

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 UK, but also a practical insight in managing workplace issues on a pro active 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 email any comments or suggestions which you may have relating to the Updates to employmentgroup@steptoe.com.

We look forward to hearing from you.

1. Data Protection - New Division

The Information Commissioners' Office has established a new division devoted to protecting personal information held by businesses. The new **Regulatory Action Division** will use the Commissioner's power to regulate the behaviour of organisations and individuals that collect, use and keep personal information to ensure compliance with the Data Protection Act 1988. The Division will use powers including criminal prosecution, non-criminal enforcement in order to ensure that personal information is properly protected.

Data Protection - Consolidated Code

The Information Commissioners' office has launched a consolidated and updated version of the **Employment Practices Data Protection Code**, previously available in four separate parts. As well as the Code, the Information Commissioner has also published a booklet entitled 'Quick Guide to the Employment Practices Code' and Supplementary Guidance, giving more in-depth notes and examples.

Complimentary copies are available on request.

2. Temporary Employee

Hawley v. Luminar Leisure Plc - QBD 2005 EWHC5

The owner of a nightclub was vicariously liable for the actions of a door supervisor whose services had been supplied to it by another company. The club owner became the supervisor's temporary deemed employer for the limited purpose of assuming vicarious liability for his assault on a customer as he had sufficient control over the supervisor's activities.

3. Constructive Dismissal

Doherty v. British Midlands Airways Limited - EAT

Mrs Doherty complained that she had been unfairly constructively dismissed because of her trade union activities. She claimed her statutory rights of protection were implied by statute into her contract. The Appeal Tribunal held that except in very limited cases, an employer's breach of an employee's statutory right does **not** give rise to a contractual claim giving the employee the right to resign and claim constructive dismissal.

4. Procedure

Blake Envelopes v. Cromie - EAT

The employer's Response Form was faxed 44 minutes after the time limit had expired. The Tribunal rejected an application for an extension of time by 44 minutes but the Appeal Tribunal overturned this. It is open to a Tribunal to review its decision not to allow a Respondent to take part in proceedings but justice demanded that the extension be granted.

5. Sex Discrimination - Harassment

Carnie v. Ruth - EAT

The Appeal Tribunal increased the injury to feelings award of a barmaid who was sexually harassed from £1,500 to £8,500. The Tribunal held that three months was a short period for harassment to occur over; however, Miss Carnie did not suffer harassment from a junior employee but from one of the owners of the business which was also reflected in the award of compensation.

Sex Discrimination - Harassment

Loosley v. Moulton & Another

Miss Loosley was a probation officer. She complained about her male line manager's remarks to her and claimed sex discrimination after an inadequate investigation into her allegations when she resigned. The Tribunal found that the remarks had not been caused by her being a woman but rather by her having been a member of a group of people in an office who engaged in banter. Her contribution towards the banter and the context of the office culture meant that her claim must fail as she had failed to prove that the behaviour was unwanted.

6. Non-Compete Restriction

TFS Derivates Limited v. Morgan 2004 EWHC 3181 QB

Mr Morgan was a highly regarded equity broker for TFS. When he resigned to join a competitor he was placed on garden leave for his three months' notice period. TFS sought to enforce his six months

non-compete period. The clause stated that he “would not undertake, carry on or be employed, engaged or interested in any capacity in any business which is competitive with or similar to a relevant business”. The Court blue-pencilled the words “or similar to” and upheld the restriction.

7. Parental Leave

Rodway v. South Central Trains Limited

The Court of Appeal has confirmed that there is no right for an employee to take parental leave for just one day. A single day's leave was not envisaged by the Regulations and therefore the employer was within reason in taking disciplinary action for the employee's absence.

8. Dual Contract Arrangements

The Revenue and Customs have issued new guidance on dual contract arrangements setting out a number of elements which may trigger a challenge to the validity of those arrangements. If successful, the PAYE and NIC implications for employers may be significant. Dual contract arrangements need to be entered into with considerable caution and with careful reference to the guidance.

9. Disability - TUC Booklet

The TUC has published a booklet on “Monitoring Disability”. Complimentary copies are available on request.

Disability Discrimination - New Act

The Disability Discrimination Act 2005 is now published. The Act will be brought into force in three stages, although no Regulations have yet been laid before Parliament, in December 2005, June 2006 and December 2006.

Disability Discrimination - Adjustments

The Home Office v. Collins

An employer did not fail to make reasonable adjustments when it dismissed a disabled employee for long periods of sick leave without considering the option of part-time work.

