APRIL 2002

LEGAL ALERT

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EMPLOYMENT NEWSLETTER

MORE NEW LEGISLATION - THE EMPLOYMENT BILL 2001

This Bill is currently making its way through Parliament and whilst its final content may change it is clear that it will introduce far reaching changes in a number of areas, not least unfair dismissal. We shall update you on its progress. However, there are some likely developments which employers should be aware of now and which might cause them to review their employment documentation to avoid future liability.

The Bill proposes the introduction of statutory dismissal and disciplinary procedures as well as a statutory grievance procedure. These will be incorporated by statute into every employees' contract of employment.

Any dismissal which is wholly or mainly attributable to the fact that the statutory dismissal procedure was not satisfied will be automatically unfair.

In cases where an employer has failed to follow the procedures an Employment Tribunal will, on a finding of unfair dismissal, have a discretion to increase the award to the employee by between 10% - 50%. The flip side of this is that a Tribunal may also reduce any award by a similar percentage if an employee has failed to comply with the procedures him or herself or, for example, failed to exercise a right of appeal under it.

There is also a proposal to bar employees from claiming unfair dismissal if they have not followed the statutory grievance procedure or have failed to appeal against the decision to dismiss.

A further penalty for employers will arise in that any award of compensation could also be increased by up to a further 25% if the employer has failed to provide a written statement of terms and conditions. Although this requirement has been in place for some 30 years it is still frequently the case that no written contract is ever provided. These changes in the law should give employers a significant incentive to ensure that they have proper employment documentation in place.

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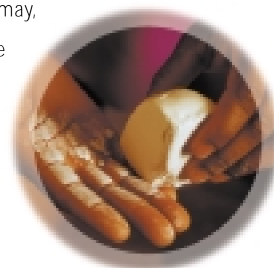
FLEXIBLE WORKING

It is also proposed as part of the Employment Bill that employees who are responsible for looking after a child under the age of 6 will have the right to ask their employers to vary their terms and conditions of employment in respect of their hours and/or place of work.

An employer will have a duty to consider such a request properly. A request may be refused only on a limited number of grounds, for example, the burden of additional costs, a detrimental effect on the ability to meet customer demand or an inability to reorganise work amongst existing staff.

An employee whose request is refused may apply to an Employment Tribunal which may, in turn, require an employer to reconsider the request and make an award of compensation.

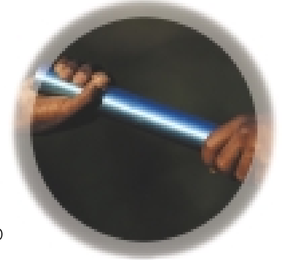


TUPE UPDATE

TUPE - POINT OF TRANSFER

In the 1990s the Training and Enterprise Councils came into being to carry out functions previously performed by the Department of Employment. This was caught by TUPE and a number of Civil Servants employed in the Department of Employment were seconded to the TECs for a period of three years. In 1993 a number resigned from the Department to take up employment directly with the TECs.

The EAT held in the case of ***Celtec Limited -v- Astley and others*** that the Civil Servants continuity of employment with the TEC commenced in 1993 and not from the earlier date when the TUPE transfer occurred. At the time of transfer they had remained employees of the Department of Employment. The test the EAT applied was to look at the point when the new employer took over actual occupation and control of the business. That was the point at which the TUPE transfer occurred. Whilst the transfer of functions was gradual, control had been assumed by the TEC long before the civil servants took up employment with it.



INFORMATION ON TUPE TRANSFERS

The case of ***Hagen -v- ICI*** involved ICI transferring part of its business to Redpath Engineering Services ("RES"). Both ICI and RES made various promises to employees regarding their likely future terms and conditions and employment prospects. Both employers were held to owe a duty of care to the employees.

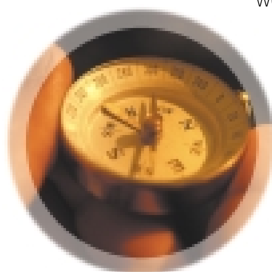
In respect of pension rights, ICI was adjudged to have been negligent in relation to information provided to its employees. They had not fully communicated to employees the fact that some of them would be worse off in the future. This information had been available to ICI but they had chosen not to pass it on. The employees therefore had a remedy in damages for this negligence.

This case undoubtedly illustrates the need for employers to ensure that they fully consult and provide all relevant (and accurate) information to their employees.

TUPE - TRANSFER OF LIABILITIES

There is now significant confusion and argument as to whether liabilities for a failure to inform and consult trade union or elected employee representatives (up to 13 weeks pay for each employee) pass in a TUPE situation to the transferee.

