

Welcome to the latest issue of the Steptoe & Johnson Employment Law Update. The Employment Law Updates are aimed at providing information on recent developments in UK employment law. It is our desire to provide you with not only an update of the law in the United Kingdom, but also a practical insight in managing workplace issues on a proactive basis.

To achieve our objective and to continuously improve the Updates, it is important that we receive feedback from you. With a view to this, please e-mail any comments or suggestions which you may have relating to the Updates to employmentgroup@steptoe.com.

We look forward to hearing from you.

1. Employment Equality (Sex Discrimination) Regulations 2005

These Regulations come into effect on **1 October 2005**. They introduce a definition of harassment that incorporates both sexual harassment such as unwanted sexual advances and harassment relating to a person's sex, which need not be sexual in nature.

2. The Employment Relations Act 2004

Commencement Regulations effective **1 October 2005** amend the information that unions are required to give employers in advance of industrial action.

3. Minimum Wage

The new minimum wages effective **1 October 2005** are:

- for adult workers £5.05
- for younger workers between 18 and 21 £4.25

The rate for workers aged below 18 who have ceased to be of compulsory school age remains unchanged at £3.00 per hour.

4. Changes to the Sex Discrimination Act

From **1 October 2005** amendments to the Sex Discrimination Act will clarify a number of existing obligations. The working environment should be free of discrimination and harassment. Discrimination in unpaid practical working experience will be unlawful. Partnerships will no longer be allowed to discriminate when providing death and retirement benefits. Sex questionnaires must be responded to within eight weeks. The law will also apply if employees are normally resident in Great Britain but work outside the country.

5. Age Discrimination

The draft age discrimination Regulations have been published for consultation. The Regulations will come into force on **1 October 2006**. Consultation runs to **17 October 2005**.

As well as removing the upper age limit, the new rules will also:

- Prohibit unjustified age discrimination in employment and vocational training.
- Require employers who set their retirement age below the default age of 65 to justify or change it.
- Introduce a new duty for employers to consider an employee's request to work beyond his or her retirement.
- Require employers to inform employees in writing and at least six months before they intend to retire.

6. Religious Discrimination

Copsey v WWB Devon Clays Limited EWCA/Civ/2005/932

The Court of Appeal has ruled that an employee's freedom to manifest his religious beliefs was not infringed by his dismissal for refusing to agree to Sunday working. Mr Copsey was dismissed for refusing to agree to a contractual variation of his working hours so as to provide a seven day shift including Sunday. He was dismissed for some other substantial reason. The employer had done everything it could to avoid dismissing him, including offering him other job opportunities. The employer had not failed to reasonably accommodate his beliefs.

7. Race Discrimination

Redfearn v Serco Limited t/a West Yorkshire Transport Service

Mr Redfearn was a post delivery driver who was found to be a satisfactory employee. However, he was dismissed following union representations when the union discovered that he stood for and was elected as a local authority councillor representing the BNP. The EAT held that he had been dismissed on "racial grounds". This was to be interpreted widely. The decision to dismiss was significantly influenced by the question of race, and the employers' motive no matter how benign was not a defence.

Commission for Racial Equality

The CRE has just published on its website a case law database for court decisions relating to race discrimination. This is a useful tool

and it can be accessed at www.cre.gov.uk.

8. Disability Discrimination

Pousson v BT Plc UK EAT/0547/5M

Mr Pousson suffered from diabetes. BT was aware of his condition. The Tribunal found that BT had failed to make a reasonable number of adjustments to afford him facilities for blood testing and insulin injection. BT had obtained medical advice on his condition, but they had ignored the advice. Diabetes is a recognised disability for the purpose of the DDA.

Home Office v Collins Court of Appeal

An employer who had dismissed a disabled employee on account of her extensive period of sickness rather than pursue the possibility of phased return or part-time work did not fail to make reasonable adjustments for the purpose of the Disability Discrimination rules. Since the employee had not at any point been ready or able to return to work and had indicated no definite return date, there was no need for the employer to consider the alternatives. In view of the length of time of Ms Collins' absence, August 2001 until October 2002, the duty to make reasonable adjustments did not require the employer to delay his decision any longer. Ms Collins' disability claim failed.

9. Homeworking – Indirect Discrimination

Giles v Cornelia Care Homes

The Tribunal found that an employer who required a part-time female employee to work full-time or at least 25 hours per week in the office and did not consider other suitable flexible working options, including working partly from home had indirectly discriminated against her on the grounds of her sex. The Tribunal also increased the compensation awarded to her as the employer had failed to respond to the employee's written grievance in accordance with the statutory procedure. The Tribunal awarded Mrs Giles £19,495 in damages. As her employer had failed to follow the statutory grievance procedure, it was just and equitable to uplift this award by 40% and therefore awarded a further £7,798 plus a further £2,000 by way of aggravated damages because of the employer's scandalous conduct of the litigation.

