

**EMPLOYMENT LAW FOR CHARITIES SEMINAR JUNE 2005**

**RECENT DEVELOPMENTS AND IN THE PIPELINE**

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**Disability Discrimination Act 2005**

**Disability Discrimination Act 1995 (Amendment) Regulations (SI 2003/1673)**

The Regulations came into force in October 2004 and the Act is expected to come into force in stages from December 2005 to December 2006.

The small employers exemption has been removed and the Regulations have confirmed the issue of the shift of the burden of proof, following other discrimination legislation. The meaning of disability discrimination remains largely unchanged, although conditions such as HIV and multiple sclerosis are defined expressly as falling within the meaning of disability from the point of diagnosis rather than at some later point when they would have the required substantial effect. Cancer is also included, although regulations may be made in future to limit it to certain types of cancer. The Act also extends the definition of disability to make sure that people with mental illness are protected in the same way as everyone else by removing the requirement that their illness be clinically recognised. This is one of the means by which stress claims have been excluded from the protection of disability legislation in the past and it is likely to lead to a review of whether work related stress claims will have to be dealt with under the amended DDA.

The Regulations also provide for harassment and victimisation, including in post employment situations, for example in the giving of references. The amended Act expressly applies to discrimination against contract workers and in relation to work experience. It will also be unlawful for a placement provider to subject a disabled person to harassment in providing a work placement or applying for a work placement. "Placement provider" means any person who provides a work placement to a person whom he does not employ and this could extend to include volunteers. However, the work placement section does not apply to local education authorities or responsible bodies, which include further and a higher education establishments.

The Act also extends the scope of the legislation by making publishers liable for disability discriminatory advertisements and extends DDA protection into all functions exercised by public authorities, including issuing licences and the appointment of school governors.

### **Disability Discrimination (Questions and Replies) Order 2004 SI 2004/1168**

Two new Codes of Practice have been issued by the Disability Rights Commission updating the prescribed form of disability questionnaire. The period during which the questionnaire may be served has also be expanded to

- within 3 months of the act complained of
- within 28 of tribunal complaint; or
- such other period as Tribunal may order

The employer's response must now be made within 8 weeks unless there is a reasonable excuse.

### **Disability Discrimination Act 1995 (Pensions) Regulations 2003 SI 2003/2770**

1<sup>st</sup> October 2004

These Regulations introduce provisions dealing with discrimination in relation to occupational pensions. These include the imposition of a duty on pension scheme trustees to make reasonable adjustments to a scheme's provisions (including scheme rules) so that no disabled person is placed at a disadvantage.

The non-discrimination rule does not apply to rights accrued or benefits payable in respect of periods of service prior to 1st October 2004, although it does apply to communications with members or prospective members of the scheme about such rights or benefits

Where a relevant disabled person presents a complaint to an employment tribunal against the trustees or managers of a scheme, the employer in relation to that scheme is to be treated as a party to the complaint.

The tribunals powers are limited in that (save in the case of claims by pensioner members) the tribunal may make a declaration of the complainant's rights (to be admitted to the scheme or, as the case may be, to scheme membership without discrimination) but may not award any compensation other than compensation for injury to feelings.

### **Civil Partnership Act 2004**

With effect from December 2005 the new Act will amend S.3 Sex Discrimination Act 1975 so that protection from discrimination on the grounds that a person is married will be extended to include those having concluded a civil partnership.

### **Gender Recognition Act 2004**

The purpose of the Gender Recognition Act is to provide transsexual people with legal recognition in their acquired gender. Legal recognition will follow from the issue of a full gender recognition certificate by a Gender Recognition Panel. Amendments to the Sex Discrimination Act 1975 will remove the genuine occupational qualification which limited the protection afforded to those who had undergone gender reassignment.

In practical terms, legal recognition will have the effect that, for example, a male-to-female transsexual person will be legally recognised as a woman in English law. On the issue of a full gender recognition certificate, the person will be entitled to a new birth certificate reflecting the acquired gender (provided a UK birth register entry already exists for the person) and will be able to marry someone of the opposite gender to his or her acquired gender. The Act also deals with issues relating to parenthood, benefits and pensions, discrimination, inheritance, sport, gender-specific offences and foreign gender change

Under the previous law, transsexuals were not recognised in their acquired gender. Although transsexual people could obtain some official documents in their new name and gender, they could not obtain new birth certificates or enjoy gender specific rights relating to their acquired, rather than their birth, gender.

