

**EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR
JUNE 2008**

RECENT DEVELOPMENTS AND IN THE PIPELINE

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Agency Workers

The Government has reached agreement with the TUC and the CBI on granting agency workers limited employment rights and in particular:

- After 12 weeks in a job the Agency worker would be entitled to "equal treatment"
"Equal treatment" refers to the basic working and employment conditions (pay, holiday etc) that would apply had the worker been directly and permanently recruited, but not including pension benefits.
- The Government will consult further about implementing the draft Agency Directive on matters such as dispute resolution and anti-avoidance measures, for example to avoid repeated short term contracts.

It is likely that the legislation will have a similar basis to the Fixed Term Worker (Prevention of less Favourable Treatment) Regulations and the Part Time Employee (Prevention of less Favourable Treatment) Regulations.

The agreement also requires that these arrangements are reviewed after a suitable period to establish how they are working in practice.

There does not appear to any agreement on the rights of agency workers who have been working for the same end-user for more than a year, in particular in relation to unfair dismissal or for redundancy pay.

There remains some distance between this domestic agreement and the terms of the draft Agency Directive which calls for equal rights after only six weeks. The government has successfully resisted that call with discussions with the European partners also encompassing the issue of the continuation of the 'opt-out' under working time rules. This does represent a substantial shift by the government and one which is likely to find favour and acceptance with the European partners. Whether it will stave off further pressure on the 'opt-out' remains to be seen.

Agency Workers are not Employees

The Court of Appeal has hopefully put to rest once and for all any suggestion that Tribunals will imply an employment relationship simply because a worker has been

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engaged with one employer for any significant period of time. The Court has sought to be clear that there is no rule which says that an agency worker cannot, in the right circumstances, be an employee of the service user. Equally there is no rule that agency workers are simply employees in disguise. Recent cases, such as *Dacas* and *Muscat*, had raised the hopes of agency workers that they could acquire employment status. Seeking to bring these conflicting cases in line the Court of Appeal once again stresses that each case must be decided on its own fact. A Tribunal will only be entitled to imply an employment contract where it is necessary to give business reality to the situation. There is no such necessity where the agency arrangements are genuine and properly reflect the relationship. *James -v- London Borough of Greenwich 2008*

Consultation

The Information and Consultation Regulations (from April 2008) apply to all employers with more than 50 staff.

There is a duty to consult over the reason for redundancies

One of the big questions in redundancy is at what point is an employer obliged to start the consultation process. Guidance is drawn from the collective redundancy provisions set out in the Trade Union Labour Relations (Consolidation) Act 1992 (TULRCA) which requires consultation where an employer proposed to make 20 or more employees redundant at one establishment within 90 days or less. In these cases consultation must begin "in good time".

Since the case of *Vardy* (1993) Tribunals and employment advisers have worked on the basis that consultation does not include looking at the reason for redundancies. This substantially limits the value of consultation since it focuses on how redundancy may be implemented rather than whether it can in truth be avoided.

A recent case challenged and overturned this principal drawing upon the Information and Consultation of Employee Regulations which sets out a regime where employers may be required to consult about economic issues.

The Employment Appeal Tribunal (EAT) has now held that *Vardy* is no longer good law and subsequent changes in legislation had widened the scope of the consultation obligation to include ways of avoiding dismissals which meant consultation on the reason for the redundancy dismissal. The EAT took the view that redundancies were proposed at the point where the closure itself was proposed and not at the later stage arising as a result of the closure. *UK Coalmining Limited - v- National Union of Mineworkers (September 2007)*

Failure to Consult

Macmillan Publishers Ltd was fined £55,000 for its failure to arrange a ballot to elect employee representatives following a valid request under the ICE Regulations.

