

The Equality Act 2010

The core provisions of the Equality Act 2010 came into force on 1 October 2010.

The Act replaces nine major pieces of discrimination legislation and other ancillary measures that have been introduced over the last forty years to protect people from unfairness and discrimination on grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

These are now called 'protected characteristics'. The Act extends some protections to characteristics that were not previously covered and also strengthens some aspects of equality law.

The Arbitration, Conciliation and Advisory Service has produced a table showing 'what's new and what's changed: at a glance'. This and other guidance on the Equality Act can be found at <http://www.acas.org.uk/>.

Recruitment Policies and the Equality Act

In order to protect job applicants with a disability from discrimination during the recruitment process, Section 60 of the Equality Act prohibits the use of questionnaires on an applicant's general health and related issues prior to a job offer being made. This includes prohibiting the use of such questionnaires before selecting a pool of applicants from whom the successful candidate will be chosen.

The measure does not prevent employers from asking job applicants any questions about their health but stipulates that they are only allowed to do so for the purpose of:

- deciding whether they need to make any reasonable adjustments to enable an applicant to participate in the selection process;
- deciding whether a job applicant can carry out a function that is essential ('intrinsic') to the work concerned;
- monitoring diversity amongst those applying for jobs;
- taking positive action to assist disabled applicants; and
- establishing whether the applicant has a disability where this is a genuine requirement of the job.

It is important to make clear why a particular question is being asked and how the information will be used.

Once a person has been offered a job, whether this is an unconditional or a conditional offer, the employer is

permitted to ask appropriate health-related questions and require a medical assessment where this is normal practice for all applicants.

If a candidate thinks a prospective employer has acted unlawfully by asking questions that are prohibited, he or she can make a complaint to the Equality and Human Rights Commission (EHRC). The EHRC has the power to investigate and take enforcement action where necessary. A serious breach could result in a fine of up to £5,000.

If an employer uses a pre-employment health questionnaire and a disabled job applicant who is unsuccessful brings a claim of disability discrimination, using the questionnaire as evidence in support of his or her claim, it is up to the employer to prove that there was a non-discriminatory reason for not offering that person the job.

Contact us if you would like advice on ensuring your policies and procedures comply with the Equality Act.



Default Retirement Age to be Scrapped

The Government intends to abolish, by 1 October 2011, the Default Retirement Age (DRA) of 65 contained in the Employment Equality (Age) Regulations 2006.

Under proposals put forward for consultation, there will be a six-month transition period beginning on 6 April 2011. From this date, employers will not be able to issue any notification for compulsory retirement using the DRA procedure. Between 6 April and 1 October, only employees who were notified before 6 April and whose retirement date falls before 1 October can be compulsorily retired using the DRA.

From 1 October 2011, the DRA will be abolished and employers relieved of the administrative burden of the associated statutory retirement procedures. From that date, individual employers will only be able to operate a mandatory retirement age if this can be objectively justified as a 'proportionate means of achieving a legitimate aim'. As the consultation points out, 'It is not easy to demonstrate that a retirement age is objectively justified, so the employer should be confident that it can be objectively justified before deciding to use a retirement age' and an employee will still have the right to request to work beyond the employer's mandatory retirement age where one is in operation.



Where an employer chooses to have in place a mandatory retirement age and this cannot be objectively justified, it could face claims of age discrimination and/or unfair dismissal.

This is a radical change in employment law and will impact on many employment rights, such as pension schemes and age-related benefits. We advise that you consider its implications for your business without delay.

Effective Date of Termination – Early Release



The Employment Appeal Tribunal (EAT) has ruled that absolving an employee from working his or her full notice period does not of itself alter the effective date of termination (EDT) for the purposes of deciding whether or not a claim of unfair dismissal was presented within the three-month time limit allowed for bringing a claim (*Wedgewood v Minstergate Hull Ltd.*).

Mr Wedgewood worked as an accountant for Minstergate Hull Ltd., a car dealership. On 4 November 2008 he was sent a letter confirming his selection for redundancy and giving

him notice, which expired on 1 December 2008. Mr Wedgewood wished to leave earlier than this and agreement was reached in writing whereby he would be released on 26 November but would attend a 'handover' meeting on 28 November and be paid up to the expiry of his notice period on 1 December.

On 28 February 2009, Mr Wedgewood brought a claim of unfair dismissal. The issue was whether the agreement between the parties brought forward his EDT. The Employment Tribunal (ET), relying on the judgment in *Palfry v Transco plc*, held that it did and Mr Wedgewood's claim was therefore submitted out of time.

The EAT overturned the ET's decision. In its view, the circumstances in the present case were different from those in *Palfry v Transco*, where the EDT was brought forward by agreement and pay in lieu of notice was given up until the revised date. In this case, there was no change to the EDT. Although Mr Wedgewood was allowed to leave

prior to his EDT, this date was not altered by agreement and he had been paid up to the original date of termination.

The EAT therefore found that the EDT in this case was 1 December 2008 and so Mr Wedgewood's claim was brought in time.

No reference was made in the judgment to the case of *Fitzgerald v University of Kent*, which ruled that the EDT is a statutory construct which depends on what actually happened. It is not open to an employer and employee to alter the date by later agreement. In circumstances where an employee wishes to leave before the expiry of his or her notice period and the employer accedes to this request, the original dismissal notice should be withdrawn and a new notice provided showing the revised termination date.

Contact us for advice on any matter relating to redundancy or dismissal.

