

## Employment Update

May 2009

---

### Employment Update

---

Author: David Green

Date: May 2009

---

At the end of April we saw the publication of the Equality Bill, which it is anticipated will become law in 2010 and in this briefing we look at some of the key proposals. The incidence of "swine flu" is increasing and with an official pandemic likely, we offer advice to companies on what steps they should take. Additionally, we report on the first prosecution under the Corporate Manslaughter and Corporate Homicide Act 2007.

### In the News

#### Focus on the Equality Bill

The long awaited Equality Bill was finally published on 27th April and at the same time, the Government published "*A Fairer Future - the Equality Bill and other action to make equality a reality*" which explains what the Bill is seeking to achieve. The key points are:

---

### Contents

---

- Focus on the Equality Bill

- Working Time Directive

- Increase in Statutory Redundancy Payments

- Employers who fail to pay Tribunal Awards to be "named and shamed"

- Cases Update

- Health and Safety Focus
- 

- The Bill brings together and re-states existing discrimination legislation concerning sex, race, disability, sexual orientation, religion or belief and age, and seeks to adopt a single approach where appropriate. When the Bill is passed, all earlier pieces of discrimination legislation will be repealed.

- The prohibition on "associative and perceptive" discrimination and harassment is extended to all discrimination strands. Currently discrimination based on the race, sexual orientation, religion or belief of a person with whom the claimant associates is prohibited. This does not currently extend to other strands of discrimination, but will do so under the Equality Bill.

- Currently, employers are explicitly liable for harassment by third parties under the Sex Discrimination Act 1975. This definition is to be extended across all discrimination strands.

- The Bill will expand the concept of positive action to allow employers to recruit or promote someone from an under-represented group where they have a choice between two or more "equally suitable" candidates. Unfortunately, however, it is unclear at this stage how "equally suitable" will be judged and this is likely to cause controversy.

- Currently, the Sex Discrimination Act does not cover issues of pay based discrimination. This aspect of discrimination is covered under the Equal Pay Act 1970. Under the proposals, there will be the potential to claim direct sex discrimination in respect of pay and conditions based on a hypothetical comparator where there is no "equal" male/female. The majority of claims, therefore, should still be brought under the traditional equal pay concepts, but this new avenue will enable an individual to claim, even where there is no actual comparator.

- The Bill introduces a power to require employers with 250 or more employees to

publish information relating to employee's pay for the purposes of showing whether there are differences in the pay of male and female employees. This will not be introduced before 2013 and will only be introduced if sufficient progress on reporting has not been made. The Equality and Human Rights Commission is tasked with monitoring progress on reporting, but if a Conservative Government is in power in 2013, then is unlikely that this provision will be implemented.

- There will be a ban on “gagging” clauses which prevent employees discussing their pay with colleagues.
- There will be an extension of age discrimination legislation to cover the provision of goods and services.
- Tribunals will be able to make recommendations that Respondents who have lost discrimination claims take steps to remedy matters, not just for the benefit of the individual Claimants, but also for the benefit of the wider workforce.
- The Bill places a new duty on certain public authorities to consider socio-economic disadvantages when taking strategic decisions about how to exercise their functions. Those placed under this duty will include government ministers, local authorities and NHS bodies. In “A Fairer Future...” the Government states that the new duty will affect how these bodies make strategic decisions about spending and service delivery. An example given in this document is *“a local education authority could evaluate the schools' application process and find that some parents in social housing were having difficulty navigating the system and getting their child a place at school. The authority could then target supported people living on housing estates to help them with the application process.”*

We will keep you updated with the progress of the Bill.

#### **Working Time Directive**

Negotiations on amendments to the European Working Time Directive came to an end without any agreement being reached between the European Parliament and the European Council of Ministers. This means that, for the foreseeable future, the UK will retain the ability to “opt out” of the 48 hour working week.

#### **Increase in Statutory Redundancy Payments**

In the Budget it was announced that there would be an increase in a week's pay for the purposes of calculating the amount of a statutory redundancy payment, from £350 to £380 per week. It is anticipated that this will be introduced on 1 October, but there has been no official confirmation of this as yet.