In the case of ***Kerry Foods Ltd -v- Creber,*** the EAT decided that liability for protective awards (which arise on a failure to consult collectively on redundancies) passed to the transferee under TUPE. However, in a recent case involving ***TGWU -v- James McKinnon, J R (Haulage) Ltd,*** the EAT held that this principle should not be applied to cover liability for any failure to consult on the transfer itself pursuant to Regulation 10 of TUPE. The EAT held this was not a duty which could be said to arise out of a contract of employment and was not therefore one caught by Regulation 5 of TUPE which transfers such liability. There is much to commend that approach. Otherwise, in a transfer of services, for example, what incentive would an outgoing contractor have to fulfil his obligations and why should the incoming contractors pay the price of any failure?



However in the Kerry case it is not at all clear that the EAT there intended to confine the transfer of liabilities to protective awards. There is therefore much scope for further debate and a continuing need for care when negotiating indemnities on a TUPE transfer, assuming indeed it is possible to negotiate at all.

HANDLING LONG TERM SICKNESS ABSENCES

In the case of ***Cosgrove -v- Ceasar & Howie,*** Mrs C was employed as a legal secretary. She had been off work for one year but despite the length of absence there was nothing which caused her employer to consider her as being disabled. Neither Mrs C nor her doctor ever suggested any possible adjustment that could be made to her job which might facilitate a return to work.

However, the EAT were clear that this was still a duty owed to her by her employer. In particular, Mrs C's employer had failed to be proactive in considering possible adjustments which might have allowed a return and for that reason had discriminated against her on the grounds of her disability.

This case can be contrasted with ***Callagan -v- Glasgow City Council*** where an employer made every effort to work with the disabled employee throughout a period of extended absence. In that case it was determined that the decision to dismiss was justified even though the Council had not considered the possible reasonable adjustment of allowing Mr Callagan to return to part-time work. Mr Callagan had never asked for this and even if the adjustment had been made it was still unlikely that he would have been able to return.

One of the worst courses of action an employer can take is to simply deny that the employee is disabled and do nothing!

DISABILITY AND REASONABLE ADJUSTMENTS

In the case of ***London Clubs Management Limited -v- Hood*** it was argued that a change in policy which meant that employees no longer received any contractual sick pay discriminated again disabled employees. The EAT however decided that the reason for the policy change and detriment suffered by Mr Hood was not related to his disability, migrainous neuralgia.

However, it emerges from this decision that it is possible for a disabled person to argue that their employer has failed to make a reasonable adjustment in stopping pay during sickness absences. This could obviously have very serious ramifications.

DEMOTION AFTER MISCONDUCT

The case of ***Hilton -v- Shiner Ltd*** involved an employee with 20 years service who had failed to issue invoices for goods taken by customers on 3 separate occasions. After a disciplinary hearing Mr Hilton was given a final written warning. His employer stated that they believed that he had been acting dishonestly but accepted that they had no proof.

Mr Hilton was moved to a new position within the business which did not involve handling customer transactions. His pay was unaffected. However, he did not accept this demotion and left claiming constructive dismissal.

It was accepted by the EAT that there was no breach of the implied duty of trust and confidence. The employer in this case had a reasonable and proper cause for his action. However, the variation of the job without Mr Hilton's agreement could still amount to a fundamental breach of contract. The fact that the employee behaved in a way which might have justified his dismissal could not excuse a subsequent breach of contract by his employer.

In these circumstances it would still be possible for the employer to defend any claim for unfair dismissal on the basis that regardless of any breach of contract they had acted reasonably in imposing this sanction. However, this case does make the law appear unduly inflexible. It is surely preferable for employers to use sanctions other than dismissal where appropriate.

Obviously, employers may wish to include the right to demote in the contract of employment which would get round a breach of contract claim on the basis of a removal of the individual's position. However, the employer must still act with reasonable and proper cause to preserve mutual trust and confidence.