Disability - Training

RNID, a charity representing the deaf and hard of hearing, is offering organisations with fewer than 250 employees free deaf and disability awareness training. Eligible organisations, which must have fewer than 250 employees and a turnover of less than £11.2 million, have until **November 2005** to apply for free training. Details are available on request.

Disability Discrimination - Mental Impairment

Dunham v. Asford Windows

The EAT has handed down its judgment on whether a general “mental handicap” or generalised learning disorders can amount to a disability. The Appeal Tribunal made it clear that general learning disabilities, if sufficiently serious, can amount to a mental impairment whilst mental illness must be clinically well recognised in order to amount to a disability. This does not preclude other types of mental impairment which do not amount to mental illness from qualifying as a disability. Mr Dunham had severe reading and writing difficulties.

10. Agency Workers - Implied Contracts of Employment

Cable & Wireless Plc v. Muscat

A worker whose services were supplied by an employment business to a client company was an employee of the client company for the purpose of claiming unfair dismissal.

Royal National Lifeboat Institution v. Bushaway

In this case the existence of an entire contract clause was not conclusive that a self-employed worker supplied by an agency was not employed by RNLI. The Tribunal had been entitled to look at the surrounding circumstances to determine the nature of the relationship between the parties.

Asprey v. Gist

In triangular agency arrangements where a worker is supplied by an agency to an end user which are to be argued before a Tribunal, the parties should be required to join the user **and** the agency into the proceedings from the outset so the Tribunal has access to all the relevant factual information from all the parties involved. Thus end users and agencies may now not escape proceedings which they might otherwise have expected and the worker may not be left without a remedy.

Bunce v. Postworth Ltd t/a Skyblue Court of Appeal

A worker was not an employee of an employment agency since the contract in which he was engaged lacked the necessary requirements of control over his day-to-day work and mutuality of obligation. He was not an employee of the agency or the company to whom he was assigned. There was no overarching umbrella agreement in this case governing each assignment with the end user.

11. Age Discrimination

Draft Regulations outlawing age discrimination will be published in **July 2005**. As claimants in the future will be able to point to things happening today to establish that their employer is an ageist organisation, steps should be put in place now to change workplace culture.

Age Discrimination - ACAS Leaflet on Older Workers

ACAS has issued a new advisory leaflet, "Employing Older Workers", which gives advice on what to consider when recruiting, planning for the future and managing older workers. Complimentary copies are available on request.

12. Apprenticeships

Fleet v. Matheson

A modern apprenticeship where an individual works for an employer but is sent out to a college or other training provider for part of the working week to be trained qualifies as a normal contract of employment thus a modern apprentice qualifies for employment protection.

13. Compensation - Disability Discrimination & Subsequent Unfair Dismissal

Beart v. H M Prison Service

The Court of Appeal has agreed with the EAT that an unfair dismissal does not break the chain of causation from an earlier act of disability discrimination. On this basis compensation should be assessed according to the discrimination regime rather than the unfair dismissal regime and is not therefore subject to the statutory upper limit.

14. Vicarious Liability

Majrowski v. Guys & St. Thomas' NHS Trust

An employer may be vicariously liable under the Protection from Harassment Act 1997 for the acts of its employees. Mr Majrowski alleged that he had been bullied, intimidated and harassed by his manager and commenced proceedings against his employer under the 1997 Act. He was successful and the employer was liable for the abuse.

15. Protection from Harassment Act 1997

Banks v. Ablex Limited - Court of Appeal

Miss Banks suffered a depressive disorder allegedly resulting from conduct of a colleague but failed to establish that a course of con-

duct had taken place that could properly be described as harassment under the Act in that she failed to show that the misconduct had occurred on at least two occasions. Her claim was unsuccessful. The Court of Appeal clarified the law of harassment under the Act stating that the harasser's conduct must be intentional and the approach to deciding what the harasser knew or ought to have known is objective.

16. Territorial Jurisdiction

Saggar v. Ministry of Defence

Lt. Col. Saggar was an army officer who served 16 years in the UK and was then posted to Cyprus. During that posting he was allegedly subjected to acts of race discrimination. The Court of Appeal held that the correct approach was to look at the entire period and that a period of three years abroad out of 19 years' total service may not be said to be employment wholly or mainly outside Great Britain. The case has been remitted to a Tribunal for a rehearing.

17. Sex Discrimination - Bonuses on Maternity Leave

Hoyland v. Asda Stores

Employers are entitled to make pro rata'd reduction of bonuses paid to female staff to reflect periods when they are absent on maternity leave where the bonus is based on attendance. The exception is that the bonus must be paid in respect of the two-week period of compulsory maternity leave. If the bonus is based on individual performance and targets, the position may differ.