### **Employment Equality (Sex Discrimination) Regulations 2005**

These regulations give effect to the Amended Equal Treatment Directive (No 2002/73), and will amend the Sex Discrimination Act to bring the definition of indirect discrimination into line with the Race Relations Act and the sexual orientation and religion or belief regulations. A definition of harassment that incorporates both sexual harassment (such as unwanted sexual advances) and harassment related to a person's sex (but which need not be sexual in its nature) will also be introduced.

### **Amendments to the TUPE regulations as a result of Acquired Rights Amendment**

**Directive (2001/23/EC)** was expected in Autumn 2004, but is now expected in October 2005.

The key features of the amendments are:

- a review of the rules about when TUPE applies, particularly in relation to service provision and labour intensive services;
- an obligation on transferors to provide information relating to the rights and obligations which will transfer;
- flexibility in relation to insolvency to attract buyers;
- clarification of the economic, technical or organisational (ETO) defence;
- proposals regarding variation of contracts for an ETO reason..

The **Pensions Act 2004** will come into force in stages through 2005 and 2006. The key feature areas are:

- equality of treatment in the operation of company pension schemes, eg during paternity and adoption leave;
- pension rights to be transferable under TUPE
- a new Pensions Regulator will replace the Occupational Pensions Regulatory Authority (OPRA)
- the creation of a Pension Protection Fund (PPF) to protect members schemes
- consultation requirements on significant changes to pension schemes;
- new responsibilities for trustees.

### **The Transfer of Employment (Pension Protection) Regulations 2005**

The Transfer of Employment (Pension Protection) Regulations 2005 came into effect on 6<sup>th</sup> April and provide that where a TUPE transfer occurs from an employer who provides a pension scheme, the new employer will be obliged to make arrangements to provide for the continuation of pension benefits. However there is no obligation to match the type or value of any scheme and the new scheme can be a defined benefit (final salary), defined contribution (money purchase) or stakeholder arrangement. The new arrangements need have no reference to the pre-transfer benefits and the Regulations establish a minimum standard for an employer to match an employee's contributions to a maximum of 6% of basic pay.

**Employment Act 2002 (Dispute Resolution) Regulations 2004 SI 2004/752** details the new statutory disciplinary and grievance procedures. A related order has updated the ACAS Code of Practice on Disciplinary and Grievance Procedures to take into account the new statutory procedures

**Employment Relations Act 2004** will come into force in stages from October 2004. The key areas are: trade union recognition, membership and activities; in particular the procedures for balloting for industrial action and dismissal of striking workers and a review of the Central Arbitration Committee's role in determining claims for statutory recognition. The Act also includes greater protection for workers subjected to detrimental treatment as a result of union membership and gives a greater role to a companion in disciplinary and grievance hearings.

**Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861)** came into force on 1 October 2004 and has implemented changes to the tribunal system including new tribunal forms and measures to encourage early dispute resolution between parties. Such measures include the power for a tribunal chairman to determine a case without a hearing; case management meetings to deal with matters of procedure; and wider power to award costs, including where proceedings are "misconceived". The tribunal is also given the power to reject a claim where the applicant has failed to lodge a grievance in line with the new statutory grievance procedure

**Minimum wage increases** will take effect from 1 October 2005. The adult rate (for workers aged 22 and over) will increase from £4.85 to £5.05 with a further increase to £5.35 proposed in October 2006, subject to confirmation from the Low Pay Commission that economic conditions continue to make such an increase appropriate. The development rate (for workers aged 18-21 inclusive) will increase from £4.10 to £4.25 and to £4.45 in October 2006. The development rate also applies to those aged 22 and over doing accredited training in the first six months of employment.

The 16-17 year old rate (for those above the compulsory school leaving age) is £3 an hour and the Low Pay Commission will report in February 2006, with recommendations for any increases.

In England and Wales a person is no longer of compulsory school age after the last Friday of June of the school year in which their 16<sup>th</sup> birthday occurs.

In Northern Ireland a person is no longer of compulsory school age after the 30<sup>th</sup> June of the school year in which their 16<sup>th</sup> birthday occurs.

