

Employment Update

December 2008

Briefing Note

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Welcome to our December Employment Update.

As 2008 draws to a close, we take a look at what 2009 has in store for HR practitioners. The key change will be the repeal of the statutory disciplinary, dismissal and grievance procedures which takes effect in April, but what will replace them? There are also some interesting cases which should be resolved early next year and more legislative changes in the pipeline.

I hope you have a happy Christmas and a successful 2009.....

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2009 - WHAT HAPPENS NEXT?

The end of the statutory disciplinary, dismissal and grievance procedures - not a moment too soon...

The Employment Act 2008, which received Royal assent back in November, is primarily concerned with repealing the statutory dismissal, disciplinary and grievance procedures with effect from April 2009. The position will largely revert to the pre- 2004 position, but one notable difference is that Tribunals will have the discretion to increase or decrease awards by up to 25% where the employer or employee unreasonably fails to comply with the new ACAS Code of Practice on discipline and grievance.

Unfortunately there is no guidance on what amounts to an "unreasonable" failure, but employers will welcome the fact that the inflexibility of the current regime will be a thing of the past. Employers should be looking now to revise their policies and procedures, in line with the new ACAS Code, which encourages employers to work with staff in developing new policies.

Increase in paid holiday

The much heralded increase in statutory annual paid holiday from 4.8 weeks (24 days) to 5.6 weeks (28 days) takes effect from 1 April (pro rated for part timers).

Extension of Right to Request Flexible Working

The plans to extend the right to request flexible working to parents with children aged 16 or under come into effect in April 2009. This is not a right to work flexibly, merely a right to request to work flexibly.

Equality Bill

As part of the Queen's speech, it was confirmed that an equality bill will be introduced during the course of the next Parliament. The primary aim is to consolidate the various discrimination strands in one piece of legislation, but there are some additional proposals, notably a provision that contractual clauses preventing employees from discussing their pay be banned.

Tips and the National Minimum Wage

The Government's intention is that the law be changed so that tips, gratuities and service charges can no longer be taken into account when deciding if a worker has received the appropriate minimum wage. Currently tips/ service charge paid through the payroll can be included in minimum wage pay, but tips paid directly to workers, or via a troncmaster cannot.

The Independent Safeguarding Authority

The Safeguarding Vulnerable Groups Act 2006 introduces a centralised vetting system for people working with children and vulnerable adults. Whilst this system was originally due to be introduced in 2007, it has been postponed until October 2009.

Implementation of Temporary Agency Workers Directive

The UK has until December 2011 to introduce new agency provisions following the adoption of the EU Temporary Agency Workers Directive. The legislation will entitle agency workers to equal basic working conditions as comparable permanent employees, but does enable the UK to derogate from this and only provide equality after 12 weeks' in the position. The UK Government have indicated that they hope to introduce this in 2008/2009 but employers' groups are urging the Government to make full use of the three year implementation period.

The Opt Out

The European Parliament has voted to scrap the working time opt out, which will not be welcomed by businesses in the UK. The proposal still needs to be approved by the European Union and is therefore still some way off.

CASES TO WATCH OUT FOR IN 2009

Long Term Sickness and Annual Leave

We are still awaiting the ECJ's decision on the case of *Stringer & Others v HMRC*. The Advocate General gave her opinion in January 2008 and is of the view that workers can accrue, but not take, paid statutory annual leave during a period of sick leave. The ECJ decision should finally end the uncertainty surrounding this issue.

Will the retirement provisions survive? The Heyday challenge...

The Heyday challenge is also awaiting a decision of the ECJ. In this case the Advocate General's view was that a national rule permitting employers to retire employees aged 65 or over is covered by the Equal Treatment Framework Directive, but could, in principle, be objectively justified. If the ECJ follows this opinion, the case will then return to the High Court for determination as to whether the default retirement age provisions contained in the Age Regulations are justified.

FINAL THOUGHTS ON 2008 - SOME RECENT CASES OF INTEREST...

Disability Discrimination - how broad is the protection?

The case of *Coleman v Attridge Law* was referred to the European Court of Justice. The ECJ found that under the Equal Treatment Framework Directive discrimination and harassment on the grounds of an individual's association with a disabled person were prohibited; this case then returned to the English employment tribunal which has now

given its' decision. The Tribunal found that the aim of the Disability Discrimination Act was to give full effect to the disability provisions of the Framework directive. The intention must therefore be that associative discrimination is prohibited. As a result, Miss Coleman's direct discrimination and harassment claims (based on the fact she cares for a disabled child) could proceed to full hearing. This could have implications for other areas in which associative discrimination is not covered by UK legislation, in particular in relation to age discrimination and sex discrimination.

"Heat of the Moment" Resignation

In *Ali v. Birmingham City Council*, Mr Ali, a data entry clerk, claimed he was "under pressure, stressed out and couldn't think straight" and therefore resigned on 25th April 2007. He handed a letter of resignation to his manager who offered him a twenty minute cooling off period to reconsider his decision. He was then given another ten minutes and, following this, he confirmed he wanted to resign with immediate effect.

On Friday 27 April he phoned the Council but was told that as he had resigned he didn't have an automatic right to return. Then on Sunday 29 April, he sent his manager an email advising him that he wished to return to work, but on 4 May he was told that "a decision has been made not to reinstate your contract and your resignation therefore still stands". Mr Ali issued Tribunal proceedings for unfair dismissal, but an Employment Judge found that he did not have jurisdiction to hear his claim as he had used unambiguous words of resignation and had confirmed his wish to resign, following a cooling off period.

On appeal the EAT supported the Tribunal's view finding that Mr Ali had been given an opportunity to reflect on his resignation, he had persisted in his desire to resign and it was not until four days later that he tried to withdraw his resignation.

Age Discrimination - Length of Service and Redundancy

In *Rolls Royce plc -v- Unite the Union* the High Court were asked to rule on whether Rolls Royce's use of length of service as part of its matrix for selection for redundancy was lawful.

Rolls Royce and Unite entered into collective agreements in respect of redeployment and redundancy of employees at two Rolls Royce factories. These agreements contained an assessment matrix "designed to ensure that the selection process is fair in general terms and fair to the individual". One of the criteria was that employees received one point for each year of continuous service.

Rolls Royce applied to the High Court to determine, amongst other things, whether use of length of service was justifiable age discrimination as a "proportionate means of achieving a legitimate aim" under the Regulations.

The High Court found that Rolls Royce had a legitimate aim, that of achieving a peaceful and fair selection process. The High Court observed that Rolls Royce's redundancy scheme did not use last in first out alone, which might have been objectionable. Here,

length of service was likely to be fair indicator of both loyalty and experience.

Whilst the High Court in this instance found the use of length of service to be justified, this was in context of it not being the sole criteria in relation to redundancy; additionally the matrix had been agreed with a recognised trade union. As a result, the High Court found that the matrix pursued the legitimate aim of achieving a peaceful and fair selection process in the event of redundancy.

More Information

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