#### **Employers who fail to pay Tribunal Awards to be “named and shamed”**

The Government has announced that employers or individuals who fail to pay Employment Tribunal awards in England and Wales will be added to the Register of Judgments, Orders and Fines once enforcement proceedings are brought against them. This Register is searchable by members of the public and credit reference agencies and

the Government hopes that this will provide an incentive for employers to pay sums due in a timely manner.

### Cases Update

#### Is there a right to legal representation at internal disciplinary hearings?

The High Court have recently had to consider in *R (on the application of G) v The Governors of X School and Y City Council*, whether a teacher was entitled to have legal representation at an internal disciplinary hearing on the basis of article 6 of the European Convention of Human Rights which provides the right to a fair trial in relation to the determination of civil rights or obligations or criminal charges.

G was a teacher who worked in a primary school and was subject to disciplinary action, following allegations of an inappropriate relationship with a child. G asked to have legal representation at the disciplinary hearing, but this was rejected and he was subsequently summarily dismissed and told that he would be reported to the Secretary of State on the basis that he might be unsuitable to work with children. G appealed against the dismissal and his request for legal representation at the appeal was also refused. He applied for a judicial review of the decision not to allow him legal representation, arguing that his rights under article 6 were breached.

The High Court had to consider whether the disciplinary proceedings formed part of the same procedure as the referral to the Secretary of State and decided that they were because dismissal for gross misconduct would inevitably result in a referral. It also considered whether the proceedings were a “criminal” charge for the purposes of article 6, which meant that he would have the right to legal representation and to cross-examine witnesses or, if not, whether legal representation was required under the civil limb of article 6. The court held that the proceedings were not criminal but that they did fall within the civil limb of article 6, given the serious nature of the allegations and the severity of the consequences. G was therefore entitled to legal representation. The Court expressly stated that this decision only related to the facts of this case and was not intended to have wider implications.

Despite this comment from the Court, it would appear that the principles on which the case was decided could apply to any case where an employee is faced with serious allegations which could result in severe consequences for the individual's future employment. Although only public sector employees can apply for judicial review, private employers should still be aware that Employment Tribunals, as public bodies, are required by the Human Rights Act 1998 to implement legislation in accordance with the ECHR principles. This, therefore, opens up the possibility of employees arguing at the Tribunal that any refusal to allow them legal representation at a disciplinary hearing which results in their dismissal, makes that dismissal unfair. This case has, however, been appealed so watch this space!

#### Can a Controlling Shareholder be an Employee?

The long awaited Court of Appeal decision in *Secretary of State for Business Enterprise and Regulatory Reform v. Neufeld* has been given. Here, two controlling shareholders (in two separate cases) were found to be employees of their respective

Companies. The individuals concerned had given personal loans to the relevant companies and provided guarantees for loans, but despite this were found to be employees. The Court of Appeal has set out new guidance for Tribunals and, in doing so, has rejected the previous view that an individual could not be an employee if they were the controlling shareholder of a company and held that, in the event of an insolvency, the question of employment status had to be determined at the date when the company became insolvent.

The guiding factors are:

- 1 The burden of proof is on the party denying the existence of an employment contract, particularly where tax has been paid and NIC's deducted.
- 2 The possession of a controlling shareholding and/or the exercise of control over a company's activities does not prevent an employment contract existing.
- 3 The fact that an individual is an entrepreneur, has built up a company and profits from its success, does not mean an employment contract cannot exist. A controlling shareholder benefits from the company's success, but so do employees with share options.
- 4 Conduct in accordance with the contract is a strong indication that a valid and binding contract exists.
- 5 Conduct that is inconsistent with a contract is potentially an important factor against finding that a controlling shareholder is an employee.
- 6 Failing to put a contract in writing is powerful evidence that it was not intended to regulate the relationship.
- 7 Taking loans from a company or guaranteeing its debts will exceptionally be relevant, but in most cases is unlikely to carry any weight.
- 8 The fact that an individual had a controlling shareholding might cast doubt on them also being an employee, but that fact alone does not resolve the doubt one way or the other.

**Is a belief in climate change covered by the religion or belief regulations?**

In *Nicholson v Grainger Plc & ors* an Employment Tribunal judge had to decide at a pre-hearing review whether the meaning of "belief" in the Religion or Belief Regulations would cover beliefs about climate change and the environment.

Mr Nicholson was employed by Grainger PLC a residential property investment company as Head of Sustainability from September 2007 until July 2008. He was made redundant and brought a number of claims for unfair dismissal and discrimination on the grounds of religion or belief as well as having suffered detriments for disclosures he had made and because of his beliefs. He argued he had a "strongly held philosophical belief about climate change and the environment" and that these beliefs were "not merely an opinion

but a philosophical belief which affects how I live my life including my choice of home, how I travel, what I buy, what I eat and drink and what I do with my waste and my hopes and fears.”

A pre-hearing review was held to determine various issues including whether Mr Nicholson’s beliefs were protected. The tribunal decided its job was not to examine Mr Nicholson’s beliefs, but to analyse those beliefs and decide if they fell within the definition of “philosophical belief” in the Regulations. In doing so it took into account the EAT’s decision in *McClintock v Department of Constitutional Affairs* which approved a test for determining if beliefs fell within that definition. This included whether they have “sufficient cogency, seriousness, cohesion and importance and are worthy of respect in a democratic society.” The tribunal concluded that his beliefs did give rise to a moral order similar to most religions, that it was difficult to argue that beliefs about the impact of climate change do not fall within this definition and distinguished this case from that of McClintock where the EAT held that a “belief” required more than an “opinion based on some real or perceived logic based on information or lack of information available”. In this case Mr Nicholson’s views went beyond “mere opinion” because they affected the way he led his life.

The tribunal did, however, note that Mr Nicholson had to show he had suffered discrimination on the basis of his beliefs and that this decision should not be seen as the thin edge of the wedge for similar complaints.

This is the first case where a claimant has successfully argued that a belief which is not similar to a religious belief falls within the definition of “belief” under the Regulations. It should be noted, however, that this is a tribunal decision and therefore not binding on other tribunals and the tribunal itself was careful to emphasize that it did not intend for its decision to open the floodgates to similar types of claim.

## Health and Safety Focus

### “Swine Flu” – What steps should employers take?

The relatively sudden threat of a swine flu pandemic has raised awareness of whether businesses are prepared for dealing with this type of situation. The potential impact on employers is enormous with suggestions that in a worse case scenario up to 75% of the workforce could be absent. The key is planning and preparation. For more information

[Click Here](#)

### The first company to be charged under the Corporate Manslaughter and Corporate Homicide Act 2007

Cotswold Geotechnical Holdings is reported to be the first company charged with the criminal offence of corporate manslaughter following the death of an employee who was killed while taking soil samples from a building site when a pit collapsed. One of its directors has also been charged with the common law offence of gross negligence manslaughter.

Under the Corporate Manslaughter Act, an organisation is guilty of an offence if the way in which its activities are managed or organised causes a person’s death. The death

must be the result of gross breach of a relevant duty of care owed by the organisation to the deceased (that is conduct which falls far below what can reasonably be expected of the organisation in the circumstances). If convicted, the company faces an unlimited fine and the director could face life in prison.

It is anticipated that the construction and engineering sector may be particularly vulnerable to such prosecutions as it accounts for a significant number of workplace deaths each year. In light of this prosecution, companies should:-

- ensure the health and safety leadership within the organisation meets the appropriate standards;
- review safety management systems and consider whether improvements can be made;
- ensure the organisation has a health and safety culture so that everyone takes responsibility for improving health and safety.

---

**More information**

---

Joanna Wort

---

+44 (0)20 7203 5361

---

[joanna.wort@charlesrussell.co.uk](mailto:joanna.wort@charlesrussell.co.uk)

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.