

# LEGAL ALERT

EMPLOYMENT NEWSLETTER

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## FIVE MORE YEARS HARD LABOUR?

The last Labour Government pushed employment law reforms through at a sometimes seemingly relentless pace. The indications are that there will still be much new legislation in the next five years for employers to come to terms with. However, the UK Government cannot be credited (or blamed) for all of these.

One area the Government continues to champion are measures promoted under the general heading of "Family Friendly Policies". The Government has made a commitment to introduce rules to support flexible working offering potentially the right to work on a part-time basis (subject to business and operational requirements).

Changes have already been announced to maternity and parental leave. Ordinary maternity leave will increase to 26 weeks, as will the period of additional maternity leave a woman is entitled to take thereafter. We will also see the introduction of two weeks paid paternity leave, adoption leave and an increase in parental leave to 18 weeks for parents with disabled children.

However, much of the new legislation being introduced in the next few years derives from Europe. We will shortly see measures in place requiring wider information and consultation rights for employees on business proposals (see separate article on Works Councils below). Another Directive outlawing discrimination against those employed on fixed-term contracts also falls to be implemented in the UK (now, it appears, some time in 2002).

Anti-discrimination law generally will soon be widened on a Europe wide basis to cover age, religion and sexual orientation.

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### UNFAIR DISMISSAL - WIDENING HEADS OF COMPENSATION?

In the case of *Johnson -v- Unisys Ltd*, Mr Johnson was summarily dismissed and claimed that the manner of his dismissal had caused psychological problems which made it impossible for him to find work. The House of Lords were unwilling to award damages for breach of contract in respect of loss sustained due to an employer's actions during the process of dismissal.

However, they instead contemplated that such losses may possibly be recoverable in a claim of unfair dismissal. In an appropriate case it was suggested that an unfair dismissal award could cover compensation for "distress, humiliation, damage to reputation in the community or to family life".

It will be interesting to see to what extent tribunals rely on this statement in assessing future awards.

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## NEW TRIBUNAL RULES

There has been much publicity and an equal amount of misunderstanding about the new rules which came into force on 16 July 2001. Most of the new Regulations affect lawyers, rather than business, and are designed to align Tribunal procedures to those of the Civil Procedure Rules operated already in the County Court and High Court. The rules have also taken note of the lobbying of those representing small businesses and other employers. The maximum deposit has been increased from £150 to £500 where, at a pre-hearing review, that an application has no reasonable prospect of success. While this power does not stop an Applicant from continuing with his case, the ordering of a deposit and the views of the Chairman that the case has little prospect of success, usually deter speculative applications.



The new power relating to costs may be of interest to employers. The Tribunal can make an order for the payment of costs of up to £10,000 where, in its opinion, one party has, in bringing or conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably or where the bringing or conducting of the proceedings by a party has been misconceived. The reference to the conduct of proceedings specifically includes the conduct of the representatives.

One important change is the removal of the description "frivolous" in the former rules and the substitution of "misconceived". This is now defined in the Regulations as "having no reasonable prospect of success". While the new rules give Tribunals the power to make a more meaningful order for costs, the extent of their powers and the circumstances in which they will exercise them remain unknown. Only time will tell if these new powers are exercised in a way which deters "nuisance" Tribunal Applications.

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## WORKS COUNCILS

The EU has now reached agreement on minimum rights for employees to be informed and consulted by their employers in respect of a number of workplace issues.

When the Directive first takes effect in the UK, probably in late 2004, it need apply only to those companies employing at least 150 employees. Two years later companies employing at least 100 employees will be covered and finally after a further two years the Directive will apply to all companies employing at least 50 employees.

Employers covered will be obliged to inform employees about the development of their business and inform and consult in respect of the probable development of employment within the organisation, any measures envisaged and in respect of decisions likely to lead to substantial changes in the organisation of work or contractual arrangements.

Consultation must be undertaken with the view to reaching an agreement but will not give employees the right to veto their employer's plans.

Employers will also be given some security in respect of confidential information and will not be obliged to disclose information if the business would be harmed by so doing.

It remains to be seen what penalties there will be for non-compliance. It had been suggested that a breach of the Directive would prevent a business from proceeding to implement the changes it proposed. This potential sanction, however, does not appear in the latest draft of the Directive.

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## ACAS ARBITRATION SCHEME - THE END OF TRIBUNALS?

Amidst much publicity ACAS announced the implementation of their arbitration scheme after several years of gestation. Arbitration is only available for unfair dismissal claims and both parties must agree to an arbitrator dealing with the case. The procedure is intended to be less formal. The venue can be any agreed location including a hotel or the workplace and the presentation will be informal. There are no oaths to be taken and perhaps, most significantly, there can be no cross examination of a witness by the other party (although the arbitrator can question all witnesses).



