

Employment Law

The frightening pace of change in employment law continues with a vengeance, especially this year with the introduction of age discrimination legislation from 1 October 2006. This bulletin provides an important update on developments in the legislation and the impact of recent case law. This is essential reading for all employers!

The areas covered in this bulletin are:

- Employment Equality (Age) Regulations 2006
- Compromise agreements - repayment or penalty clauses?
- Disability discrimination - 'reasonable adjustments', a comparison of recent case law
- Employment tribunal statistics 2005/6
- Employed or self employed - tax liability may be doubled if employers get it wrong
- Dispute Resolution Regulations 2004, two years on...
- Family friendly proposals for 2007
- Minimum Wage - October 2006 changes
- Smoking ban 2007
- Government proposals for statutory minimum holidays
- TUPE 2006 regulations



EMPLOYMENT EQUALITY (AGE) REGULATIONS 2006

On 1 October 2006, one of the most far reaching pieces of legislation this century came into force to prevent discrimination against workers, employees, job seekers and trainees on the basis of their age.

Its importance is underlined by the fact that nearly a third of all workers will be over the age of fifty by 2020, which means that businesses increasingly need to recognise the benefits of age diversity in the workplace.

Unfortunately, a recent survey of over 150 organisations indicates that most businesses are not prepared for the changes. Employers need to ensure they have the appropriate policies and procedures in place to deal with age discrimination and should raise awareness of it so that acts of discrimination on the grounds of age can be prevented.

Direct and indirect discrimination

Both direct discrimination (treating someone less favourably because of their age or because of the age they appear to be) and indirect discrimination (having a policy or practice which puts people of a certain age at a disadvantage, compared with other people) are unlawful.

An example of direct discrimination would be where someone with all the skills and competencies to undertake a role is not offered the position just because they completed their professional qualification 30 years ago. Other examples could include refusing to hire a

40 year old because of a company's youthful image, not providing health insurance to the over 50's and not promoting a 25 year old because they may not command respect.

A business requiring applicants for a courier position to have held a driving licence for five years is likely to be guilty of indirect discrimination. A higher proportion of people aged between 40 and above will have fulfilled this criteria than those aged 25. Other examples of indirect discrimination could include seeking an 'energetic employee', requiring 30 years of experience or asking clerical workers to pass a health test.

Unlike other forms of anti-discrimination legislation, however, age discrimination can be objectively justified if it is both proportionate and necessary. For example, an employer might argue that it was appropriate and necessary to refuse to recruit people over 60 where there is a long and expensive training period before starting the job. However, cost by itself is not capable of justifying such an action.

Harassment

Harassment on the basis of age is equally unlawful. For example, a mature trainee teacher may be teased and tormented in a school on the grounds of age during the teaching experience. If no action is taken by the head teacher, this may be treated as harassment. An employee may be written off as 'too slow' or 'an old timer'. This too could be seen as harassment.

Recruitment

Employers must be aware of the significance of the legislation at all stages in the recruitment process and to avoid breaking the age rules they should consider:

- removing age/date of birth from adverts for example: 'Trainee Sales Representatives... envisaged age 21-30 years'
- reviewing application forms to ensure they do not ask for unnecessary information about periods and dates
- avoiding asking for 'so many years of experience' in job descriptions and person specifications for example: 'graduated in the last seven years'
- avoiding using language that might imply a preference for someone of a certain age, such as 'mature', 'young', 'energetic' or 'the atmosphere in the office, although demanding, is lively, relaxed and young'
- ensuring that other visible methods are used to recruit graduates as well as university milk rounds, to avoid limiting opportunities to young graduates
- focusing on competencies to undertake a role and not making interview notes that refer to age considerations
- never asking personal questions nor make assumptions about health or physical abilities.

Service related benefits

Employers are allowed to use a length of service criterion in pay and non-pay benefits of up to five years' service. Benefits based on over five years service are also allowed if the benefit reflects a higher level of experience, rewards loyalty or increases or maintains motivation and is applied equally to all employees in similar situations. It is for the employer to demonstrate that the variation in pay/benefits over five years can be objectively justified.

