EMPLOYMENT LAW
UPDATE

A periodic report from
Steptoe & Johnson
Issue No. 15
March 2006

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, 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. Increase of Employment Tribunal Awards

With effect from **1 February 2006** the limits on tribunal awards increase annually in line with the Retail Prices Index. They apply to dismissals occurring on or after that date. The important increases are:-

- maximum compensatory award to rise to **£58,400**; and
- maximum week's pay increases to **£290**.

2. Legislative Timetable for 2006

Changes from **6 April 2006**.

- The Information and Consultation of Employees (Amendment) Regulations 2006.
- The Transfer of Undertakings (Protection of Employment) Regulations 2006.

Changes from **1 October 2006**.

- Age discrimination legislation.
- National minimum wage rates.
- New dispute resolution procedures.

3. Data Protection: Good Practice Guidance on references.

The Information Commissioner's Office has issued a Good Practice Guidance Note on subject access requests and the provision of references. Complimentary copies are available on request.

4. Restrictive Covenants

Dyson Technology Limited v Ben Strutt

The Claimants sought an injunction to restrain a former employee from acting in breach of his restrictive covenants. The Claimants were concerned that the employee, who had joined Black & Decker, would disclose confidential information. Black & Decker and Mr. Strutt were not prepared to give undertakings and his non-compete restrictive covenant was held to be enforceable. The fact that Dyson would not suffer any damage by its breach was not a reason for not enforcing the covenant. Mr. Strutt was held to his bargain with Dyson by the grant of an injunction.

5. Procedure: Waiver of Legal Advice Privilege

University of Southampton v Kelly

In a case concerning an expired visa and a fixed term contract the Employment Appeal Tribunal held that legal advice privilege and communications between an employer and its legal adviser was not waived just because the substance of the legal advice was then set out in correspondence to the employee.

Procedure: Territorial Scope of Employment Rights Act

Serco Limited v Lawson

The House of Lords has given its judgment on the geographical extent of an employee's rights under the Employment Rights Act 1996. The appeals concerned individuals who sought to bring unfair dismissal claims in respect of employment that was partly or wholly carried on outside Great Britain. Mr. Lawson worked on Ascension Island. It was held that Parliament intended the normal case for the application of unfair dismissal provisions to be that of an employee who was working in Great Britain. This was to be determined not so much by reference to the terms of the contract of employment but by reference as to how the contract was being operated at the time of dismissal. It was not enough to secure protection that the employer was based in Great Britain and the employees be British without something more. An employee who could show a strong connection with Great Britain and British employment law, should be able to bring a claim.

In the case of peripatetic employees who, through their nature of the work did not perform services in one particular territory, it was sensible as the Court of Appeal had held to treat their base as the place of their employment.

6. ICE Regulations

Stewart v Moray Council

The Central Arbitration Committee delivered its first reported judgment on the Information and Consultation of Employees Regulations 2004 ("ICE"). The CAC held that a pre-existing agreement negotiated by Moray Council before the ICE Regulations came into force, did not provide a sufficiently detailed description of how information should be provided to employees and how their views should be sought. Moray Council was therefore obliged to enter directly into negotiations for an Information and Consultation Agreement under the ICE Regulations and could not hold a ballot. The decision does indicate that pre-existing agreements must be carefully drafted with sufficient detail if they are to assist employers seeking to avoid the default standard provisions in the ICE Regulations being triggered.

7. Work and Families

The DTI has now published the draft:-

- Maternity and Parental Leave (Amendment) Regulations 2006;
- Paternity and Adoption Leave (Amendment) Regulations 2006; and
- Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006 to deal with some of the Government's family-friendly proposals for consultation, which closes on **18 April 2006**.