Obligations Under TUPE

The Employment Appeal Tribunal (EAT) has reaffirmed (*Todd v Strain and others*) that when there is a 'relevant transfer' under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), the obligation under Regulation 13.2 to inform affected employees and the obligation under Regulation 13.6 to consult 'appropriate representatives' are separate obligations and where there are no appropriate representatives for this consultation process, the transferor is obliged to arrange for their election by employees (Regulation 14).

Ms Todd was the owner of a care home in Glasgow. The business was sold to Care Concern (GB) Ltd., which gave rise to a relevant transfer under TUPE. 32 of the employees brought proceedings in the Employment Tribunal (ET) claiming that Ms Todd had failed to inform and consult them, had not complied with the duty to organise the election of employee representatives and that Care Concern was also jointly and severally liable for this failure by way of TUPE Regulation 15(9).

Some of the care home employees had been given limited information regarding the impending transfer but Ms Todd did not arrange for the election of appropriate representatives. She did not therefore give any information to or consult with any such representatives. Her contention was that she did not envisage taking any measures in connection with the transfer that would impact on any of the employees, so was not under any obligation to consult and the obligation to inform only arose if there was an obligation to consult.

On the facts of the case, the ET found that Ms Todd must have envisaged taking some measures that would affect the employees and was in breach of her duty to inform and consult with them. It ordered Ms Todd to pay each claimant the maximum award of 13 weeks' pay in compensation and

dismissed the claim against Care Concern. Ms Todd appealed against the ET's decision.

The EAT held that the obligation to inform and the obligation to consult are distinct obligations and upheld the ET's finding of liability against Ms Todd. In its view, however, the seriousness of her failure could not be said to be at the extreme end of the scale so as to justify the maximum compensation award. She had given employees some basic information and, importantly, a reassurance that Care Concern would not be making changes in staffing or terms and conditions following the transfer. The EAT therefore substituted an award of seven weeks' pay for each employee.

As regards joint liability, the EAT found the ET's reasoning on this point 'difficult to follow'. The wording of TUPE Regulation 15(9) is unequivocal and the EAT therefore found Care Concern jointly and severally liable for the compensation payable.

Failure to comply with the TUPE provisions can be very expensive for businesses. When a business or business unit is being transferred, with its employees, it is essential to take advice at the beginning of the process in order to avoid the potential pitfalls.



Travel and Subsistence – Minimum Wage Loophole to Close

From 1 January 2011, the National Minimum Wage (NMW) Regulations will be changed in order to close a loophole whereby some Employment Businesses and umbrella companies operate travel and subsistence schemes for temporary workers in order to save on tax and National Insurance Contributions (NICs).

The schemes work by creating a single employment contract for each temporary worker so as to convert what would otherwise be a series of permanent workplaces into temporary workplaces, for which tax relief on travel and subsistence expenses is available. Workers agree to sacrifice a part of their gross pay, which would otherwise be subject to tax and NICs, in return for payments for travel and subsistence expenses. As well as tax and NICs savings for employees, the employer saves on NICs.

Currently, the expenses paid for travel to a temporary workplace can be taken into account when calculating whether or not a worker is being paid the NMW. However, where workers are paid at or near the NMW level, the reduction in their pay for tax and NICs purposes can adversely affect their right to earnings-related contributory benefits.

The Government has decided to tackle the problem by stopping payments made into travel and subsistence tax relief schemes from counting towards the NMW. This solution targets the issue of NMW workers participating in such schemes without affecting other workers, as it does not impact on the tax and NICs treatment of travel and subsistence expenses generally.

Hotel Cleaners Win Minimum Wage Claim

In its 2010 report on the National Minimum Wage (NMW), the Low Pay Commission recommended that HM Revenue and Customs should investigate whether contract and agency cleaners in the hotel sector are receiving their entitlement under the NMW Regulations for their hours worked. A recent case illustrates the sort of practice the measure is intended to target.

In 2009, the BBC carried out an undercover investigation into exploitation of migrant workers at two luxury hotels in London. In particular, they examined the pay of those employed by leading contract cleaning agency Hotelcare, which employs in the region of 2,000 workers at hotels in the UK. The agency cleaners were allowed just 20 minutes to clean each room. They had signed agreements stating that they would be paid the NMW hourly rate and, on average, worked more than 40 hours per week, but this was not reflected in their wages. Their payslips showed that the agency was in fact paying them

according to the number of rooms cleaned each day.

Following the investigation, 13 room attendants have now been awarded back pay and damages after taking their case to the Employment Tribunal, claiming that they had been paid less than the NMW and that insufficient records were kept.

The hourly NMW rate is non-negotiable. Productivity targets cannot be used to justify paying less than the legal rate and the rates apply equally to migrant workers. Employers are required to keep adequate records to show that they are paying workers at least the NMW.

Employers are reminded that new NMW rates came into force on 1 October 2010 and the adult rate is extended to those aged 21 and over. The new rates are as follows:

- The adult hourly rate has increased from £5.80 to £5.93;
- The development rate (which



covers workers aged 18-20 years) increased from £4.83 to £4.92; and

- The rate for workers aged 16 and 17 increased from £3.57 to £3.64.

In addition, an apprentice minimum wage of £2.50 per hour was introduced. The new rate applies to those apprentices who are under 19 and those who are aged 19 and over but in the first year of their apprenticeship.

Contact us if you would like advice to ensure your pay arrangements do not breach the NMW legislation.



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