Protective Awards

In *Susie Radin*, the EAT and Court of Appeal made it clear that a protective award was intended to be penal and that 90 days' pay should be awarded unless there were good reasons for awarding less. In *Evans v Permacell*, the Et sought to award 30 days pay as a protective award on the basis that less than 20 employees were made redundant, and the relevant consultation period was 30, not 90, days. The EAT confirmed that the starting point was 90 days' pay.

Compensation Limits

New tribunal award limits apply where the 'effective date' is on or after 1 February as follows:

- maximum weekly pay: £330 (was £310)
- maximum compensatory award for unfair dismissal: £63,000 (£60,600)

The 'effective date' depends upon the type of claim but for dismissal and redundancy will be the effective date of termination.

Corporate Manslaughter

The Corporate Manslaughter and Corporate Homicide Act came into effect from 6 April. The requirement to identify a "controlling mind" in order to prosecute an organisation for manslaughter has been removed. Now the focus is on the way in which an organisation's activities are managed and the issue of a gross breach of a duty of care. Criticism of the new test continues particularly in relation to the un-level playing field as between small and large businesses. "Management" decisions are still likely to be taken at local level close to where the fatal incident occurred increasing the liability for small employers working directly with staff and fixing it firmly on line management in larger organisations well removed from the strategic function of the board of directors where the pressure for "cost cutting" measures and rationalisation will originate. Boards in large companies will continue to demand cost reductions safely removed from a decision on how those cuts are to be implemented.

This change will impact on all incorporated acharities. Government estimates suggest that prosecutions (not just of charities) will increase tenfold. In particular charities are likely to face increased pressure in justifying the benefits, taking account the increase risks to organisations, of engaging in fundraising events such as long distance races and more extreme activities such as bungee jumps, sky dives and absailing. Recent press reported a claim against a family when they had a bouncy castle in their garden at a kid's party when an older kid was injured. Where liability can be found there is a real risk that criminal liability can follow.

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Many fundraising events have been curtailed on the basis of concerns over 'health and safety' or the cost of insurance. This is not going to get any easier as the stakes have now been increased. The key for charities is to ensure that they have all the correct training, equipment and safety policies in place to cover any event they organise or to use professional events organisations and make sure that they accept liability.

Employer liable for suicide

The House of Lords has confirmed that an employer can be liable for the suicide of an employee who had suffered depression following a work related injury. The claim was brought under the Fatal Accidents Act 1976 which entitles dependent of an individual who dies as a result of any wrongful act, negligent or default by another to damages for loss of financial support arising from the individual's death.

The House of Lords held that the suicide was a foreseeable result of the injuries and that the suicide was not a voluntary act of a person of sound mind as a result of the victim's depression. *Core -v- IBC Vehicles*

Discrimination

From October 2007 a new single equality commission (the "Commission for Equality and Human Rights" or CEHR) succeeded to the functions of the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. It is also be responsible for enforcing anti-discrimination rules in other areas, including religion or belief and age, and will have general responsibility for promotion of human rights.

Age Discrimination

Tribunal gives guidance on justification - There has been a great deal of press coverage of what is seen as the first high value age discrimination claim; that it involved a major city based US/UK law firm was simply a bonus. The Tribunal found that the discriminatory effects of changes to a pension scheme were justified, recognising that any change to a pension scheme (and this may extend to any benefits based on length of service) would affect staff differently depending upon their age and employers need to take that into account in making such changes. The Tribunal found that the employer had undertaken a wide and effective consultation and implemented changes which had been designed to remove an inherent and increasing disadvantage to scheme members based on their age. The Tribunal noted that the changes requested by the claimant would simply have shifted the disadvantage the claimant experienced to another age group and no less discriminatory proposal had been put forward. *Bloxham v Freshfields Bruckhaus Deringer*.

