

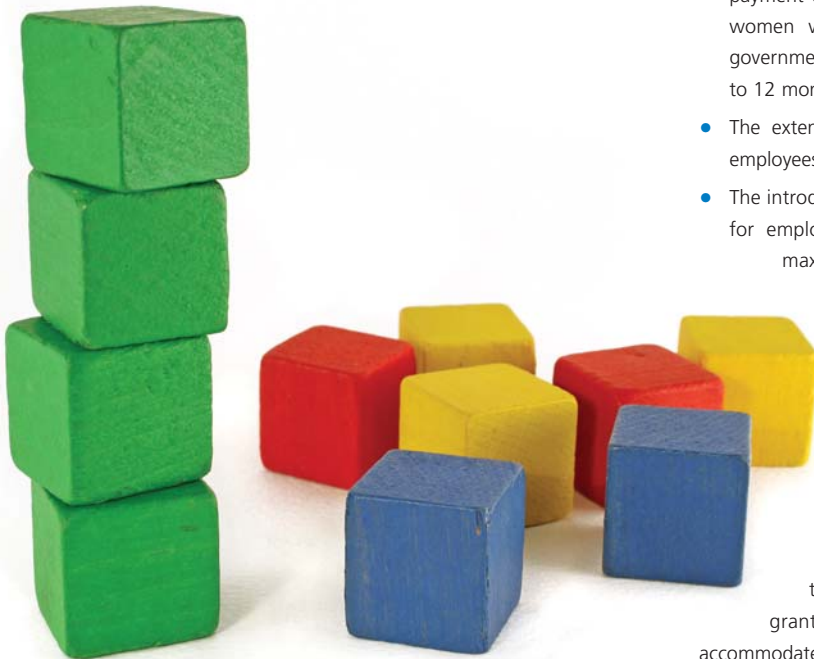
New Family Friendly Rights

Employees will no doubt be delighted by the new and valuable rights introduced by the Work and Families Act 2006 – although there is some good news within the detail for employers as well.

The 2006 Act essentially provides a framework of additional rights although much of the detail is to be brought into force at various stages by separate legislation.

The main changes are as follows:

- The removal of the length of service requirement for additional maternity leave with the result that women who qualify for ordinary maternity leave automatically qualify for the extended period of additional maternity leave as well.
- A doubling of the period of notice women are required to give if they wish to return early from maternity leave from 28 days to 8 weeks.



- The introduction of “keeping in touch” days whereby an employee on maternity leave can work for up to 10 days during the statutory leave period without losing statutory maternity pay or bringing the period of maternity leave to an end.
- Clarification that employers are permitted to make reasonable contact with an employee on maternity leave.
- The removal of the small employer’s exemption so that the employee has a right to return from additional maternity leave to the same or similar job regardless of the size of organisation.
- An extension of the period during which a woman is entitled to receive payment during her maternity leave from 26 weeks to 39 weeks for women whose babies are due on or after 1 April 2007. The government has the power to further extend the maternity pay period to 12 months and has indicated a future intention to do so.
- The extension of the existing right to request flexible working to employees with caring responsibilities for adults.
- The introduction of a new statutory right to additional paternity leave for employed fathers following the birth of a child of up to a maximum of 26 weeks. Fathers may also be entitled to additional statutory paternity pay during this period if the mother has not used up all of her entitlement to statutory maternity pay at the time of her return to work.
 - An increase in statutory paid holiday entitlement under the Working Time Regulations (discussed elsewhere in this Newsletter).

Although some detail remains to be provided on the application of these new rights, employers will quickly have to become accustomed to yet more flexible working rights granted to parents which can already be a struggle to accommodate in many workplaces.

Pregnant Workers – Health & Safety

Employers are obliged to assess any health and safety risks to new or expectant mothers. Furthermore, the employer must alter the employee's working conditions where it is reasonable to do so.

In *New Southern Railway -v- Quinn*, Mrs Quinn was moved from her Duty Manager role to a lower paid job. Her employer said there were risks associated

with that job and “they would be unable to forgive themselves” if anything happened to the baby.

However, it was held that they had jumped to a conclusion that she could not continue in the more senior role and were guilty of a “patronising and paternalistic” attitude. It was stressed that expert health and safety or medical evidence is desirable in cases such as this.

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Review of Statutory Grievance and Disciplinary Procedures

The DTI has announced a review of all aspects of the statutory grievance and disciplinary procedures with the aim of simplifying and improving the system.

On their introduction in 2004 we were told that these were indeed simple to follow for businesses of all sizes. Apparently the cost of the procedures to businesses has been £290m!

Certainly, we continue to see employers facing a finding of automatically unfair dismissal for sometimes minor and very technical failures in how they implement the procedures. This can mean an employer cannot defend a claim of unfair dismissal and also faces an uplift of 50% on any compensation awarded.

Very often no "step 1" letter (or only an inadequate one) is sent. This is an essential stage in any dismissal - an invitation to a meeting to discuss why consideration is being given to the termination of employment. An employee must also know the basis for such consideration.

This letter must be written in all types of dismissal situations not just those of a misconduct/disciplinary nature.

Also, in Tribunal cases there is often much argument as to how much information has to be given to an employee to be compliant. In redundancy

cases, for instance, it is now clear that employees at risk need to be aware, in advance, of the assessments made of them and an indication of what they would have been required to demonstrate to have survived the exercise.

Dealing with grievances is no easier. Often employees are deemed to have raised a grievance where an employer might quite reasonably have concluded that no more than an informal moan was being aired. Often grievance letters are vague and unclear.

The procedures are also a minefield to navigate when an employee raises a grievance of his/her own part way through the employer taking disciplinary action against them.

The raising of a grievance by an employee again triggers obligations on the employer – in particular, to arrange a meeting to discuss the grievance. A failure to do so can produce a further financial penalty.

Unfortunately, given the length of time it took to finalise current procedures, even if the review is in favour of an overhaul, employers are going to have to live with these procedures for some time longer.

Retirement and Age Discrimination

Employers are now coming to terms with the new procedures which allow the forcible retirement of those aged 65 or over (provided of course that the procedures are followed to the letter!)

However, employers still need to be alive to possibilities of other discrimination claims such as disability discrimination which can still be brought.

Some employers have decided as a matter of policy that it is simplest to retire everyone at 65 and put in place a policy to that effect.

Others do not want to take such a rigid line or perhaps cannot afford to lose experienced employees.



Any retirement policy requires careful drafting to ensure maximum flexibility whilst, at the same time, guarding against potential complaints of discrimination.

Whilst many employers have taken steps to equalise benefits, particular problems arise in respect of insurance related benefits where costs rapidly escalate for older workers. Our view is that Tribunals will be reluctant to accept pure arguments of "cost" as sufficient justification for withdrawal of benefits.

There has also been a great deal of confusion regarding rights under pension schemes. Again, the exclusions the government have allowed do not prevent employees accruing further pension rights on the grounds that they work beyond their normal retirement age of 65.

Works Councils

The Information and Consultation of Employees Regulations came into force in April 2005. They provide a framework whereby employees may compel employers to set up a works council and consult with them on a variety of business issues.

The Regulations have had limited impact thus far but from April 2007 businesses with 100 or more employees are covered.

News in Brief

Injury to Feelings Awards

Previous guidance suggested that in discrimination cases an award of £25,000 for injury to feelings was at the top end of the scale and only to be applied in the most serious of cases.



In *Miles -v- Gilbank* such an award was made in favour of a pregnant hairdresser whose Manager had made no adjustments to working practices to accommodate her condition, had ignored her and had made unsympathetic remarks.

On appeal the Court refused to view an award of £25,000 as excessive and agreed that the Manager (who was also the majority shareholder in the Company) should be jointly and personally liable for the award.

Unfair Dismissal and Lapsed Warnings

In cases of misconduct falling short of gross misconduct an employer must give adequate warnings to the employee prior to dismissal. In *Diosynth Limited -v- Thomson* it was held that the employer had acted unreasonably in taking into account an expired written warning when deciding whether or not to dismiss. Mr Thomson was entitled to take the warning at face value and treat it as expired after 12 months.

Redundancies – Notification to the DTI

The requirement to notify the DTI when an employer is proposing to dismiss as redundant 20 or more employees has been amended. The employer must now ensure that he notifies the Secretary of State of

the proposal before giving notice of termination of employment to any of the affected employees.

Disability

Sick Pay & Absence – Recent Cases

A disabled employee whose pay had been reduced in accordance with the employer's sick pay policy had suffered less favourable treatment – a person who was not on disability related absence would not have suffered the same loss of pay as he or she would not have been absent for over 26 weeks. It fell to the employer to justify its treatment of the disabled employee.

On the other hand, an employer may take into account disability related absences when operating a sickness procedure leading to dismissal. The question of unlawful discrimination will depend on whether the employer's action was justified in the circumstances of the particular case. Unfortunately, whether a Tribunal will accept that there was sufficient justification is not predictable, particularly in cases of employers with more substantial resources.

Definition of Disability – New Guidance

The Disability Rights Commission has published new guidance reflecting changes to the necessary qualifying conditions for a person to be classed as "disabled". In particular:

- There is no longer any requirement that a mental illness be clinically well recognised.
- Specific progressive conditions (cancer, HIV infection and multiple sclerosis) are now disabilities under the Disability Discrimination Act from the point of diagnosis regardless of their immediate affect on the sufferer.

Discrimination

No Protection for the BNP

It had been determined that a BNP councillor dismissed from a job working closely with people of Asian origin was treated less favourably on racial grounds. The Court of Appeal has now overturned this ruling. Whilst the case clearly involved racial considerations the councillor, Mr Redfearn, was no more dismissed on "racial grounds" than an employee dismissed for racially abusing a colleague.

A Right to Wear the Veil?

