet that the Government will succeed, particularly given the wide margin of discretion given to Member States referred to below, and continue to rely on the default retirement age. Other more cautious employers will want to carefully consider requests to continue working past 65 and only refuse where there are compelling reasons.

The European Equal Treatment Framework Directive prohibiting age discrimination includes a recital that it is without prejudice to national provisions laying down retirement ages. In a recent Spanish case the ECJ has ruled that the Directive nevertheless bites on national measures governing the conditions for termination of employment where the retirement age is reached. Compulsory retirement provisions are discriminatory on the basis of age, and therefore unlawful unless shown to be an appropriate and necessary means of achieving a legitimate aim.

The case concerned Spanish laws which permitted collective agreements to provide for compulsory retirement at 65 provided the employee had sufficient service to draw a pension. The ECJ held that the law's aim to promote better access to employment through a better distribution of work between generations was a legitimate aim, and that it was an appropriate and necessary means of achieving it, given that member states retain a broad discretion in this area. (*Palacios de la Villa v Cortefiel Servicios SA*, ECJ)

This decision impacts on part of the challenge to UK age law being brought by Heyday (covered in the August 2007 legal update). The good news for Heyday is that the Directive does apply to laws on retirement ages; the bad news is that the ECJ has emphasised the broad discretion States have in justifying inequalities based on legitimate aims. Heyday is reported to be pressing ahead with its case, although currently the reference to the ECJ does not ask it to consider whether the UK retirement provisions are justified; unless the questions are reframed this issue will wait until the case returns to the High Court. Differences between the Spanish and UK laws and in the circumstances surrounding their introduction mean that it is by no means a foregone conclusion that the UK Government will succeed in justifying the UK retirement provisions.

Pending the Heyday judgment, many tribunals were staying retirement claims. One more bullish tribunal which struck out such a claim, on the basis that it had no reasonable prospects of success, has just been overturned on appeal. The EAT has apparently granted leave to appeal the question of whether it is permissible to stay tribunal proceedings pending the outcome of an ECJ decision. (*Johns v Solent*, EAT). In the meantime, the President of the Employment Tribunals (England and Wales) has issued a Direction ordering all current and future claims challenging the UK default retirement age to be stayed pending the ECJ's decision in the Heyday case. This Direction will be reviewed once the Court of Appeal has looked at the issue in *Johns v Solent*.

Discriminatory pension arrangements justified where prolonged consultation and no less discriminatory alternative identified

The employment tribunal has rejected a high profile age discrimination claim brought by an ex-partner against law firm Freshfields.

The claim related to changes made by the firm to its arrangements for making payments from its profits to ex-partners as a form of pension. The reason for the change was to adopt a financially sustainable model which was fairer to younger partners. Transitional provisions were put in place with the aim of ameliorating the effect of the change on those nearing retirement whose benefits would be less under the new scheme; those partners were permitted to retire under the old scheme by a specified date. Under the old scheme those aged 55 could retire with their full entitlement but those aged 50-54 suffered a discount of between 40% and 20% depending on age. Peter Bloxham was 54 at the specified date and therefore suffered a 20% discount when he chose to retire under the old scheme. The discount was held to be discriminatory because it applied purely because of age.

The tribunal found that the firm's reasons for changing the scheme and putting in place transitional provisions, including the retention of the 20% discount, were legitimate. It was important to consider the context of the discriminatory treatment, given that in age cases treatment of one age group will often have a direct impact on how other age groups are treated. The tribunal noted that the removal of the discount would have led to a substantial reduction in the benefits of others, and that there was no appropriate group to take the hit. The most obvious group would have been those aged 55 and over; because of the numbers, this would have involved a substantial reduction in their rights. The tribunal therefore considered that the reasons for not altering the 20% discount were legitimate.

The tribunal also concluded that the firm had comfortably shown that the means to achieve its aims were justified. Relevant factors were that the reform involved balancing conflicting interests between different age groups and that, in the context of the changes to remove unfairness to younger partners, it would be unfair and perverse to enhance further the old scheme rights of older partners which they were being permitted to retain under the transitional provisions. Key to the decision was the fact that expert advice had been sought, that there had been extensive consultation with the partners leading to majority approval for the proposals, and that no alternative less discriminatory means had been put forward at any stage.

It remains to be seen whether the decision will be appealed. In the meantime it provides a useful indication of how the concept of justification may be approached by tribunals, in particular the importance of consultation and considering alternatives. The recognition that steps taken to eliminate inequality for one age group won't necessarily be unlawful simply because they inevitably have an adverse effect on another age group may also be useful for employers seeking to eradicate historical discrimination from their benefits. (*Bloxham v Freshfields Bruckhaus Deringer*, Employment Tribunal)

New resources

Acas has issued a new e-Learning module on Age Discrimination, available at <http://www.acas.org.uk/elearning/> (free registration is required).