Redundancy was really age discrimination - The employer was held to have a general culture of seeking to employ younger, and less expensive, staff. Whilst there was

considered to be a genuine case for redundancy the 55 year old manager was informed of his selection in a manner which was automatically unfair for lack of proper procedure under the Statutory Dismissal Procedure as well as unfair under ordinary principals. The Tribunal noted that discrimination did not arise simply because the claimant could point to a difference in treatment and a difference in age with any comparator. However, significant in this case was that the manager's replacement was more than 20 years his juniors as was every other member of the restructured team which allowed an inference of age discrimination for which no justification was made out. *Court v Dennis Publishing Ltd.*

Much too young - The employee claimed that she was told by her employer that she was too young to deal properly with the private members of a club in central London. As the employer had failed to defend the claim no reasoning has been given but whilst we understand that there may be an appeal the case is a reminder that age discrimination applies to all ages and any dismissal or other detriment (such as lack of training or promotion) for age related reasons is potentially unlawful. *Thomas v Eight Member Club.*

Still too young - An office admin worker was dismissed on ground of poor performance. A claim for age discrimination was based upon comments made by a senior manger on the date of dismissal that the employee was simply too young. The Tribunal took the view that the employer's claims of poor performance did not stack up when the worker's performance was compared to the performances of both her predecessor and successor in that role. In addition the Tribunal took the view that the employer's attempts to assist the employee to achieve performance improvements was again tainted by a stereotypical assumption that because the person providing the assistance were older they were either more experienced or better able to do the job. The case turned on the burden of proof since the employee was able to demonstrate sufficient facts for the Tribunal to conclude a prima facie case of age discrimination. The employer was unable to prove that poor performance was the real reason for dismissal.

The case is also reminder of the importance to follow the statutory dismissal procedure even though the employee had less than 12 months service. An employee does not require 12 months service to bring a claim on grounds of discrimination. As the statutory procedure had not been followed there was an automatic uplift of 50% on the Tribunal award. *Wilkinson -v- Springwell Engineering Limited*

Disability Discrimination by Association

The Advocate General has given his opinion in the referral to the European Court of Justice (ECJ) on the question of whether the Equal Treatment Directive protects disabled employees and those who are associated with the disabled. The Directive impacts on matters such as the Disability Discrimination Act and more recently the Equal Treatment Regulations relating to Sexual Orientation and Religion and Belief, the latter which includes restrictions on discrimination by association.

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In the *Coleman -v- Attridge* law case it was claimed that the employee was treated less favourably in requests for flexible working to care for her disabled child when compared to parents of non-disabled children.

The Advocate General stated that direct discrimination and/or harassment by association is prohibited by the Directive and went on to confirm that this applied to each of the prohibited grounds listed in the Directive, including disability and age. The ECJ will usually follow the Advocate General's opinion. If it does so the Courts will be left with the question of whether it can interpret UK legislation to give effect to the purpose of the Directive or whether there is a need to change the legislation.

No duty to make adjustments that will not help - The Employment Appeal Tribunal (EAT) has reconfirmed that an obligation to consider reasonable adjustments for an employee who is on long-term sick leave was not triggered until there was some sign of the employee returning to work. Employers should however consider carefully whether there are measures which form part of the absence management or other steps that can be taken to facilitate a return. However, the EAT also confirmed that it was reasonable for an employer to hold off from pursuing the question of a phased return to work until there was a definite date for return. Significantly, the EAT also ruled that if an adjustment would not help in removing the disadvantage which the disabled person was placed in then such adjustment cannot be considered "reasonable" under the DDA. *NCH Scotland -v- McHugh*

Equal Pay

The Equal Pay Act 1970 is concerned only with ensuring that the sexes have the same pay and other terms and conditions of employment if and when they are doing the same work, work of equal value or work rated as equivalent by a job evaluation scheme. The Act implies equality into every employment relationship.

One of the final recommendations of the outgoing Equal Opportunities Commission was for a three year moratorium on all new equal pay claims in order to allow employers to address any outstanding discriminatory pay issues. The EOC also called for mandatory equal pay reviews.