Employers are recommended to review their pay and benefits policies now to ensure that they are based on experience, skills and other non-age related criteria.

Redundancy

The existing statutory payment provisions remain in place. Employers can, as before, pay enhanced redundancy payments. However, to avoid discriminating, employers should use the same age brackets and multipliers as used when calculating statutory redundancy pay.

Retirement

An employer must give an employee notice of their intention to retire them, the intended retirement date and the employee's 'right to request' to continue working past the intended retirement date. This notice must be given not more than one year and not less than six months before the intended retirement date.

Employees have the right to request to work beyond 65 or any other retirement age set by their employers. Employers have a 'duty' to consider such requests and to hold a meeting with the employee to discuss the request.

Actions for employers

Employers need to be undertake the following to ensure that they are not breaking the law:

- review equal opportunities policies
- review employee benefits
- review policies and procedures on retirement
- undertake equal opportunities training covering recruitment, promotion and training.

For practical help and guidance on this complex area, support is available from the following websites: www.acas.org.uk ; www.dti.org.uk ; www.agepositive.gov.uk alternatively contact us for further information.

COMPROMISE AGREEMENTS

Compromise agreements are regularly agreed with employees in exchange for a sum of money to protect employers against employment tribunal claims. The case of **CMC Group PLC v Zhang** recently led to a new interpretation of wording, which can be very disadvantageous to employers.

CMC Group PLC (CMC) agreed in a compromise agreement to pay Mr Zhang \$40,000 in settlement of his claim. The contract contained a clause, common in compromise agreements, which said that the full \$40,000 would be immediately repayable if Zhang broke any terms in the agreement (namely non-harassment and non-derogatory remarks clauses).

CMC alleged that Zhang breached the agreement and brought proceedings for repayment of the \$40,000 but, in May 2006, the Court of Appeal held that the repayment clause was unenforceable on the basis that it was a 'penalty' rather than a 'repayment' clause and fixed damages of \$40,000 as a 'penalty' were plainly excessive.

The Court of Appeal has granted permission for appeal to the House of Lords but, in the meantime, employers should ensure that they make some evaluation of the loss they may suffer in the event of a breach of any repayment clauses by an individual.

WHAT CONSTITUTES 'REASONABLE ADJUSTMENTS' UNDER THE DISABILITY DISCRIMINATION ACT?

The following two recent and very different cases provide a useful insight for employers into what constitutes 'reasonable adjustments' under the Disability Discrimination Act 1995 (DDA) and subsequent amendments.

A definition of 'reasonable adjustments' is any step or steps an employer can take to prevent arrangements made by them, or physical features of premises occupied by them, from putting a disabled person at a disadvantage in comparison with a non-disabled person.

The first case highlights that cost can be a very real factor in determining what is reasonable and what is not reasonable. The second shows that an employer cannot make generalised and stereotypical assumptions about what is and what is not reasonable, but must undertake an objective assessment of individual circumstances.

O'Hanlon v HM Revenue & Customs 2006

In this first case, Mrs O'Hanlon, an employee of HM Revenue & Customs (HMRC), was absent from work for 365 days. The sick pay policy provided for 26 weeks' absence on full pay, 26 weeks' absence on half pay and thereafter absence at the pension rate of pay. Due to the level of her absence Mrs O'Hanlon's pay was reduced to the pension rate.

Mrs O'Hanlon claimed that her employer had failed to make a 'reasonable adjustment' under the DDA, arguing that HMRC should have amended its sick pay policy to keep her on full pay.

The Employment Appeal Tribunal decided that although the reduction in her pay did place her at a substantial disadvantage as compared with a non-disabled person, it was not a reasonable adjustment to require her employer to pay her full pay. This was on the following basis:

- the cost of a change in HMRC's policy would cost an additional £6 million per annum
- in cases where the reasonable adjustment being argued was generic (ie an adjustment for any disabled employee rather than a particular employee in a particular job with a particular condition) it was relevant to look at the costs of making the adjustment across the board for all disabled employees
- the purpose of the DDA was to provide an incentive to disabled employees to work (full sick pay would be a disincentive) and to assist in the integration of disabled employees into the workplace.