No decision will be announced at the hearing and the arbitrator will send written notification to the parties later. Arbitrators have the same powers as a Tribunal to order reinstatement, re-engagement or compensation.

In line with the notion of informality, it is not intended that arbitrators should follow case law but will take into account the guidance given in the ACAS publications and will use their own experience in determining the fairness of the dismissal. Finally, there can be no appeal from the arbitrator's decision and very limited legal challenge.

At present it is not clear how much use will be made of this new scheme. At first glance there appears little advantage to parties and much uncertainty. The Unions and ACAS themselves at times have shown little real enthusiasm for the scheme. It is perhaps most likely to be used where there is a wish for privacy. All arbitration hearings are in private and the written award of the arbitrator is not published.

## HOLIDAYS FOR ALL

As a result of a ruling by the European Court of Justice, the limitation in the Working Time Regulations that only those workers with 13 weeks service qualify for paid holidays is unlawful.

Public sector workers can take advantage of this ruling now and amending Regulations will be in force soon covering all other employees.

At present only draft Regulations have been published. However, the Government has helpfully proposed that under these new Regulations holiday entitlement in the first year of employment will accrue on a pro-rata basis i.e. one twelfth of the entitlement per month worked.

Otherwise, employees would be entitled to the full four weeks from day one thus causing difficulties to employers where short serving employees do not return to work after holiday and where the employer has no ability to recoup monies in respect of excess entitlement taken.

Employers can still of course stipulate that holiday cannot be taken at the times requested by the employee and the proposed amendments will not affect this right.



## TUPE AND CONSTRUCTIVE DISMISSAL

The Employment Appeal Tribunal, in the case of **Rossiter -v- Pendragon Plc**, has given warning that for a claim to succeed under Regulation 5(5) of TUPE it is only necessary to show (following the words of the Regulations and the Directive) that the employer has suffered "a substantial change in his working conditions to his detriment." This is not the same as the standard common law test for constructive dismissal.

The case concerned the transferee employer allegedly changing the rate of commission and declining to pay holiday payments on the basis of

average commission. The Tribunal had found that there was no breach of contract in the new employer's conduct but the EAT pointed out that this was not the test and remitted the case to a different Tribunal for a decision.

Transferee employers need to be careful when making any changes to a newly acquired workforce. They could find they are liable to compensate an employee for a substantial amount of damages if it can be shown that there was a substantial change in working conditions to his detriment.

## RACE DISCRIMINATION AND PREVIOUS CONDUCT

The Court of Appeal in **Anya -v- University of Oxford** has given guidance concerning inferences to be drawn by Tribunals of race discrimination. Pointing out that direct discrimination today is rarely overt or even deliberate, they rule that Tribunals, when considering whether there is race discrimination in the rejection of a candidate equally well qualified as a successful applicant, can take into account other factors. In particular, they confirm that racial factors can often only be discerned from surrounding circumstances and previous history. A Tribunal can take into account prior events which are described in evidence given by an Applicant including the employer's conduct towards him and the failure to comply with their own policies and procedures.

## PROTECTION FOR HOMOSEXUALS - NOT JUST YET!

We previously reported on a decision in Scotland where the Human Rights Act was used, successfully, to argue that employees suffering a detriment on the grounds of sexual orientation had a right to sue the employer under existing sex discrimination legislation. That case involved an RAF Officer Cadet who was forced to resign when he declared in a vetting procedure that he was a homosexual. Effectively, in that case, it was decided that the word "sex" was wide enough to cover sexual orientation.

The Court of Session in Scotland has now overturned this decision and held that "sex" in the context of the Sex Discrimination Act simply means "gender". To succeed in a claim the Applicant would have to show that he had been treated less favourably than a female homosexual would have been.

However, the question is far from closed. An English case involving a lesbian schoolteacher (**Pearce -v- Governing Body of Mayfield Secondary School**) is going to appeal. In that case Mrs. Pearce had been called, amongst other things, "a dyke" - but had suffered no worse abuse than would have been accorded, the EAT held, to a male homosexual teacher. Her claim failed but will now be considered by the Court of Appeal.

In any event, the Government is obliged by a European Directive to have measures in place to protect workers against discrimination on the grounds of sexual orientation by 2 December 2003.