Equal pay claims have also led to unions being sued by some of their female members where the unions had agreed settlements which were on terms which were less favourable than might have been awarded by a tribunal. In reaching settlement the unions adopted a "reasonable rather than maximum settlement policy" because pressing for maximum compensation for equal pay claimants could have had a detrimental impact on other members, both men and women. Since local authorities do not have unlimited funds there was the possibility of redundancies as well as a knock on effect on future pay award negotiations. A sex discrimination claim followed against the unions on the basis that most of those who lost out under the settlements were women. The claim was upheld, but the union was held to have used proportionate means to achieve a legitimate aim and its actions were therefore held to be justified.

Race Discrimination

The Racial and Religious Hatred Act 2006 creates the new criminal offence of inciting hatred on religious grounds through the use of threatening words or behaviour, or by displaying, publishing or distributing written material, visual images or sounds. Employers can be held vicariously liable for acts of their employees, both in and out of the workplace. Penalties include a fine and up to 7 years imprisonment. As always employers should have appropriate policies in place. Steps taken to introduce policies and procedures to comply with and raising awareness of the Employment Equality (Religion or Belief) Regulations 2003 will help but these may require some updating to include the new offence.

The wide exemption for freedom of speech (including preaching the benefits of or practicing one's own religion) will likely mean there be few successful prosecutions save in the more extreme or directed circumstances.

Also on Race

Recently FIFA (the world football governing body) voted in favour of a rule which would limit every team to only five foreign players in their starting line up. In the UK and across Europe this would unlawful direct discrimination.

UEFA, the European football governing body, is said to supports the FIFA proposals but as they are discriminatory can only continue with its own proposals for clubs to field a minimum number of "home grown players" to be eligible for UEFA competitions. "Home grown" players may be of any nationality. This is likely to amount to indirect (rather than direct) discrimination and therefore potentially justifiable as a "proportionate means of achieving a legitimate aim".

Sex Discrimination

The Sex Discrimination Act 1975 (Amendment) Regulations 2008 make a number of changes from October 2008. Existing rules provide for different entitlements to benefits for women on Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML). During OML a woman has a statutory right to benefit from all terms and conditions save in relation to remuneration. Benefits such as holiday, childcare vouchers, private medical insurance, mobile phone and car (private use) continue. Restricted rights exist during AML, covering contractual rights to discipline and grievance procedures, termination and redundancy.

The new regulations require that for those women whose Expected Week of Childbirth falls on or after 5 October 2008 benefits provided during AML must be no less than those provided during OML. Employers must also be cautious to ensure that any period of AML is taken into account when calculating any length of service related benefits.

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With the recent extension of statutory maternity pay to 39 weeks (and the proposals to extend it to 12 months) it is likely that more women will be taking advantage of AML. This represents a significant increase in maternity rights.

Sexual Orientation

The EAT has held that the Sexual Orientation Regulations do not protect someone who is known to be heterosexual against homophobic abuse. An agency worker had been subjected to "gay jibes" when colleagues had discovered that he had attended boarding school and had lived in Brighton. It was accepted that no one actually believed the agency worker was gay. This was held to mean that the Equal Treatment Regulations could not apply as they only extended protection from harassment if he was gay, thought to be gay or suffered harassment though his association with someone who was gay or thought to be gay. The Tribunal noted that this narrow definition meant that the Equal Treatment Regulations did not properly implement the Equal Treatment Directive and unless this decision is overturned on appeal it will require the Regulations to be amended.
English -v- Thomas Sanderson Blinds

Dispute Resolution

ACAS Code of Practice on Discipline and Grievance

ACAS have produced a new Code for consultation in response to the government's proposals to scrap the statutory dispute resolution procedures. Following introduction of the Employment Bill, expected to be in April 2009, Employment Tribunals considering issues of unfair dismissal or breach of contract will be required to take account of any relevant codes of practice. The Code will be familiar as it draws on existing ACAS guidance on discipline and grievance and the basic requirements of the soon to be defunct statutory procedures. However the Code is more streamline seeking to identify key principals for handling dispute and grievance situations. Failure to follow the Code will not make any dismissal automatically unfair but Tribunals will be able to take any unreasonable failure into account and adjust an award by up to 25%. Under the current statutory procedures Tribunals have to adjust awards by between 10% and 50%. There are still cases seeking to identify the relevant factors Tribunals should take into account when making any adjustment and it is likely that these cases will remain relevant even once the statutory procedure has gone.