18. Unfair Dismissal - for some other substantial reason

Scott & Co. v. Richardson

Scott & Co. was a firm of debt collectors. They wanted to re-organise their employees' contracts to introduce a shift system. Mr Richardson refused to agree to the change and after seven months of trying to persuade him, he was dismissed. The EAT held that the correct approach is whether the employer reasonably believed or concluded that the change to the contract terms had advantages and it was not necessary to go a step further and prove that that it did have advantages. Provided that the reason for the dismissal was not whimsical, unworthy or trivial, then the employer will establish some other substantial reason. The case was remitted to a different Tribunal to decide whether the dismissal was fair which involves balancing the detriment to the employee of introducing the change against the detriment to employer of not introducing the change.

Unfair Dismissal - Risk of Disclosure of Confidential Information

Chandlers (Farm Equipment) Limited v. Rainthorpe

Mrs Rainthorpe had been employed for 22 years. She was dismissed because her husband, also employed by Chandlers, was planning to join a competitor. Her summary dismissal because of the employer's concern that she would disclose confidential information was not a dismissal for some other substantial reason and was also procedurally unfair. The EAT found Chandler had acted outside the bounds of reasonableness.

19. ACAS

ACAS has updated a number of **information leaflets** as follows:

- Communicating with your employees
- Contracts of Employment
- Controlling labour turnover
- Dealing with grievances
- Discipline at work
- Induction training

updated three of its **guides**:

- Recruitment & Induction
- Q&A on Discipline Dismissal & Grievance
- Flexible working

and published a **leaflet** on 'Employing Older Workers'.

Complimentary copies are available on request.

20. Part Timers

James v. Great North Eastern Railways

G Limited's full-time workers were contractually obliged to work an average of 40 hours per week and to work overtime. For the first 35 hours they were paid a basic rate and for the remaining five hours they were paid an additional hours rate. Similarly, part-time workers were contractually obliged to work a set number of hours per week but they were paid a basic rate in respect of all their contractual hours receiving no additional hours allowance. No overtime was paid unless they exceeded 35 hours work. It was held that they could bring a claim under the Part Time Workers Regulations as the issue was not in relation to overtime which is excluded from the Regulations.

Gibson v. Scottish Ambulance Service

Mr Gibson complained that he was required to be on stand-by for 56 hours a week whereas as a full-time worker was only required to be on stand by for 35 hours. His claim was unsuccessful because the employer was able to show that the reason for his treatment was not his part-time status but because of the demand in the area where he worked.

21. Maternity Pay

New Regulations have now been approved and have been in force since **6 April 2005** to oblige employers to re-calculate the level of maternity pay if a pay rise takes effect at any time between the start of the set period and the end of the maternity leave whether ordinary or additional. The change was necessitated by the European Court of Justice's judgment in *Alabaster v. Woolwich plc*.

22. Dismissal for the Purpose of Safeguarding National Security

B v. BAA Plc UKEAT/0557/05/LA

The EAT have handed down what is believed to be the first decision under Section 10(4) of the Employment Tribunals Act 1996 in relation to the dismissal for the purpose of safeguarding national security.

23. TUPE - the Date of the Transfer

Celtec v. Astley

The ECJ held that the date of transfer for the purpose of the directive is the particular point in time when the responsibility for carrying the business of the undertaking passes.

TUPE - New Regulations

These are now to be delayed until **April 2006** due to the response in consultation. The Regulations may be published in the Autumn.

24. Sexual Orientation

Whitehead v. Brighton Marine Palace & Pier Company Ltd

A **one-off** exceptionally abusive comment related to an employee's sexuality amounted to harassment on the grounds of sexual orientation and was sufficient to justify constructive dismissal. Mr Whitehead was awarded a total of £9,215 of which £4,000 was for injury to feelings.

25. Grievances - Right to be Accompanied

Skiggs v. South West Trains UK EAT/0763/03/TM

The company was investigating an employee's grievance which involved Mr Skiggs. Mr Skiggs was invited to a meeting to discuss the grievance but he refused to attend without representation. He complained that he had been unreasonably refused to be accompanied. Held that the investigation was not a disciplinary hearing to which the employee had a right to be accompanied, despite the fact that the matter discussed could lead to later disciplinary proceedings.

26. Who is an Employee?

Melhuish v. Redbridge Citizen Advice Bureau

Mr Melhuish was a volunteer working at the CAB. When his work came to an end, he sought to bring a claim for unfair dismissal. Held he was not an employee. Although he was provided with training and courses, in accordance with the *Ready Mix Concrete* case, unless there is a wage or other remuneration, there is no consideration and without consideration there is no contract.