In Scotland pupils whose 16th birthday falls between 1<sup>st</sup> March and 30<sup>th</sup> September may not leave before the 31<sup>st</sup> May of that year. Pupils aged 16 on or between 1<sup>st</sup> October and the last day of February may not leave until the start of the Christmas holidays in that school year.

### **Age Matters**

New Regulations are scheduled to come into force on the 1<sup>st</sup> October 2006 and will:

- set a default retirement age of 65 but create a right for employees to request to work beyond a compulsory retirement age which employers will have a duty to consider;
- ensure close monitoring of retirement age provisions so that evidence is available for a formal review of age discrimination five years from implementation; and
- allow employees to objectively justify earlier retirement ages if they can show it is appropriate and necessary.

The duties on an employer to consider a request to work beyond a compulsory retirement age are likely to mirror those which apply on a request for flexible working, taking into consideration issues identified during the consultation process such as the cost of retraining elderly employees where they may exceptionally be affected by a retirement age which would not allow the individual to be sufficiently productive in that time.

Consequential amendments arising out of the age discrimination legislation would allow employers to continue to provide paid and non-paid benefits based on length of service or experience where it can be justified and a change in the way that financial compensation is calculated on redundancy and unfair dismissal to remove reference to an individual's age (although retaining the maximum 20 year length of service) which will include permitting service below the age of 18 to be taken into account

**Equality Bill.** After failing to reach Royal Assent in the previous session, the Bill was re-introduced into the House of Commons in May 2005. If passed, it will create a new Commission for Equality and Human Rights to bring together the work of the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission. It also includes measures to prohibit discrimination on grounds of religion or belief, create a duty on public authorities to promote gender equality and prevent sex discrimination in the exercise of public functions

A **Parental Rights Bill** was announced in the May 2005 Queen's speech. It proposes extending the period of statutory maternity pay and statutory adoption pay, introducing new rights for mothers to transfer part of their maternity leave and pay to the father, and extend the right to request flexible working to other groups with caring responsibilities.

Paid maternity leave (and adoption leave) is to be extended from six months to nine, with a 'goal' of one year's paid maternity leave by 2010.

### **Update on holiday pay**

Different regimes currently exist between Scotland and England and Wales in connection with the treatment of rolled up holiday pay. As matters currently stand, north of the border, the payment of annual leave in a rolled up rate of pay is considered unlawful, in part because it was considered to discourage workers from taking their statutory holiday as they would not receive any pay during such absences as any entitlement would have been paid over the course of the weeks they had actually worked.

South of the border, the Court of Appeal has taken the view that holiday pay does not have to be paid at the time the holiday is actually taken. Whilst the issue has been referred to the European Court of Justice to determine, the Employment Appeal Tribunal has set out recent guidance to assist:

- the provision for rolled up holiday pay should be clearly incorporated into the contract of employment;
- the contract should identify sufficient particulars to enable the rolled up holiday pay to be calculated; and
- a record should be kept of holidays taken.

The EAT used the words 'incorporated' in recognition that contractual provision can be established by express agreement as well as through incorporation from a collective agreement or by custom and practice.

### **Update on the Working Time Opt Out**

At the Wrigleys Employment Law for Charities Update Seminar last year I commented on the European Commission's recommendations for amending the 1993 Working Time Directive 104/EC of 23 November 1993. The current proposals are to end the individual Opt Out within 3 years of adoption of a new Working Time Directive, but to extend the calculation of the

average working week from its current 17 week reference period to 52 weeks. There are also proposals to introduce a new classification of 'on-call' time where the worker is at the employer's disposal but not actually working. Such 'on-call' time would count towards working time.

These proposed changes were met with concern by business organisations and employers' groups, who claimed that the new Directive would be unduly restrictive. A compromise position was offered by the European Commission with a revised proposal issued on 1 June 2005, which would have allowed Member States to ask the Commission's permission to maintain the opt-out beyond the three-year limit 'for reasons relating to their labour market arrangements'. In such circumstances the working week would still have been limited to an average 65 hours and it was suggested that 'on-call' time would not amount to working time if there was a collective agreement to that effect, but also would not count towards any rest period. However, this proposal has also now been rejected by the UK Government with the help of its 'blocking minority' in the Council of Ministers. The issue is now unlikely to return to the European agenda until next year, and certainly not before the expiry of the UK's presidency of the European Union.