The key elements of the Code are:

- deal with issues promptly;
- act consistently;
- investigate;

- discipline and grievance meetings should, as far as possible, be conducted by a manager who is not involved in the matter giving rise to dispute;
- where there is a performance problem the immediate manager should be involved;
- an employee should be informed of the basis of the problem and have an opportunity to put their case before any decisions are made;
- an employee has the right to be accompanied; and
- an employee has the right to appeal.

None of this should seem unusual. However all employers are best advised to follow the code once it comes into effect. The draft Code is open for consultation until 25 July.

The Statutory Procedures

The new Employment Bill introduces the principal recommendations of the Gibbons Review, effectively scrapping the existing statutory dispute resolutions procedures which were introduced in 2004. Also going are the rules relating to procedural unfairness in dismissal cases. In its place will be a requirement to follow relevant codes of practice. In particular this will refer to the updated ACAS Code of Practice on Discipline and Grievance. An unreasonable failure to follow the code will result in any award being adjusted (upwards or downwards) by up to 25%.

The changes also remove the employer's defence that a failure to follow procedure makes no difference as they would have dismissed the employee in any event. We will revert back to the pre-statutory dismissal procedure situation where an unfair procedure or technical breach of a contractual procedure can give rise to a finding of unfair dismissal. A procedural defect which made no appreciable difference to the outcome would still have some relevance as it may have the effect of reducing compensation.

The Bill also extends the role of ACAS to allow them to offer conciliation even before a claim is submitted to a Tribunal.

One of the provisions of the Bill which may otherwise go unnoticed is an increase in the power of the Tribunal to compensate a worker for financial loss arising out of a claim for deduction of wages or for redundancy payments. This opens up the possibility of claims for an employee to be able to recover costs incurred in taking a complaint to an Employment Tribunal or for losses arising on home repossessions where mortgage payments have been missed.

The Employment Bill also introduces tougher sanctions for employers who fail to pay the minimum wage with the possibility of an unlimited fine. The Bill is anticipated to come into effect in April 2009.

Taking expired warnings into account

The Court of Appeal has reversed decisions of both the Tribunal and Employment Appeals Tribunal and held that there is no general principle that an employer could not take into account an expired disciplinary warning. The employer was held to have been dismissed because of misconduct which was reasonable in the circumstances. In this case the warning was simply part of the overall question of reasonableness and not the deciding factor and that a proposition that a previous spent warning should be ignored for all purposes was not correct.

It remains for employers to be very clear as to the reasons for dismissal in any case and to take care to identify any relevant factors which may effect their decision. Accordingly an employer that might otherwise reasonably dismiss on the grounds of any misconduct may wish to exercise leniency where there has been a previously unblemished record but may in another case may reasonably determine not to be so lenient. *Airbus -v Webb*

Flexible Working

The Government has accepted the conclusions of the Walsh Review, to extend the right to request flexible working to parents with children up to the age of 16 and now proposes to consult on how exactly the change is to be implemented

From April 2003 parents of children under 6 (or disabled children up to 18) have had a statutory right to request flexible working arrangements - not a right to flexible working but a right to request flexible working. An employer is not obliged to agree a request by a qualifying employee if he considers that one of a number of grounds (listed in the Employment Rights Act 1996) applies. The sanction against a defaulting employer is that an employment tribunal has power to order reconsideration of the request and to award compensation of up to (currently) £2,640

From April 2007 the right was extended to those with responsibility for caring for spouses and adult relatives. It is proposed to extend the right to request to all employees with children up to age 16.