Bridges & Others v. Industrial Rubber Plc

The claimants were home workers undertaking work for Industrial Rubber and wanted to claim that they were employees. The terms of the written contract stated that there was no obligation on the company to provide work nor to the home worker to accept it. That meant that no contract of employment could be implied to make an unfair dismissal claim possible. Although there were other features of the employment relationship that may have pointed them to being employees, the lack of mutual obligation militated against the existence of an employment contract.

27. Pensions

The Department for Work and Pensions has launched a consultation and draft Regulations that will place duty on employers to consult scheme members before making changes to an occupational or personal pension scheme. Consultation runs to 26 August 2005. The new rules are set to come into force, gradually applying to businesses with over **150** employees from **6 April 2006** to those with over **50** employees by **6 April 2008**.

28. Redundancy - Basic Award Set Off

Bowyer v. Siemens Plc

A redundancy payment made to an unfairly dismissed employee who was not, in the Tribunal's view, dismissed for redundancy could not be deducted from the basic award. It is not sufficient merely for the employer to carry out what is called a redundancy exercise in order for the payments made to employees to be offset against any basic award. In unfair dismissal cases it is for the employer to prove that the employee was dismissed wholly or mainly by reason of redundancy.

Redundancy - Alternative Employment

Fisher v. Hoopoe Finance Limited

Mr Fisher had several meetings with his employer regarding the redundancy situation which had arisen and was informed of other vacancies within the Group of companies. He was not given any details of the financial prospects of a job and he decided not to apply. He was made redundant and one month later the position of Sales

Account Manager was advertised at the same salary as he was earning. He brought a claim for unfair dismissal. On appeal it was held that where there are one or more possibilities of a suitable alternative employment available to an employee who was to be made redundant, then the employer should normally inform the employee of the financial prospects of these positions. Because of the timing of the redundancy and the advertisement of the post, there was a clear indication that the employer had the financial information available to it when referring Mr Fisher to the vacancy or could easily have found out what the potential financial prospects could be. No evidence was produced why Hoopoe had failed to provide information and the case was remitted to the Tribunal for assessment of compensation.

Redundancy - Collective Redundancies

Amicus v. GBS Tooling Limited

Tribunals will not automatically make a maximum protective award in cases where there has been no consultation after the proposal to make redundancies has been made. Where the failure to provide information is not deliberate and efforts have been made to provide information to employees and their representatives, albeit prior to the redundancy proposal being made, the Tribunal may take this into account as mitigating circumstances and reduce the protective award accordingly. The Tribunal had held that 70 days was just and equitable in this case.

Redundancy - Redundancy Pool

Hendy Banks v. Fairbrother

A Tribunal should adopt the 'range of reasonable responses' test when deciding whether the employer had acted reasonably in selecting the pool for redundancy. The company had four departments. One department was looked at for the redundancy selection although not all the workers in that department worked solely in that department. It was held that the company ought to have used a wider remit when selecting employees for redundancy.

Redundancy - Right to be Accompanied

Task Force (Finish & Handling) Limited v. Love unreported

The statutory right to be accompanied does not apply to redundancy meetings and a failure to inform the employee of the right therefore did not render the dismissal unfair.

29. Unlawful Deduction

Farrell Matthews and Weir v. Hansen, EAT

An employer's refusal to pay in full a £12,000 bonus to a solicitor who had resigned from her job amounted to an unlawful deduction from wages. Although the bonus was discretionary, the employee

acquired a legal entitlement to payment in full once the employer had declared that the bonus would be paid.

30. Immigration

The Government has published the Immigration, Asylum & Nationality bill which will impose new penalties for employing illegal workers. The Bill introduces a new **civil penalty** of up to £2,000 on those who employ illegal workers. It is already unlawful to employ someone who is not entitled to work in the UK. These new provisions will give the Home Office the power to impose fines without a court hearing and much stronger sanctions when it is necessary to go to court.

31. Religious Discrimination

Baggs v. Fudge

A job applicant who was not interviewed because he was an active member of the British National Party was not discriminated against on the grounds of his religion or belief. The BNP is a political party and not a religion or set of religious beliefs. In dismissing the claim the Tribunal ordered Mr Baggs to pay £1,400 for costs on the basis that the claim had no reasonable prospect of success.

32. Stress-Related Injury

Harding v. Pub Estate Co. Limited C/A

Mr Harding managed a public house in a rough area. He suffered a heart attack and brought a claim in the County Court arguing that his employer had been negligent in failing to take steps to prevent his injury. His employer expected him to work long hours in stressful circumstances and it had failed to accede to his request for help. He was unsuccessful. The indications of harm to his health from stress at work had not been so plain that any reasonable employer would have realised that action was necessary.

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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