Continuing with the issue of working time, or rather the right to statutory holiday, the Labour Party election manifesto contained a pledge to add public holidays to the four week statutory holiday entitlement under the Working Time Regulations, allowing up to eight extra holidays a year. Some of you may also be aware that the TUC has for some time been running a campaign to add extra public holidays to the calendar to make up for our lowly position in the public holiday league table.

### **Some Cases of Note**

Also on the issue of statutory holiday the Court of Appeal, in **Commissioners of Inland Revenue v Ainsworth** 2005 EWCA Civ 441, has held that the EAT was wrong to find that workers who had exhausted their entitlement to contractual and statutory sick pay could claim holiday pay, notwithstanding that they were still absent from work.

In the case of *Kigass Aero Components Ltd v Brown* 2002 ICR 697 the EAT held that even though the claimant had been on long term sickness absence they were entitled to the right to paid leave under the Regulations provided that they satisfied the notice provisions and there was

no requirement that they either attended work or had done any work in any relevant period. Regulation 13 of the Working Time Regulations 1998 provides that workers are entitled to four weeks' paid annual leave.

Overturing the EAT's decision, the Court of Appeal criticised the approach taken by the EAT in focussing on a definition of word 'worker'. The Court preferred to focus on the word 'leave' which suggested a release from what would otherwise be an obligation. The Court held that the Regulations are intended to ensure minimum health and safety standards in relation to working time, so that workers can expect a minimum period of release from the pressures of work. In effect, if they were on sick leave then there was no work for the worker to take leave from. The case of *Kigass* did nothing to further the interests of health and safety. The only result was a windfall for the claimant.

In the case of **South Central Trains Ltd -v- Rodway** 2005 EWCA Civ 433 the Court of Appeal confirmed the EAT's decision that there is no right for an employee to take parental leave in periods of less than one week.

In two recent cases the Courts have considered matters relating to an employers vicarious liability. It is established that an employer can be vicariously liable where an employee in the course of their duties commits a tortious act, for example where an employee injures some third party. In addition an employer is liable where an employee commits acts of discrimination under the relevant legislation which make specific provision for liability. In the case of **Hawley -v- Luminar Leisure** 2005 EWHC 5, a nightclub owner was sued for an injury caused by a door supervisor. It was accepted that the 'door supervisor' had acted in the course of his duties but it was argued that the club was not his employer but rather he was employed by the security company who provided him and which had subsequently gone into liquidation.

In a case that must concern any organisation which has volunteers, the Court accepted that the door supervisor had not been employed by the club for all normal employment purposes, but had been a 'temporary deemed employee' for the purposes of fixing the club with vicarious liability. Here it seems that the Court focussed on the issue of the extent of control exercised by the club and in the words of one Lord Denning, if a temporary worker has the right to control the manner in which a labourer does his work, so as to be able to tell him the right way or the wrong way to do it, then he should be responsible when he does it the wrong way as well as the right way'.

In the second case, **Majrowski -v- Guy's and St Thomas's NHS Trust** 2005 EWCA Civ 251, the Court of Appeal has confirmed that an employer can be vicariously liable for an employee's conduct in bullying, intimidating and harassment of a subordinate for the purposes of a claim under the Protection from Harassment Act 1997. Such a claim can allow recourse to an employee who may not have protection from harassment on one of the prohibited discriminatory grounds and will allow damages for any anxiety caused and any financial loss resulting from the harassment. This case gives employees an alternative to the much more difficult route of establishing personal injury arising through work related stress.

In the European Court of Justice case of **Junk -v- Wolfgang Kuhnel** (C188/03), it was held that the definition of redundancy for the purposes of consultation meant the point where the employer gives notice of intent rather than the point when notice took effect. Employers are required to consult employees concerning potential redundancies and in practice notice of redundancies are often issued prior to the end of the consultation period, but so that they take effect once the consultation period had come to an end. Although we must wait and see how this decision is interpreted by the tribunals, it now seems that the notice itself cannot be given until the consultation period has ended and employers who fail to do so risk breaching their consultation obligations.

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