Holiday increases

from 1 October the statutory entitlement to paid annual leave increased from 4 weeks to 4.8 weeks (24 days a year for those working five days a week). Holiday will increase again in April 2009 (delayed from 2008) to 5.6 weeks (28 days for those on a five day week).

Immigration

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Since the introduction of the Asylum and Immigration Act 1996 it has been a criminal offence to employ any person not legally entitled to work in the UK. New rules are introduced by the Immigration, Asylum and Nationality Act 2006, which in particular see increases in the potential penalties for those employing illegal workers, imposing a fine of up to £10,000 in respect of every illegal worker employed (where the employer is negligent, for example in not undertaking the required checks) and potentially unlimited fines and imprisonment for knowingly employing an illegal worker.

The rules introduce a host of issues which all employers need to familiarise themselves with.

- the new offences can only be committed in relation to an employee
- the rules apply to persons aged 16 or over
- the rules apply to those who are subject to immigration control i.e. a person who requires leave to enter or remain in the UK. British citizens, Commonwealth citizens with a right of abode and nationals of the European Economic Area (EEA) and Switzerland are generally free to live and work in the UK, save for EEA nationals from Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia, who may need to be registered. Non-EEA nations are subject to immigration control. Detailed information can be found on the Border and Immigration Agency's (BIA) website (see www.bia.homeoffice.gov.uk)

A statutory defence exists in terms of having taken reasonable steps to check a person's entitlement to work freely in the UK. Checks must be undertaken before employment commences, and related documents that exist in what are referred to as List A or List B (in the schedule to the Immigration (Restrictions on Employment) Order 2007 SI 2007/3290). List A relates to those who are not subject to immigration control and demonstrate a person's entitlement to live and work in the UK. Copies of original documents must be taken. List B contains documents for those subject to immigration control and follow-up checks will need to be undertaken each year to ensure that any relevant leave remains valid.

- where a person is subject to immigration control they must have valid leave to enter i.e. that it has not ceased to have effect (for example through curtailment, revocation, cancellation, passage of time or otherwise) or subject to any condition preventing a person from accepting employment. Under the old rules a check only needed to be done when an employee first started work. From February this year where there is any limitation on the right to remain or work an employer must continue to monitor the situation and make further checks, for example where a visa may have expired. Employers will only have a defence for employing those with time limited leave to be in the UK if they carry out repeat checks at least once every 12 months.

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Employers are required to take reasonable steps to check the validity of any documents produced in evidence. Employers cannot simply accept the validity of a document on face value and will be required to undertake some rudimentary checks. If unsure as to the validity of any document an employer can contract the Employer Checking Service. A service request form, email address and fax number are available from the BIA website above. These reasonable checks are not available as a defence where the offence is one of knowingly employing an illegal worker.

These changes on illegal working are only part of a more fundamental change on immigration, including the introduction of a points based immigration system and the compulsory biometric identity cards.

The key for employers is to avoid race discrimination by only asking relevant questions of those who "look foreign". All employees should be required to demonstrate that they are entitled to live and work in the UK. The BIA has also produced "Guidance for Employers" on the avoidance of unlawful discrimination in employment practice whilst seeking to prevent illegal working and have also issued "Comprehensive Guidance for UK Employers on Preventing Illegal Working" providing more information on the new rules summarised above.

Maternity Pay

The Government proposes to extend Statutory Maternity Pay, Maternity Allowance and Statutory Adoption Pay from 39 weeks to 52 weeks and to introduce Additional Paternity Leave and Pay. It is unlikely this will take effect before April 2010.

Minimum Wage

National Minimum Wage on 1st October 2007, increasing on 1 October 2008 is as follows:

- for over 21 year olds £5.52 increasing to £5.73;
- for 18-21 year olds £4.60 increasing to £4.77; and
- for 16-17 year olds £3.40 increasing to £3.53.

Also as from 1st October 2007 three new classes of persons will be added to those who do not qualify for the national minimum wage, as follows (i) persons doing work experience as part of a further education course; (ii) workers participating in the latest phase of the Leonardo da Vinci Programme (an EC scheme providing participants with vocational training); and (iii) workers participating in the EC Youth in Action Programme.

Agricultural workers have their own special minimum pay rates, depending on "grades" which range from basic trainee to management. As from 1st October the minimum wage for a standard agricultural worker in England and Wales will increase from £5.74 per hour to £6.00 per hour.

The TUC has called for a review of the minimum pay rate for apprentices, most of whom (apprentices aged 16-18 and older apprentices in their first year) are exempt from the minimum wage. A minimum payment of £80 per week has been set for apprentices by the Learning and Skills Council but the TUC has called for an urgent increase to a minimum £110 per week (equivalent to the lower minimum wage rate) in order to address the high drop out rates. Alongside poor pay the TUC identifies inadequate training leading to inequality, particularly amongst young female apprentices working in areas such as hairdressing, early years education and social care - see www.tuc.org.uk/extras/apprenticepay.pdf

Minimum Wage Review on Voluntary Workers

DBERR has recently completed a consultation looking at the question whether the existing provisions of the Minimum Wage Act 1998 as they apply to voluntary workers are fair and clear. It may have come as something of a surprise to many charities to realise that there is a difference between voluntary workers and volunteers. Voluntary workers work under a contract of employment but do not receive payment and are subject to an express exemption from the minimum wage provisions. As employees they fall to be protected under other areas of employment legislation including rules relating to unfair dismissal and discrimination. Volunteers are not employees and have none of the protection afforded to employees or the wider category of worker. We have touched on issues relevant to the employment status of volunteers in previous Employment Update Seminars. In recent years there have been a number of cases involving volunteers seeking to establish an employment relationship the case of *Grayson -v- South East Sheffield CAB (1997)* still being the leading case.

One of the concerns which has fed into the consultation is the uncertainty around expenses paid to voluntary workers can be provided with accommodation and training but who (strictly speaking) can't be reimbursed for the cost of making their own arrangements. Under current legislation voluntary workers are only entitled to claim back expenses incurred while performing their duties leaving many unable to recover incidental expenses such as travel and childcare. In the Grayson case the payment of childcare expenses alongside other out of pocket expenses was not considered to amount to a benefit to the volunteer to shift their relationship to that of an employee. Also, in a move seen to support the government's wish to increase youth volunteering the consultation suggested that youth volunteering charities could be wholly exempted from the minimum wage legislation, allowing them to offer further inducements to support of volunteering.

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Following the consultation DBERR has determined that no changes in the minimum wage rules are required, although further guidance will be issued, hopefully clearing up the issue of expenses. As part of this clarification, the draft Employment Bill has been amended to confirm that expenses will include any expense "reasonably incurred in order to enable the worker to perform his duties" except for accommodation expenses. The Bill is anticipated to come into effect in April 2009.

Smoking ban

This is a reminder, as if you needed one, that the smoking ban came into effect as from 1st July 2007. This applied to all premises or parts of premises used as a place of work by more than one person (even if the persons who work there do so at different times or intermittently). Under the new rules it is an offence to:-

- smoke in any enclosed or substantially enclosed public;
- allow smoking in any such place; or
- fail to display a "no-smoking sign" of a type and size and in a position specified in the regulations.

The list of exempt premises includes private houses, even if someone is working there provided that the work is provision of personal care for a resident or carrying out maintenance work etc. However some local authorities are reported to have withdrawn home care where smoking has caused an unpleasant working environment for staff and argued Health and Safety grounds.

Vulnerable Workers

In England and Wales the Safeguarding Vulnerable Groups Act 2006 (in Scotland the Protection of Vulnerable Groups (Scotland) Act 2007) is concerned with ensuring that people with inappropriate records are not involved in work with children or vulnerable adults.