Tudor v Spen Corner Veterinary Centre Ltd

In this case, Ms Tudor was employed as a veterinary nursing assistant and receptionist. She suffered a stroke and became blind after which the Veterinary Centre dismissed her claiming that no adjustments could be made to accommodate her disability. In April this year, the Tribunal found in her favour on the basis that:

- the employer had made generalised and stereotypical assumptions about Ms Tudor's condition, the duration of her disability and its effect and they had done this without proper consideration of the circumstances
- they did not have a meeting with the Claimant, seek her input or refer to a medical report, all of which amounted to direct discrimination on the grounds of her disability
- they had failed to consider reasonable adjustments to the premises and workplace including general tidying, use of tactile labels, standardisation of storage areas and the use of adapted software which would have received up to 80% funding by Access to Work.

LATEST EMPLOYMENT TRIBUNAL STATISTICS

Published Employment Tribunal figures for the year to April 2006 indicate a rising trend in claims with a total of 115,039 compared with 86,181 in the previous year.

Of the total, 50% were for unfair dismissal or breach of contract, particularly unlawful deduction of wages. Whilst awards for unfair dismissal are capped just short of £70,000, the average award last year was £8,679, up from £7,303 in 2005. Awards for discrimination, where there is no upper limit, were much higher averaging £10,800, £19,300 and £30,300 for sex, disability and race discrimination respectively.

It is therefore not surprising that a recent survey of 470 businesses concluded that employers increasingly view the tribunal system with suspicion and feel that they are biased towards trained lawyers! With now more than 70 individual types

of claims employees can bring against employers, more and more multiple claims are being submitted to increase the likelihood of winning. If such claims are taken into account, the total number of claims last year increases to over 201,000.

These statistics add fuel to the Confederation of British Industry's claim that the Dispute Resolution Regulations introduced in 2004 (see below) not only represented a further debilitating administrative burden for employers but have also added significantly to the number of vexatious claims.

The Tribunal Service, however, deny this to be the case and argue that the increase in claims is due to a high number of equal pay cases.

EMPLOYED OR SELF-EMPLOYED

The case of Demibourne Ltd v Her Majesty's Revenue and Customs, heard at appeal in April

2005, provides useful insight on this much debated area of employment law. The question considered was whether a Mr Rodney Bone was a self-employed person working under a contract for services or an employee, working under a contract of employment.

Having been employed for 15 years to undertake all general maintenance work at an hotel, Mr Bone, when he reached the age of 65 in 1993, was told that he could only continue if he was self employed. He agreed to this. The Employment Appeal Tribunal (EAT) found that whilst he no longer received holiday pay and submitted invoices he was nonetheless an employee on the basis that his hours did not change, he worked under the direction of the business, he could not bring in helpers or substitutes and sought reimbursement from the hotel for any goods he purchased. He was also paid for the hours he worked and he was accepted as part of the hotel's team. Taking all the factors together, the EAT held that Mr Bone was an employee of Demibourne.

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DISPUTE RESOLUTION REGULATIONS TWO YEARS ON

The Dispute Resolution Regulations introduced in October 2004 set out to establish a simple and fair process for dealing with disciplinary, dismissal and grievance procedures.

Statutory Disciplinary and Dismissal Procedure

Step 1 - Employers must set out in writing the reasons why dismissal or disciplinary actions against the employee are being considered.

A copy of this must be sent to the employee who must be invited to attend a meeting to discuss the matter, with the right to be accompanied by a colleague or union representative.

Step 2 - A meeting must take place.

Step 3 - An appeal procedure must be established.

Statutory Grievance Procedure

Step 1 - The employee must set out their grievance in writing and send this to their employer.

Step 2 - The employer must invite the employee to a meeting to discuss the grievance.

Step 3 - An appeal procedure must be established.

Two years have passed since the introduction of these regulations and a number of common mistakes have tripped up employers.

