

Employment Update

March 2009

Employment Update



David Green

+44 (0)207 5203 5066

David.green@charlesrussell.co.uk

Contents

- News update
 - April changes
 - Case update
-

The new ACAS Code has now been given Parliamentary approval, so as we bid farewell to the statutory disciplinary and grievance procedures that have been described as "in important respects unfit for purpose" we can look forward to what replaces them. In this briefing we will also look at what other changes April brings, and review some of the more interesting recent cases.

News update Immigration

On 22 February, the Home Secretary, Jacqui Smith announced details of changes to the Points Based System (PBS) for Tier 1 (General), migrant applications. When the PBS was introduced in April 2008, the Tier 1 (General) visa category replaced the old Highly Skilled Migrant regime. To qualify under Tier 1, individuals need to score at least 75 points calculated by reference to recent earned income, age, approved academic qualifications and UK experience. There are also English language and maintenance requirements which must be met in all cases. As from 1 April 2009, only Masters Degrees and PHDs will qualify for points on grounds of academic qualifications and the minimum recent earned income for which points will be awarded is increased from £16,000 to £20,000 per annum. It may be possible to qualify for a visa if an individual does not reach the minimum previous earnings, provided they can score maximum points in other categories, but not if they do not score any points for qualifications, for example, if the highest academic qualification is a Bachelor's Degree.

In addition, the Home Secretary announced that the resident labour market for Tier 2 skilled jobs will require employers to advertise all roles with Job Centre Plus before they are able to issue a certificate of sponsorship to a non-EEA individual. This will affect those employers who are UK border authority licensed sponsors but do not currently use Job Centre Plus to satisfy the requirements of the resident labour market tests. These employers may continue to advertise using other mediums, but must do so alongside advertising at Job Centre Plus. Adverts must be placed for one or two weeks depending on the pay level of a particular role, regardless of the seniority of the post or skills required.

April changes Flexible working – extension of the right to request

As has been long anticipated, the changes to the flexible working regime extending the right to request flexible working to parents of children up to the age of 16, comes into effect on 6 April 2009. It should be noted that this remains a right to request flexible working, not an absolute right to work flexibly.

ACAS Code of Practice

Parliament has now approved the final ACAS Code of Practice on discipline and grievance procedures which remains unaltered from the previous draft and will come into

effect on 6 April 2009. For more details please [click here](#).

Increase in paid holiday

From 1st April the right to paid holiday under the Working Time Regulations increases to 5.6 weeks (28 days) for full time workers. Employers who offer full time workers 20 days plus bank holidays, or 28 days inclusive of bank holidays will be compliant with the increase.

Increase in statutory rates

In April, the statutory sick pay rate increases to £79.15, with statutory maternity, paternity and adoption pay increasing to £123.06.

Case update

Too old at 36?

The National Air Traffic Services Ltd (NATS) operated an age bar which precluded anyone aged 36 or over from becoming a trainee air traffic controller. Interestingly, in 1988, the age limit for trainees was 25, this was raised in the mid 90s to 30 which was then increased to 36.

NATS undertook a review in June 2006 of its age bar and sought evidence to show that there were reductions in job performance and cognitive ability with age. Whilst undertaking this review, they suspended the age bar. They also sought to show that there was a decrease in return on older trainees as their longevity in work would be less than younger trainees. NATS acknowledged in August 2006 that the evidence that it had did not provide clear support for the conclusions it wanted to reach. Despite this, NATS reintroduced the age bar of 36 and over.

Mr Baker subsequently applied to become a trainee air traffic controller, but his application was rejected as he was 50. The Tribunal found that NATS had not approached the issue of age with an open mind, but had been driven by the need to rationalise a fixed intention to maintain an age bar. Whilst the aims identified by NATS were legitimate aims, the means chosen to achieve those aims were not proportionate. For example, the Tribunal noted that NATS were seeking to provide an adequate pool of trainees for their business, but the age 36 rule seemed to be a positive hindrance to achieving this aim. Additionally, the evidence did not suggest any link between age and length of service and therefore the intention to secure a reasonable period of service post-training did not stand up. Finally, on the safety aspect, there was no evidence to suggest that safety was compromised by older recruits. Safety was secured by proper training and appropriate testing and monitoring and anyone over the age of 36 would be subject to the same rigorous safety checks as others.

This serves as a reminder to employers that they cannot rely on generalised assumptions that performance declines with age, without evidence to support this.