8. Unfair Dismissals: Disciplinary Warnings

Diosynth v Thomson

Mr. Thomson worked in a chemical factory. He was well aware that failure to comply with important health & safety rules might cause serious injury and would potentially be regarded as gross misconduct. In July 2000 he was given a written warning, expressed to last for 12 months. In November 2001, five months after the warning expired, following an explosion in which someone died, he was again found to have ignored the same health & safety measure. 17 other operators were also discovered to have ignored the measure. The other 17 were not dismissed but Mr. Thomson was, on the basis that he was incapable of following clear safety instructions. The Court of Session held the dismissal was unfair as it was ipso facto unreasonable to rely on an expired disciplinary warning. It is unarguably the case that an expired warning cannot be a factor in deciding the sanction and substituted a finding of unfair dismissal. The Court rejected the employer's argument that an expired warning was just one factor to take into account in deciding whether a health and safety breach was sufficient reason to dismiss.

Unfair Dismissal: Disparate Treatment

Enterprise Liverpool plc v Bauress

In this case two joiners (both recently out of their apprenticeships) used their employer's van and materials to moonlight during working hours when they should have been working for their employer. Both were dismissed. The Tribunal noted that an employee had previously not been dismissed for the same offence and therefore declared the dismissals unfair but reduced the compensation by 75% for contributory conduct. The Employment Appeal Tribunal (EAT) overturned this decision, pointing to two differences between the previous employee who was given a final written warning and the two employees who had been dismissed. First, the previous employee had admitted his guilt whereas the two new employees had lied. Secondly, the previous employee had 30 years' service whereas the new employees were just out of their apprenticeship. The EAT held that the dismissals fell within the band of reasonable responses to regard these as distinguishing features and overturned the Tribunal's declaration that the dismissals were unfair.

Unfair Dismissal: Capped Loss

Gover and Others v Propertycare Ltd.

Mr. Gover was employed by Propertycare to sell insurance products in the letting industry. Propertycare proposed changes to his remuneration that would result in substantial cuts in his commission. Propertycare notified Mr. Gover and others that it would terminate their contracts with effect from 31 October 2001 but invited them to apply for new employment with Propertycare effective 1 November 2001. Mr. Gover did not take up new employment and brought a claim for unfair dismissal. The Tribunal was very critical of Propertycare's handling of the situation, essentially a reorganisation, and found that Mr. Gover and others had been unfairly dismissed. However, in considering whether the compensatory award should be reduced, the tribunal took into account *Polkey* and capped the compensation on Mr Gover's losses up to mid February 2002. Although the tribunal acknowledged that Propertycare did not handle the situation well, it considered what would have been the result if Propertycare had taken proper legal advice and put together a package which did not amount to a fundamental breach of contract. The Tribunal was satisfied that there was sufficient evidence to conclude that Propertycare would have offered Mr Gover a new type of remuneration arrangements which may not have been attractive to Mr Gover but which would have been justifiable after proper consultation. The Tribunal considered that, if there had been proper consultation, Mr. Gover's relationship with Propertycare would have come to an end by reason of dismissal for some other substantial reason on 1 February 2002 at which point he would have been entitled to two weeks' notice. Mr. Gover appealed. The Employment Appeal Tribunal concluded that the *Polkey* deduction was appropriate.

This case is useful to show what a Tribunal will do where it is able to construct what might have happened if the employer had acted fairly.

9. Employment Status: Personal Service

Real Time Civil Engineering Limited v Callaghan

The Employment Appeal Tribunal held that when assessing employment status a Tribunal may only disregard an express contractual term where it has been varied or is a sham. The Tribunal in this case was wrong to ignore a contractual provision giving an individual an unfettered right to delegate their duties to a substitute simply because the individual had not in reality ever done so. The mere inclusion of a substitution clause would not automatically mean that the personal service requirement (for the purposes of establishing employment status) will not be satisfied if there is evidence that the clause is a sham. However, if there is no evidence to suggest a sham in determining whether the personal service test has been satisfied, the Tribunal will not be able to take into account the fact that the right of substitution has never in fact been exercised.

Employment Status: Revenue Indicator

HM Revenue & Customs has launched an Employment Status Indicator. The ESI tool, which can be used in working out the employment status of an individual or groups of workers, is now available on the following site:

www.hmrc.gov.uk/calcs/esi.htm

Employment Status: Continuity of Employment

Cornwall County Council v. Prater

Mrs Prater was a home tutor. She worked under a series of contracts but without any guarantee of work and she was under no obligation to accept a new placement when offered. The summer breaks when she was not working did not break continuity of employment. The Court of Appeal held that each of her short-term engagements amounted to discrete and self contained episodes of employment under a contract of employment and therefore she had sufficient continuity to accrue employment rights.

10. TUPE Regulations 2006

The Transfer of Undertakings (Protection of Employment) Regulations 2006 are due to come into force on **6 April 2006**. The DTI has published a detailed guidance for employers, employees and representatives. There are a number of changes from the draft regulations that were published in March 2005.

The main changes are:-

- the widening of the scope of the Regulations to make it clearer that outsourcing and insourcing will be covered;
- new duty on transfer, or to provide employment liability information to the transferee;
- special provisions making it easier for insolvent businesses to be transferred to new employers;
- clarifying the ability of employers and employees to agree variations to contracts of employment when the reasons for the variation are economic, technical or organisational reasons;
- provisions clarifying the circumstances under which it is unfair for the employers to dismiss employees for reasons connected with the transfer.

TUPE: Duty to Inform and Consult

Baxter & Others v Marks & Spencer

The Employment Appeal Tribunal (EAT) has upheld the Tribunal's finding that the transferee had complied with its duty to inform and consult employee representatives prior to a TUPE transfer, save for a 'technical breach' whereby information had been sent to employees *before* rather than *after* the election of employee representatives. No compensation would be awarded for this technical breach as it was de minimis and the employees had suffered no detriment as a result. The EAT drew a distinction between "measures" to be taken as a result of the transfer, about which there must be information and consultation, and inevitable administrative "consequences" about which there need not. Employers would be well-advised to ensure that information given prior to the election of appropriate representatives is resent to the representatives following that election to ensure that there is no possibility of there being a breach of the Regulation.

TUPE: Duty to consult

Amicus v Nissan Motor Manufacturing UK Limited

The Employment Appeal Tribunal has held that consultation with union representatives which commenced several months *after* the employer had announced its relocation proposals was nevertheless in good time. Nissan proposed to relocate 62 employees on 1 June 2004. It informed the council and staff of the proposed relocation on 1 October 2003. Employees were required to indicate by the end of January 2004 whether they were prepared to relocate. The first meeting with union representatives took place on 19 January 2004. The Appeal Tribunal agreed with the Tribunal that the relocation proposal was still at a formative stage when the union representatives became involved and they were able to play an important and effective role in achieving a significant number of improvements for employees, albeit over a shortened period of time.

11. Sex Discrimination: Level of Injury to Feelings Award

Hardy & Hansons PLC v Lax

The Employment Appeal Tribunal (EAT) substituted its own award of £10,000 for injury to feelings in a sex discrimination case where the employer's failure to allow the Claimant to take a new job on a job-share basis, following a redundancy exercise, was indirectly discriminatory. The Tribunal was right not to discount the award for future loss on a loss-of-chance basis, but had erred in making an excessive injury to feelings award of £14,000.

12. Pensions - A-Day: April 2006

Implementing A-Day: one month to go. There are a number of preparatory steps that are prudent for employers to take in advance of A-Day.

- Communicating with staff.
- Reviewing employment terms.
- Understanding the A-Day regime itself.

Pensions: Consultation

The Information and Consultation of Employees (Amendment) Regulations 2006 come into force on **6 April 2006** and amend the 2004 Regulations, so that the obligations to inform and consult on 'listed changes' do not apply where the employer is under a duty to consult on changes affecting occupational personal pension schemes. This is to prevent duplication of consultation.

13. Rest Time Regulations: EU Road Transport

The Rest Time Regulations have been finally agreed covering driving and rest times for road haulage and coach drivers. With effect from **May 2006** professional drivers will not be allowed to work for longer than 56 hours a week (compared to 74 hours at present) or for longer than an average of 48 hours over a four month period. Their minimum daily rest period will rise from 11 to 12 hours and they will be entitled to a fortnightly rest period of at least 45 hours.