Issues regarding religious dress were considered by the Leeds Employment Tribunal (chaired by Pauline Molyneux) in *Azmi -v- Kirklees Metropolitan Council*. The Tribunal found that a female Muslim teaching assistant was not subjected to direct discrimination

on the grounds of religion by a requirement that she remove her veil while teaching. Also, the school's policy regarding the wearing of a veil was a "proportionate response" to the legitimate aim of providing unhindered language tuition to young children.

Religious Discrimination & Non Believers

The protection from discrimination is due shortly to be widened to expressly cover those with a lack of belief. Nor will there be any need in the future for a philosophical belief to be "similar" to a religious belief to afford the believer protection. The new Equality Act will also outlaw discrimination on the grounds of religion or belief in the provision of goods, facilities and services by any business providing those to the public.

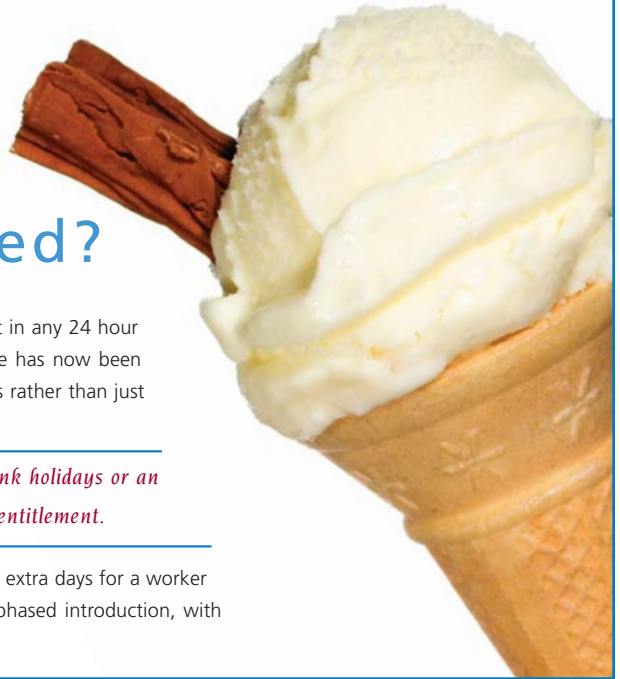
Working Time & Holidays

More Rest for the Wicked?

The Working Time Directive provides that workers are entitled to at least 11 hours rest in any 24 hour period and at least 24 hours continuous rest per 7 day period. Government guidance has now been amended to clarify that employers are obliged to ensure that workers take such breaks rather than just giving them the opportunity to do so.

The government has also indicated that it will give all workers the right to paid bank holidays or an equivalent number of days in addition to the existing four weeks annum paid leave entitlement.

This would result in statutory holiday entitlement rising to 5.6 weeks which reflects the extra days for a worker working 5 days per week. Consultation is ongoing but the current proposal is for a phased introduction, with minimum holiday entitlement rising to 4.8 weeks in October 2007 as a first stage.



Wrongful Dismissal - Tribunal or High Court?

The Employment Tribunal process is generally a quicker and cheaper way of resolving a dispute than the use of the civil courts (although costs are not generally recoverable in Tribunals).



Employees claiming unfair dismissal have no choice but to use the Employment Tribunals. However, when claims for monies under their contracts of employment are in issue they have a choice of forum subject to the Tribunal not being able to award more than £25,000 under this head. Often employees will prefer to run both claims together and therefore opt for the Tribunal jurisdiction.

The case of *Fraser -v- HCMAD* illustrates the care which must be taken in making this decision. Here the High Court ruled that an employee who succeeded before an Employment Tribunal and was awarded the maximum £25,000 was not then entitled to bring proceedings in the High Court to recover damages for the excess beyond that amount

Agency Workers

The law on the employment status of agency workers is now in a state of some chaos.

The Courts have shown a tendency to imply a contract of employment between such a worker and the end user/client. One judgment (which has since been followed in a number of cases) indicated that the inference of employment would be drawn if the worker had provided services in excess of one year to the same client.

However, these cases have now been distinguished in an attempt to limit their application to situations where the express agency arrangements do not accurately reflect the actual relationship.

In reality the authorities are difficult to reconcile. Nor is it predictable which line of authority any Tribunal faced with the question will follow.

The judiciary appears to wish to close a loop hole in current employment legislation which deprives many agency workers of protection. However, there is a disagreement as to whether that can be achieved under existing law or whether legislation is required. Some years ago attempts at a European level to introduce protection for agency workers collapsed. Whatever view is taken as to the appropriate protection for such workers, the lack of certainty now created is wholly unsatisfactory.

TUPE – Failure to Inform and Consult

In the case of *Sweetman -v- Coral Racing* it was made clear that in assessing compensation for a failure to consult employee representatives about a business transfer, similar principles must be applied as in the case of a failure to consult on collective redundancies.

The new approach in any such failures now adopted by Employment Tribunals is that the award is punitive requiring a Tribunal to focus on the extent of the employer's fault (rather than any loss suffered by the employee) awarding the maximum amount (13 weeks per employee in a TUPE case) and reducing it only if there are mitigating circumstances.

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 March 2007

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