• **Not applying the procedures to employees with under one year's service.**

Whilst such employees are often unable to claim unfair dismissal they may be able to bring another claim, such as discrimination, which, if successful, could result in compensation being increased by 50% through these regulations.

• **Failing to invite employees to disciplinary hearings in writing or supply adequate evidence before the disciplinary hearing.**

The standard procedure requires that the employer clearly sets out the 'basis of the allegations' prior to the hearing.

• **Not holding a meeting or including a right of appeal.**

• **Failing to treat any written statement/letter which raises issues which could form the basis of a tribunal claim as a grievance.** A plethora of recent case law has highlighted that employers must take seriously any written communication from employees that suggests they are not happy with their circumstances even if no mention of the word 'grievance' is made.

It is not necessary to make it clear that the complaint is a grievance, an invocation of the grievance procedure, nor any intention to pursue it as a grievance with the employer.

The statutory grievance procedures are satisfied if the employee simply sets out his or her complaint in writing and this can be a simple letter of resignation

or even a solicitor's letter written on the employee's behalf.

• **Pursuing a disciplinary hearing during sickness absence.**

In this respect, the case of William Hicks and Partners v Nadal 2005 provides a cautionary tale.

Called to a disciplinary meeting for alleged bullying of her secretary, Ms Nadal's doctor forwarded a letter saying she would not be able to attend for the foreseeable future due to stress. Later she proposed a date she felt she would be able to attend but subsequently her doctor indicated that the cause of stress was the disciplinary action itself and she would only be fit to return when it had come to an end.

The partnership went ahead and held the disciplinary hearing in her absence as they did not believe she was unfit to attend having been informed that she had already found another job. As a result of the disciplinary hearing Ms Nadal was dismissed. She took her case to tribunal and won on the basis that the partners failed to give her the opportunity to defend herself and they had no tangible evidence to prove she was misleading the firm.

The statutory procedures state that if an employer invites the employee to attend two disciplinary hearings and on each occasion the employee is unable to attend due to unforeseen reasons the employer may treat the statutory procedure as complete. This case shows that great care is needed when disciplining absent employees and each case should

be looked at individually. Here are some useful guidelines:

– if an employee goes off sick after the disciplinary hearing has been arranged the absence may be considered as unforeseeable. The employer should arrange another meeting

– if the employee remains off sick the absence is no longer unforeseeable and if the second meeting is cancelled the procedure should not be regarded as complete

– if the employee is signed off for a few weeks it may be difficult to justify holding the disciplinary hearing in the employee's absence

– however, if the employee is signed off indefinitely, it may be more reasonable to continue with the procedures and hold the disciplinary hearing in the employee's absence. In such circumstances it may be appropriate to hold the hearing at the employee's home or a location other than the employer's offices in order to reduce stress

– if the situation was less serious, for example, it didn't warrant dismissal, the employee could be offered the opportunity to put forward their comments in writing and/or to send a representative to put forward their argument.

An important tax implication emerged from this decision in that the hotel was now deemed to be responsible for employee PAYE and National Insurance Contributions (NICs). As they failed to agree the amount owing, HMRC demanded the full amount of tax and NICs without any credit being given for payments made by Mr Bone on his own behalf. This resulted in the tax being paid twice!

Although the Special Commissioner suggested that a negotiated settlement which gave credit for the tax paid would be the most desirable outcome, he stated that this was a matter for the parties and not within the jurisdiction of the tribunal.

This is a clear warning that contractual status should be clearly set out in writing to avoid any costly misunderstandings!