10. Part-Time Working

Hardys & Hansons v Lax 2005 EWAC Civ 46

The employee wanted to work part-time on her return from maternity leave, but her employer rejected this request. When she returned to work, she was advised that there was no part-time role for her and that her role had become redundant. She was given three months' notice of dismissal on the grounds of redundancy. The Court of Appeal held that the range of reasonable responses test does

not apply in these circumstances when a Tribunal had to decide whether an otherwise indirectly discriminatory provision criteria or practice is objectively justified. Where an employer is relying on the economic needs of the business, he or she should have to produce sufficient evidence of those business needs to enable the Tribunal to set out at least a basic economic analysis of the business and its needs. The analysis must be thorough and critical, and show a proper understanding of the business of the enterprise.

British Airways Plc v Starmar

A full-time female airline pilot with childcare responsibilities was indirectly discriminated against on the grounds of her sex when her employer refused to allow her to halve her hours. The employer had failed to justify the discrimination on the grounds of additional costs, impact on customer service, lack of resources or safety considerations. Although BA had stressed the issue of safety and the need for Ms Starmar to keep up her flying hours, they had failed to produce sufficient evidence to show that safety could be compromised by reducing her flying hours. BA is considering an appeal to the Court of Appeal.

11. Victimisation

St Helens MBC v Derbyshire 2005 EWCA Civ 977

The Court of Appeal has overturned the earlier decision that the Claimants had been victimised when the Council wrote to them about pursuing their claim. The issue was whether the employers' conduct had been part of an honest and reasonable attempt to compromise the proceedings. The case was remitted to the same Tribunal to reconsider the issue.

12. Restrictive Covenants

Forshaw v Archcraft Limited

Archcraft was a small plastics company. Two senior employees left to set up a rival business. The Company sought a restraint of trade clause from its employees that they would not work for a competing business for a period of 12 months following the termination of their employment. The employees refused and were dismissed. The Tribunal found the dismissals fair even though the post-termination restrictions were wider than necessary, and it was a dismissal for some other substantial reason. The Employment Appeal Tribunal disagreed. The employees' refusal to sign up to an unfairly wide and unreasonable restraint clause was not a potentially fair reason for dismissal.

Hydra Plc & Others v Anastasi & Others

A clause in a Compromise Agreement under which a former employee of a Company agreed not to solicit or entice away any continuing employees was not breached where an employee of the Company had approached the former employee and was

subsequently employed. A clause which prevented an employee from soliciting or enticing away any employee for 12 months following the termination date was not unreasonable in restraint of trade by reason of the fact that it did not distinguish between senior and junior members of staff. Companies are entitled to protect the stability of their work force. However, enticement means tempt, persuade, inveigle. Therefore, the clause did not cover the circumstances of this case where an employee had approached the former employee and sought to persuade him to let him join the new venture. The former employee had not endeavoured to entice him away.

Berry Birch and Noble Financial Planning Limited v Berwick & Others

The High Court refused to grant an interim injunction against five former agents for alleged breaches of their confidentiality covenant and restrictive covenants contained in their agency agreements. Berry Birch relied on two covenants: one of confidentiality and the other on non-solicitation and non-dealing. The Court found the definition of confidential information extremely broad. Berry Birch had not provided any evidence to explain the kind of confidential information that they had in mind which would justify a protection period of five years. The Court held that the non-dealing and non-solicitation clauses were effectively a covenant against competition and too wide to be enforceable.

The Lex Mundi Labour and Employment Practice Group for the Latin America and the Caribbean region have produced an **information letter** on non-competition clauses following the same format as the **European information letter** covering countries from **Barbados to Venezuela**.

13. Managing Change: Practical Ways to Reduce Long Hours and Reform Working Practices

The DTI has published a booklet, *Managing Change*, as a joint project with the TUC and CBI. The booklet identifies practical ways of implementing change management programs in the workplace and share this learning between businesses. Complimentary copies are available on request.

14. Continuity of Employment and Successive Contracts

Cornwall County Council v Prater UK EAT 0055/05/SM

The Employment Appeal Tribunal has held that a home tutor who worked on a succession of temporary assignments was employed under a series of employment contracts and any gaps between the assignments could be regarded as being a temporary cessation of work. The fact that there are gaps between contracts, with neither party having any obligation to the other, has no bearing on the

status of successive contracts. Once it is established that they are employment contracts, then the gaps can be temporary cessation of work s.212 ERA 1996.