## EMPLOYER LIABILITY WIDENED

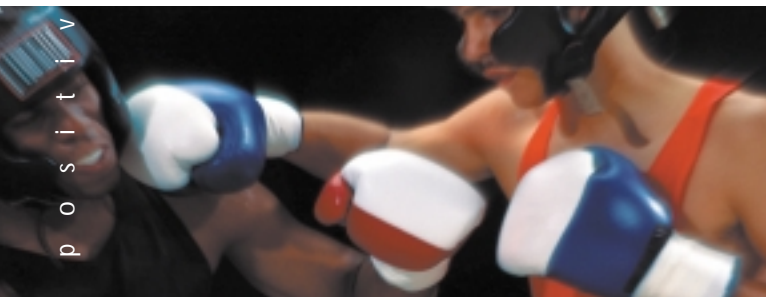
Employers are only liable for the acts of employees if committed in the course of employment. This had been taken to mean, quite restrictively, that for an employer to be liable the employee's act must be one he has authorised or one which could be regarded as a wrongful and unauthorised "mode" of doing some act authorised by the employer.

In practice, the more extreme an act of an employee the less likely an employer might be liable!

In the context of unlawful discrimination the Courts have already widened the scope of employer liability. In the case of **Jones -v- Tower Boot Co Ltd** the Court of Appeal was willing to find that a violent racial assault by employees on a colleague triggered an employer's liability.

A recent House of Lords ruling in **Lister -v- Heselley Hall Limited** has now widened the general common law liability of employers and brought it into line with the current protection against discrimination.

In this case, the House of Lords held that liability turned on whether there was a close connection between the employee's act and the nature of the duties he was employed to do. Mr. Lister had been convicted of a number of sexual offences against boys in the care of the residential school owned and managed by Heselley Hall. Applying this approach, it was not necessary to ask whether the acts of sexual abuse were improper modes of doing authorised acts. Instead, the House of Lords focused on the fact that the employer undertook to care for the boys through the services of its warden, Mr. Lister. There was a close enough connection between his employment and his wrongful acts, assaults committed on the employer's premises whilst he was carrying out his duties to care for the children, for the employer to be liable.



## VOLUNTEERS AND THE NATIONAL MINIMUM WAGE

Since the introduction of the legislation in 1999 (with only a few specified exceptions) all workers aged 18 and over are entitled to receive a National Minimum Wage. Where a worker is placed under a Government training scheme, careful enquiries should be made as to whether the trainee is so entitled.

Employers should be wary of the situation in which a person, placed for training, volunteers to remain working after the expiry of the training scheme (and funding). Under the Act, the only volunteers who do not need to be paid the National Minimum Wage are confined to those doing work for a charity, voluntary organisation, school, hospital or similar body, and even then in only limited circumstances. Therefore, a commercial or professional organisation cannot have "volunteers" in this sense. We have heard of several instances recently of trainees, who having volunteered to remain to help (and ostensibly not expecting to be paid), later applying to a Tribunal. In each case they have been found to be workers and therefore entitled to receive the National Minimum Wage backdated to the end of the training.

## SICKNESS - EMPLOYERS AT FAULT

Often an employee dismissed on the grounds of ill-health alleges that the illness was caused by the employer in the first place. In a previous EAT decision (**London Fire & Civil Defence Authority -v- Betty**) it was held that in determining the fairness of a dismissal for long term sickness absence it is not relevant to enquire whether the illness in question was caused or contributed to by the employer.

However, in the case of **Edwards -v- The Governors of Hanson School**, the EAT said that the Betty case had been wrongly decided if it prevented an employer's conduct in causing sickness from being relevant to the fairness of a dismissal.

The EAT could see no reason why an employer who has maliciously or wilfully caused an employee to go off work should not be found to have unfairly dismissed that employee, regardless of how fair the procedures were in a subsequent termination on the grounds of long term absence.



Employment Tribunals may in the future therefore be more prepared to look at the background to an employee's absence and consider his/her allegations that the employer caused the absence in the first place.

### INFORMATION

**If you have any queries on any aspect of employment law please contact:**

**Neil Maidment or Pauline Molyneux  
at Hull on (01482) 323239 or York on (01904) 625790**

This Newsletter is for the use of clients and will be supplied to others on request.

It is for general guidance only. It provides useful information in a concise form.

Action should not be taken without obtaining specific advice.

**The law is stated as at 1 August 2001**

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# DATA PROTECTION

## BE ALERT - ACCESS TO MANUAL RECORDS

The Data Protection Act 1998 extended the rights of employees to access information held by their employers about them.

However, for a transitional period this right did not generally apply to manual data e.g. personnel records. This transitional period comes to an end on 24 October 2001.

Employers therefore have only a short time left in which to get their records in order and to prepare for employees keen to ascertain what their employers really think about them!