FAMILY FRIENDLY PROPOSALS FOR 2007

Important changes to maternity leave and pay take effect from **1 April 2007**, in line with the Work and Families Act which became statute in October 2006. In brief these are:

- all pregnant employees will be entitled to 52 weeks' maternity leave (26 weeks' Ordinary Maternity Leave and 26 weeks' Additional Maternity Leave) irrespective of length of service
- pregnant employees who meet qualifying conditions based on their length of service and average earnings are entitled to up to 39 weeks Statutory Maternity Pay (SMP), which is paid by their employers and mostly or completely refunded by the government
- women who are not entitled to SMP but meet qualifying conditions based on their recent employment and earnings may claim up to 39 weeks' Maternity Allowance, paid direct by Jobcentre Plus
- employers may make reasonable contact with a woman on maternity leave for a number of reasons, such as to discuss arrangements for her return to work
- if the employee wishes to return to work before the end of her full maternity leave period (this will normally be the end date the employer confirmed to her before she went on leave), she must give her employer eight weeks' notice of her return to work. This notice requirement applies during both Ordinary and Additional Maternity Leave.
- those on maternity leave may by agreement with their employer, complete up to ten days paid work (for which the payment will include the SMP), known as "Keeping in Touch Days".

In addition flexible working rights will be extended to carers of adults from April 2007 and it is anticipated that fathers will be entitled to Additional Paternity Leave of up to six months if the mother returns to work before her maternity leave is over, paid at the SMP rate. The government has consulted on the detail of the new rights although the final arrangements have yet to be announced.

The new rights for fathers are likely to come into effect when SMP is further extended to 52 weeks 'before the end of this Parliament' but not before April 2008.

MINIMUM WAGE

The changes in the minimum wage bandings since 2004 and the current rates from 1 October 2006 are set out in the following table:

	October 2006	October 2005	October 2004
22 and over	£5.35	£5.05	£4.85
18 - 21	£4.45	£4.25	£4.10
16 - 17	£3.30	£3.00	£3.00

The Employment Equality (Age) Regulations provide a specific lawful exemption enabling young workers to continue to be paid below the standard adult national minimum wage and allowing the different rates to be used according to the above age bands. This was in response to employers' concerns about financial pressures if the maximum rate was applied to all employees.

SMOKE-FREE WORKPLACES IN 2007

Smoking will be banned in all pubs, clubs and enclosed workplaces in England and Wales from summer 2007. This will bring these nations into line with Scotland, where smoking in enclosed public spaces was banned from March 2006 and Ireland where a ban took effect in March 2004.

Failure to display 'no smoking' signs and failure to stop people smoking within smoke-free premises could mean fines of up to £250 and £2,500 respectively, whilst the fine for an individual smoking in a smoke-free place will be £50.

INCREASE IN STATUTORY HOLIDAY ENTITLEMENT

The government has stated a commitment to removing the anomaly that some, particularly the lowest paid, have to include bank holidays as part of their annual holiday entitlement.

The proposal is to increase the current statutory minimum holiday entitlement on a phased basis from four weeks to 5.6 weeks (maximum 28 days) for someone working a five day week. From October 2007 the entitlement will be increased to 4.8 weeks with increases of two days per year thereafter until 2009.

Also under consultation is whether there should be an option to carry forward the additional eight days into the next holiday year and whether there should be an option to receive pay for them instead of taking them, which is currently contrary to the Working Time Directive.

TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 (TUPE 2006)

TUPE 2006 is now the main piece of legislation dealing with the transfer of an undertaking, or part of one, to another. The main changes in TUPE 2006 came into effect on 6 April 2006 and they have provided useful clarification on a number of areas, although there remains confusion over the position in insolvency situations. The key points of clarification concern:

- the situations to which TUPE will apply. TUPE 2006 confirms that the regulations apply both to a transfer of a business and a service provision change for example where there is outsourcing of cleaners
- what constitutes acceptable variations to contracts of employment. Any changes must be for economic, technical or organisational (ETO) reasons only and relate to either number or functions of affected employees and, as such, harmonisation of terms and conditions cannot in itself constitute an ETO reason
- the obligations of the transferor regarding provision of employee liability information. This must be at least two weeks before transfer, otherwise there are fines of up to £500 per employee
- joint liability of the transferor and transferee for awards for failure to inform and consult with those affected, employee representatives or a trade union.

This is a highly complex area of employment law. Employers are strongly recommended to seek professional advice if they are involved in a business transfer or service provision change particularly if they are unsure if and how TUPE applies!