All goods and passenger vehicles covered by the Regulations will be required to be manufactured with a fitted digital tachograph. A new principle of co-liability will also mean that if a transport operator is pressurised to break driving time rules to meet shipping or production schedules, the party exerting the pressure may be held jointly liable for the infringement.

14. ABI Principles and Guidelines on Remuneration

The ABI has published its guidelines on remuneration to provide a practical framework and reference point for both shareholders in reaching voting decisions and for companies in deciding their remuneration policy. Institutional shareholders continue to expect companies to follow good practice under the Combined Code by establishing Remuneration Committees of independent non-executive directors. They will also expect companies to demonstrate best practices as regards disclosure as well as compliance with statutory regulations. Shareholders believe that the key determinant for assessing remuneration is performance in the creation of shareholder value. The overall quantum of the remuneration package and the employment cost to companies must be weighed against the company's ability to recruit, retain and incentivise individuals. Complimentary copies of the Guidelines are available on request.

15. Age Discrimination

The Government consulted on proposals to legislate on age discrimination. The DTI had plans to issue revised draft Regulations in **March 2006**.

16. Vicarious Liability: Temporary Deemed Employer

Hawley and Luminar Leisure Ltd.

Mr. Hawley was visiting a nightclub when one of the doormen hit him so hard that he suffered serious and permanent injury. The doorman was not employed by the nightclub but by another company to whom the nightclub had sub-contracted its security. The Court of Appeal upheld the finding that the nightclub exercised sufficient practical control over the doorman to make it the temporary deemed employer for the purpose of vicarious liability. Important factors taken into account were that the doormen were subject to the nightclub's code of conduct and the nightclub's manager supervised the doormen both in terms of where they should be stationed and also on detailed issues.

This case is a useful example of when an organisation to whom an employee is seconded might be regarded as having legal responsibility for that employee. It is part of the developing trend seen in employment agency cases, where implied contracts of employment can arise over a period of time between the agency worker and the end user.

17. Working Time: Rest breaks for live-in workers

MacCartney v Oversley House Management

For the purpose of the Working Time Regulations 1998, a live-in manager of a sheltered accommodation was working for the whole period she was on call. As rest breaks and rest periods cannot be taken during working time, the employer had breached the Working Time Regulations by failing to allow her to take these. In relation to rest breaks, it was held that a worker must know at the start of their break that it is a rest break. It cannot retrospectively become a rest break just because it turns out to be a 20 minute uninterrupted break. To constitute a rest period, the worker must be given the freedom to pursue their own interests away from the workplace. This could not be done where a worker is on call inside accommodation which is part of the workplace.

18. Whistleblowing

Bachnoch v. Emerging Markets Partnership

Mr Bachnoch failed to persuade a Tribunal that he had made his protected disclosure in good faith, which is a necessary condition for obtaining whistleblowing protection. On appeal the Employment Appeal Tribunal agreed that it is for the employer to establish bad faith.

Notes

SJLP 0014 03/06

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With more than 400 lawyers, Steptoe & Johnson LLP provides advice and representation in a wide range of legal fields. In more than 50 years of practice, the firm has gained a national and international reputation for vigorous representation of clients before governmental agencies, successful advocacy in litigation and arbitration and creative and practical advice in guiding business transactions. The firm has offices in Washington, New York, Phoenix, Los Angeles, London and Brussels.

The London office of Steptoe & Johnson offers clients the close collaboration of a boutique firm with the depth and breadth of legal expertise expected from a leading US and international law firm. The London office of over 30 lawyers, is organised into five practice areas. Our employment practice advises on all aspects of employee/employer relations, including compliance, employment agreements and documentation, redundancy, executive and other termination packages, maternity, discrimination, TUPE and offers advocacy at courts, tribunals and mediation.

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