15. Private use of e-mail and Internet in the Workplace

The Lex Mundi Labour and Employment Practice Group have produced a **European information letter** on this topic within the European Union. Complimentary copies are available on request.

16. Statistics – Tribunal Claims

The Employment Tribunal Service has published its annual report showing a significant decrease in the number of applications for the year 2004/05. There was, however, an increase in equal pay claims of 85%. The claims showing the biggest decrease in number of applications related to working time.

Average compensation awards are little changed. The average award for unfair dismissal was £7,303, race discrimination claims show an average award of £19,114, sex discrimination claims an average award of £14,158 and disability discrimination claims an average award of £17,736.

There were a total of 1,038 **costs orders** of which almost 75% were made in favour of the Respondent. Only 18% of cases went through to a successful Tribunal hearing, the remainder being either settled by negotiation, through ACAS or withdrawn.

17. Whistleblowing

Lingard v HM Prison Service

A Leeds Tribunal has awarded an employee compensation of £477,000. She was unfairly and constructively dismissed for having made a protective disclosure about bullied prisoners. The bulk of the compensation was for future loss of earnings and loss of pension rights. Her employers deliberately decided to reveal her name as the whistleblower and failed to protect her from the consequences. The size of the award is a stark warning to employers of the consequences of failing to properly manage whistleblowing claims at work.

18. Constructive Dismissal

Kerry Foods v Lynch Vic EAT/0032/05DM

An employer's service of a lawful notice of termination, coupled with an offer of continuous employment on different terms, cannot, of itself, amount to repudiation breach of contract. There was no breach of trust and confidence and no right to claim constructive dismissal when the employers sought to impose new terms and conditions which the employee was unhappy with.

19. Misconduct

Aitken v Weatherford UK Limited

When conducting a disciplinary hearing, the employer should normally ask an employee if there are any mitigating circumstances that would explain the misconduct of performance. However, if the employee fails to give any information and the employer does not enquire further, the dismissal may be fair. Mr Aitken had not turned up for work because he had domestic problems. He was dismissed for gross misconduct. The dismissal was fair.

20. Grievance Procedure

Aspland v Mark Warner Limited 2200483705 EAT

Mrs Aspland had made previous claims against her employer. She had further complaints and was claiming that she was constructively unfairly dismissed and discriminated against on the ground of sex. Her employer claimed that she had not raised her grievance in writing under the new statutory grievance procedures. The Tribunal held that her solicitor's letter before action was sufficient. There was no requirement for the employee to write about the grievance herself.

Noskiw v Royal Group Plc

Mr Noskiw was about to be made redundant when he complained about a pay review but did not mention a possible disability discrimination claim, which he later brought. The Royal Mail argued that he had not raised a grievance prior to bringing the claim. The Tribunal agreed. As he had failed to follow the statutory grievance procedure, his claim should have been rejected by the Tribunal.

Cook v Secure Move Property Services Limited

A Tribunal held that where an employee resigned in anticipation of his dismissal for gross misconduct and brought a claim for constructive dismissal, he did not need to raise a grievance under the statutory grievance procedure. In the alternative, a letter he had written to his employer alleging bias in the conduct of a disciplinary procedure was sufficient to amount to a Step 1 statement of grievance.

21. Protective Awards and Pay in Lieu

Krasner v McGrath 2005 EWHC 1682 CH

Mr Krasner was the administrator of two companies. The payments claimed from the companies for which Mr Krasner was responsible included the employees' payment in lieu of notice in accordance with contractual provisions and protective awards. He applied to the High Court for a declaration that the liabilities should be treated as unsecured claims. The maximum exposure of the two companies was circa £515,000. The High Court refused Mr Krasner's request on the ground that payment in lieu of notice and protective awards

were wages and salary and therefore were payable in priority to the administrator's expenses. The Court of Appeal disagreed. They were not payable in priority. If they had been preferential debts, they would in any event have been capped at £800 per employee.

22. ACAS

ACAS has published updated versions of three of its advisory booklets:

1. *Redundancy Handling*
2. *Employee Communications and Consultation*
3. *Time Off Work*

ACAS has also published a booklet, *The ACAS Model Workplace*, to help employers work with their employees and their representatives to make workplaces more effective. The booklet is split into three sections:

- Putting the right systems in place
- Developing relationships at work
- Increasing employee involvement in decision making

Complimentary copies are available on request.