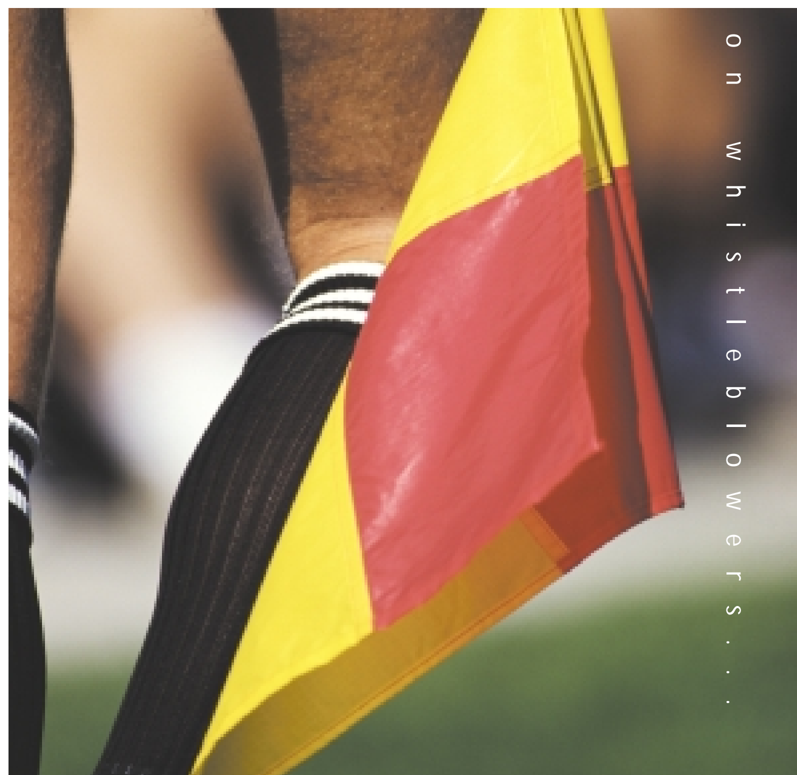
toeing the line

WHISTLEBLOWING AT WORK

Employees with less than one year's service and their advisers often try to find ingenious ways of bringing claims of unfair dismissal, despite the employee falling short of the necessary qualifying period. It is hard for employers not to be cynical about such an attempt in the recent case of ***Parkins -v- Sodexho Ltd.***

Mr Parkins was dismissed with less than one years service but complained that the decision was related to the fact that he had complained that his employer was in breach of the contract of employment in providing insufficient supervision, thus causing a health and safety risk. The EAT decided that under the Public Interest Disclosure Act 1998, the protection afforded to whistleblowers, (which includes a complaint that an employer has failed to comply with any legal obligation), was wide enough to cover a breach of the contract of employment.

If that was the ground on which the individual had been dismissed then dismissal would be automatically unfair and there was no need for the usual one year's qualifying service.



FIXED TERM CONTRACTS - THE END?

The benefit to employers of issuing fixed term contracts has already diminished with the removal of the ability to exclude unfair dismissal rights in contracts of one year or more's duration. The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, introduced to implement a European Directive, are scheduled to come into force on 10 July 2002 and (if implemented in line with the draft regulations now published) substantially remove any advantage for employers. The ability to exclude the right to a redundancy payment in contracts of 2 years or more goes.

Also from July, fixed term employees will have a right not to be treated less favourably compared to permanent employees with regard to both the terms of their contract or by being subjected to any detriment. This right extends to qualifying periods for benefits and opportunities to receive training.

An employee who believes that he is being treated unfavourably in such circumstances may write to his employer to request a written statement of the reasons for the treatment and the employer must reply within 21 days.

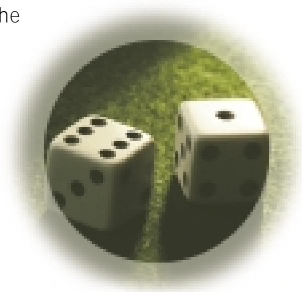
An employer may only issue fixed term contracts to individual employees for a maximum aggregate period of 4 years unless there is a collective or workplace agreement in force allowing this practice to continue. If an employer continues to issue fixed term contracts beyond this period they will be void and the contract will be regarded as of indefinite duration.

PREGNANT EMPLOYEES ON FIXED TERM CONTRACTS

The European Court of Justice in two recent judgments has made it clear that employees are protected against dismissal on the grounds of pregnancy even where they are recruited for a fixed term. In a case involving Tele Danmark A/S the employee had failed to tell her employer that she was pregnant even though she was aware of her condition at the time of recruitment and was inevitably going to be unable to work during a substantial part of her contract. She was still protected. Another ECJ decision confirms that an employee is similarly protected from dismissal where a fixed term contract is not renewed due to her absence on maternity leave at the time of its expiry.

DEVELOPMENTS IN DISCRIMINATION

The burden of proof in claims of sex discrimination has been reversed. Now, once a complainant has established a prima facie case of sex discrimination, the burden of proof shifts to the employer to show that there was a non-discriminatory reason for his actions. The legislation covering unlawful discrimination on the grounds of race and disability will also be amended to bring them into line with this change.



The Government has issued a consultation paper on further future changes to discrimination legislation. Discrimination on the grounds of sexual orientation and religion will be in place by December 2003 and on the grounds of age by 2006. From October 2004 it is also proposed that the small employer exemption in terms of disability discrimination will be removed. Currently only employers with 15 or more employees are caught.

On the question of age it is proposed to allow less favourable treatment but only where it can be objectively and reasonably justified. Views are requested on whether:-

- Employers can be justified in specifying a minimum or maximum age of recruitment for a job
- Whether attractive voluntary redundancy packages based on age and length of service can be justified
- Whether fixed retirement ages can be justified

There is also currently a Private Members Bill before Parliament on the subject of "dignity at work" which, amongst other things, proposes to give employees a right to complain to an Employment Tribunal if they have suffered unjustified criticism from their employer on more than one occasion! It is unlikely that this particular piece of legislation will ever be brought into force but it illustrates how some people see the future development of employment rights.

INFORMATION

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

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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.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 1 April 2002

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