This establishes an Independent Safeguarding Authority ("ISA"), removing direct responsibility from the government. The ISA will set up and maintain two new lists of names called the "Children's Barred List" and the "Adult's Barred List" which will replace the current List 99, the Protection of Children Act List ("POCA") and the Protection of Vulnerable Adults list ("POVA"). "Regulated Activity Providers" will commit an offence if they employ or engage as a volunteer a person without making checks with the ISA and persons on the lists will commit an offence if they engage or seek to engage in "regulated activity".

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When the new system is in operation it will not always be necessary to do a CRB (Criminal Records Bureau) check as well as an ISA check. However the ISA does not replace the CRB and a CRB check will still be needed where required by law, for example by education staffing regulations and for care workers under the Care Standards Act.

It was announced earlier this year that the new system will start in October 2009.

Without Prejudice

Further guidance has been given by the Court of Appeal on when discussions and correspondence can remain confidential on the basis that it is 'without prejudice' or 'off the record'.

At the root of every employment contract is the implied duty of trust and confidence, which in essence means that the neither party (although we are usually looking at the employer) will do anything to deliberately undermine the relationship. When that relationship breaks down it is understandably tempting simply to tell an employee to clear their desk. Some employers may be generous enough to offer to send personal items along at a later date or to insist that the employee is 'assisted' off the premises at what may be an emotional time.

As always there is the need to follow a fair procedure. However, in trying to identify any issue as requiring attention (it could be conduct, capability or any of the potentially fair reasons for dismissal) there is a danger that you overstep the mark and give too clear a statement that the relationship has already come to an end or that you have pre-determined the outcome of any disciplinary procedure. This would be a breach of the implied term entitling the individual claim that you have repudiated the contract.

To try and avoid this kind of argument any concerns can be raised as part of a 'without prejudice' discussion. Such discussion may be used alongside the usual disciplinary procedure. The normal rule would mean that those discussions, aimed at settling a dispute, would not be admissible in evidence i.e. a Tribunal would not be permitted to take any account of them in determining the facts of any particular case. However cases have already identified that you cannot have a 'without prejudice' discussion before an issue has been identified as needing to be settled (BNP Paribas). It would still be necessary to hold a review meeting, perhaps as part of an investigation, which would seek to identify any potentially disciplinary issues in a formal way and identify any formal steps that may be taken to try and resolve those issues.

We have previously cautioned at our Update seminars that claiming something is 'without prejudice' does not mean to say that you are able to speak without regard for the consequences. In discrimination cases the interests of doing justice may outweigh the need to protect the status of 'without prejudice' discussions.

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In a recent case the Court noted that it may be difficult to prove discrimination if employees are never allowed to refer to 'without prejudice' discussions. The employer publicly alleged that the employee had demanded money as part of settlement negotiations relating to a discrimination claim. The employee was able to rely upon the evidence of a solicitor who was party to the initial without prejudice settlement discussions to support a victimisation claim on the basis that it was the employer who had opened negotiations.

Such discussions can be referred to (i.e. the confidential nature of without prejudice discussions will be lost) where both parties have referred to the 'without prejudice' discussions in the ET1 claim and ET3 response or where an employer has set up an independent (i.e. third party) enquiry into what happened during a 'without prejudice' meeting (i.e. the employer has repeated the confidential discussions to a third party). *Brunel University -v- Webster and Veseghi*

In another case, the Court of Appeal has held that parties must be able to rely upon the confidentiality of 'without prejudice' discussions even where a dispute may not have been identified so long as in the course of negotiations the parties might reasonably have contemplated that litigation could follow if they could not agree terms. This decision gives more flexibility to employers where they look to use 'without prejudice' discussions but care does still need to be taken. In particular employers must recognise that they cannot use 'without prejudice' as a general shield and what they say and do under the 'without prejudice' umbrella may be referred to in a tribunal. *Framlington Group -v- Barnetson*

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