23. Retirement Age

Royal & Sun Alliance Insurance Group Plc v Payne UK EAT/0122/05/CK

The Employment Appeal Tribunal held in this case that where a contractual retirement age has been established, there could not be a lower normal retirement age. Mr Payne was therefore wrongfully dismissed before his contractual retirement age of 65 and unfairly dismissed before his normal retirement age 62. Employers can no longer ignore the plight of employees who are retired against their will. Employers must review the employment contracts to ensure that both retirement ages and any provisions relating to retirement arrangements comply with a new law on age discrimination.

24. Bullying in the Workplace

The CMI have issued a guide for managers on this. Complimentary copies are available on request.

25. Stress

Mark Hone v Six Contents Retail Limited 2005 EWCA Civ 922

The Court of Appeal has upheld a County Court's finding that a pub landlord's psychiatric injury had been caused from working excessive hours and that the injury had been reasonably foreseeable. Once an employee told his employer that he was working excessive hours

and suffering, the employer had a duty to take steps to remove him from the danger of illness. It did not matter that the employer did not believe that the employee was working excessive hours. The fact that the employee refused to opt out of the 48-hour working week also appears to have influenced the Court in relation to foreseeability.

26. Golden Parachute

Murray v Leisureplay Plc

A liquidated damages clause in a chief executive's service contract providing for one year's gross salary, pension and benefits in the event of wrongful termination was not a penalty clause and therefore enforceable, despite the fact that it was more than the executive would have obtained in damages at common law. His contract entitled him to no fewer than 12 months' written notice. He was given seven and half weeks' notice and sought the payment of the year's salary. The Court of Appeal held the clause was not a penalty. It was not for the Claimant to justify the payment; the burden was on the Defendant to show that the clause was unconscionable and extravagant and not a genuine pre-estimate of loss. The Defendants failed to do so.

27. New Limits to Noise at Work

The EU Directive on noise requires Member States to introduce revised workplace noise limits by **15 February 2006**. The new rules lower the maximum noise limit to 87db(A). The Member States are required to set an action value between 80db(A) and 85db(A). Once noises levels reach the new action level, employers will be obliged to introduce preventative measures either by reducing the noise level or by providing ear protectors.

28. Last Chance to Claim Unfair Dismissal

Wise Group v Mitchell EAT

An employee was summarily dismissed for breach of contract. She would have acquired the one year's service she needed to bring an unfair dismissal claim had her employer fulfilled its contractual obligation to operate a disciplinary procedure before dismissing her. She could not claim damages for the loss of the opportunity to claim unfair dismissal as part of a wrongful dismissal claim. Nor could she claim damages for the loss of opportunity to remain in employment. The EAT followed the Court of Appeal's decision in *Harper v Virgin Net* which is to be considered by the House of Lords on **31 October 2005**.

29. Working Hours for Live-In Workers

Vaxquez-Guirado t/a The Water Meadow Hotel v Wigmore

The Employment Appeal Tribunal held that on-call time amounted to Ms Wigmore's working time, as she was not entitled to go out and was required to be available at the hotel to deal with any emergency. The fact that she was dismissed for bringing cats to live with her in the hotel showed that it was not her home but part of her workplace. Living in the hotel was a contractual requirement rather than a perquisite.

30. Blogging

Employers should consider a responsible blogging policy in any E-mail and Internet policy. Many employers will allow limited personal Internet use at work; therefore, it is important that parties understand what is and what is not acceptable. Any disciplinary action that results from blogging should be proportionate. Blogs that are unrelated to the business of the company may be permissible, but blogging is an activity which is often conducted out of office hours and its scope should be narrowed as far as practicable.

31. Pregnancy-Related Illness and Sick Pay Schemes

North Western Health Board v McKenna ECJ 08/09/05

The European Court of Justice has handed down its judgment that subject to certain minimum safeguards absence due to pregnancy-related illness can be treated in the same way as any other sick leave under a sick pay scheme which provides for a reduction in pay after a certain length of absence and a maximum days' total paid sickness over given period. This does not constitute discrimination on the grounds of sex.

32. Procedure

Comfort v Dept of Constitutional Affairs

The EAT has held that the notes of evidence taken by a solicitor at an Employment Tribunal hearing (excluding any comments or annotations) are not protected by legal professional privilege. However, it would not usually be appropriate to order disclosure of such notes.

For more detailed information, advice or copies of any Guides or Leaflets, please contact

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This information should not be treated as a substitute for specific legal advice on individual situations.

If you no longer wish to receive the Updates, please advise us.

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