Getting round TUPE – fragmenting the contract

In *Clearsprings Management Limited v Anchors & Others*, Clearsprings provided accommodation and support services to asylum seekers in North West England under a contract with the Home Office. When this contract was retendered, contracts were

awarded to 3 new contractors with a handover transitional period of 3 months. The issue for the Tribunal was whether there was a TUPE transfer transferring the employment contracts of the 17 employees of Clearsprings who had worked on the contract, and if so, to which contractor did they transfer.

Both the Tribunal and the EAT found that because the contract was so fragmented, no relevant transfer took place.

This is another in a series of cases which seem to suggest that TUPE can be avoided if the contract is split up when outsourced, or re-tendered.

TUPE and Collective Agreements

In *Alemo-Herron & Others v Parkwood Leisure*, the EAT had to look at the effect of a collective agreement post-transfer. In this case, the employees were initially employed by the London Borough of Lewisham on terms that incorporated a collective agreement negotiated by the National Joint Council for Local Government Services and they were paid according to pay scales agreed by the NJC. The employees were subsequently transferred under TUPE (but the collective agreement applied to more than just the transferring employees) and when, several years later, the employers failed to award pay increases in line with the NJC agreement, the employees brought claims for unlawful deductions from wages.

The Employment Tribunal held that as the original NJC collective agreement had expired and (after the transfer) a new agreement had been entered into the employees were not entitled to receive pay rises in line with the later agreement. The EAT said this interpretation was wrong. They found that the employees were entitled to the pay increases negotiated by the NJC under the collective agreement, or any subsequently agreed collective agreement. This would be of most concern to employers who have taken on contracts from public sector employers. Where there is only a transfer of part of the business and a single collective agreement between the transferor and union continues to exist after the transfer, the transferring employees will continue to be able to force the transferees to comply with any terms that are collectively agreed even after the transfer.

Compensation – Final Salary Pension Schemes

In *Roberts v Aegon UK Corporate Services Ltd*, the issue of ongoing pension loss was considered in relation to compensation for unfair dismissal. Ms Roberts' employment was terminated by Aegon in January 2007, but she immediately started a new job in which she received, overall, a more favourable remuneration package. In relation to pensions however, at Aegon she was a member of a final salary scheme and in her new job, had access only to a money purchase pension scheme.

Her employment with the new employer terminated following a period of ill-health 8 months after she started work for them.

She had presented a claim for unfair dismissal against Aegon and succeeded in her claim. At a remedies hearing however, it was found that she should receive no

compensation for future loss of earnings because her employment with her new employer had broken the chain of causation. In relation to her ongoing pension loss however, the Tribunal found that given that final salary schemes were being eased out, it was unlikely that she would find employment in which she would have the benefit of such a scheme again. They therefore awarded her £37,188.30.

This is a reminder that whilst it is often assumed that unfair dismissal compensation will be insignificant where the employee gets a job with comparable earnings shortly after the dismissal, where the employee is a member of a final salary pension scheme, ongoing losses may in fact be significant.

Foisting of religious views

In *Chondel v Liverpool City Council*, Mr Chondel, a committed Christian, promoted Christianity to service users despite being told that it was inappropriate for a social worker to do so. He was summarily dismissed as the Council found that he failed to follow a reasonable management instruction not to overtly promote his religious belief. Both the Tribunal and the EAT dismissed his claim of direct discrimination under the Religion or Belief Regulations on the basis that his treatment was not on grounds of his religion, but on the ground that his employer believed that he was improperly foisting his religious views on service users.

The Tribunal was satisfied that the Council would have reached the same conclusion and acted in the same way regardless of what religion or what view (religious or otherwise) it believed was being promoted. This is a reminder to look at the reasons for the treatment of the individual and not merely to focus on their religion or belief.

Race discrimination and Non-EEA nationals

The employer in *Osborne Clarke Services v Purohit* had a policy of never accepting applications for training contracts from non EEA nationals who required work permits to work in the UK. An Indian national who applied for a training contract was turned down and he presented a claim for race discrimination. An Employment Tribunal found that the policy was indirectly discriminatory. The employer had argued that their policy was justified as the job could always be filled by an EEA Candidate, who would then receive training. They argued that this approach was in line with guidance provided by the UK Border Agency which required employers to show why a post could not be filled by an EEA worker.

The EAT rejected these arguments. The employer should have considered the CRE Code of Practice which makes it clear that selection should, so far as possible, be based purely on merit and work permit issues should only come into consideration at the last stage of selection. The same considerations would apply under the new immigration regime.

This information has been prepared by Charles Russell LLP as a general guide only and does not constitute advice on any specific matter. We recommend that you seek professional advice before taking action. No liability can be accepted by us for any action taken or not taken as a result of this information. Charles Russell LLP is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide.