



Amendments to the Sex Discrimination Act

Last year, the former Equal Opportunities Commission brought judicial review proceedings against the Government regarding some of the provisions of the Employment Equality (Sex Discrimination) Regulations 2005, which made amendments to the Sex Discrimination Act 1975 (SDA) in order to implement the Equal Treatment (Amendment) Directive. The Court judged that the Regulations did not fully implement the Directive and so the Government was required to make amendments to the SDA with regard to pregnancy and maternity leave, discrimination and harassment.



The Sex Discrimination Act 1975 (Amendment) Regulations 2008, which implement these changes, came into force on 6 April 2008.

Specifically, the definition of sexual harassment has been expanded so that the causal

link between the harassment and the sex of the person being harassed has been removed. The change will enable a claim to be made by someone who is not the subject of the unwanted conduct but where its effect is to violate that person's dignity or to create an intimidating environment for them.

As regards an employer's liability for the harassment of employees by a third party, it becomes unlawful for an employer to fail to take reasonably practicable steps to protect an employee from harassment by a third party where such harassment is known to have occurred on at least two other occasions. The person responsible for the harassment does not have to be the same on each occasion.

Changes regarding pregnancy and maternity are the removal of the requirement for a comparator who is not pregnant or not on maternity leave, when a woman brings a claim for discrimination on these grounds, and there must also be no difference between the contractual benefits allowed to women who are on compulsory, ordinary or additional maternity leave.

The amendments that the Government is required to make to the SDA relating to

terms and conditions during maternity leave will be effected by changes to the Maternity and Parental Leave etc. Regulations 1999 and will apply to employees whose expected week of childbirth begins on or after 5 October 2008. This will provide time for businesses to prepare for these changes.

The changes will affect employers who provide non-pay benefits to employees whilst on ordinary maternity leave (e.g. contractual annual leave above the statutory minimum, company cars, gym membership, mobile phones etc.) but who cease providing them during additional maternity leave. Women will also be able to bring a discrimination claim if their employer fails to pay them a discretionary bonus during their two-week period of compulsory maternity leave.



Contact us for advice on making sure your policies and procedures take account of these changes.

The Employment Status of Agency Workers

Under the Employment Rights Act 1996, protection against unfair dismissal is only afforded to employees. For this reason, the exact employment status of an agency worker is often at issue in the courts.

The Court of Appeal has handed down its judgment in *James v Greenwich Council*, which dealt with the employment status of a worker involved in a triangular agency relationship. A number of similar cases had been put on hold pending this decision and it was hoped that it would give guidance on what many regarded as conflicting authorities on this issue. However, the Court of Appeal saw no conflict in the earlier decisions and upheld the ruling of the Employment Appeal Tribunal (EAT) that the agency worker in this case was not the employee of the end user.

Ms James worked for Greenwich Council through an employment agency. There was no contract directly between Ms James and the Council. However, she had signed a 'Temporary Worker Agreement', which set out the terms of her agreement with the agency. This provided, amongst other things, that she contracted with the agency in the capacity of a self-

employed worker in relation to each assignment and that the terms constituted a contract of services and would not give rise to a contract of employment either between the agency and the temporary worker or between the worker and the client. A second agreement, made between the agency and the Council, provided that the worker would be under the supervision, direction and control of the Council but that the agency assumed responsibility for the worker's remuneration and for the deduction and payment of PAYE and NICs.

Ms James was off sick in August and most of September 2004 and was replaced by another agency worker in her absence. When she returned to work, she was told she was no longer required. She claimed that she had been unfairly dismissed, arguing that she had an implied contract of employment, given that she had worked for the Council for a number of years and had been treated in the same way as a permanent employee.

The Employment Tribunal (ET) found that there was no contractual obligation between the Council and Ms James and that there was no implied contract of employment. She could not therefore claim

unfair dismissal. The EAT upheld the ET's decision on the ground that Ms James's appeal raised no question of law. She did not have an implied contract with the Council as no mutuality of obligation existed. In reaching its conclusion, the EAT observed that the mere passage of time was not sufficient to establish any mutual undertaking of legal obligations between the worker and end user. The Court of Appeal agreed and dismissed Ms James's appeal. A contract of employment between an end user and an agency worker should only be implied where this is necessary to give business reality to the relationship between the parties. This was not necessary in this case as the work done could be explained by the existing contracts.

The Court went on to say that the courts and tribunals are 'builders of the law', not 'architects of economic and social policy' and must 'operate within the legal architecture created by others'. Unless Parliament decides to change the current law, Tribunals must continue to apply the principles of the law of contract to the wide spectrum of factual situations that arise.

Contact us for assistance in reviewing your temporary or permanent staff agreements.

New Immigration System – Rules for Highly Skilled Workers

The Government has announced the rules that will apply to highly skilled foreign workers applying to come to the UK under the new Australian-style points based immigration system (PBS). Underpinning the new system will be a five-tier framework – see <http://www.bia.homeoffice.gov.uk/managingborders/managingmigration/apointsbasedsystem/howitworks>.

The PBS is being introduced gradually with the new rules that apply to those in tier 1 – highly skilled workers – having commenced on 29 February 2008.

Any highly skilled foreign nationals currently working

here who want to extend their stay will need to apply under the new system. From April 2008, the new system is rolled out overseas when anyone from India who wants to work in the UK as a highly skilled migrant must apply under the PBS. By summer 2008, the new highly skilled system will operate worldwide.

The aim of the PBS is to ensure that only those migrants whose skills are needed can come to the UK. For further information on the highly skilled migrant programme, see <http://www.bia.homeoffice.gov.uk/workingintheuk/hsmpp/>.

Manual Handling

The Health and Safety Executive (HSE) has reminded employers of their legal duties with regard to manual handling, after an employee was injured when a 50kg sack of basmati rice fell onto the back of his neck.

The man's employer, East End Foods plc, pleaded guilty to failing to take reasonable care of the health and safety of its employees under Section 2(1) of the Health and Safety at Work etc. Act 1974. The company was fined £25,000 with £28,000 costs.

The court heard that during the course of an investigation into the incident, it transpired that large consignments of sacks of rice were routinely manually offloaded from containers without the use of any mechanical aids. The company had not carried out a suitable and sufficient risk assessment for the unloading process, nor had it taken appropriate steps to reduce the risk of injury to the lowest level that is reasonably practicable.

According to HSE statistics, 30 per cent of all acute injuries in the food and drink industry result from bad practice in manual handling, which is defined in the Manual Handling



Operations Regulations 1992 as '...any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or bodily force'.

The HSE has useful guidance on this topic, 'Getting to grips with manual handling – A short guide'. This outlines problems associated with manual handling and sets out best practice in dealing with them. The publication is available at <http://www.hse.gov.uk/pubns/indg143.pdf>. In addition, there is a Manual Handling Assessment Chart Tool, which has been developed to help the user identify the level of risk involved in workplace manual handling activities. This is available at <http://www.hse.gov.uk/msd/mac/>.

Employers who fail to comply with their duties under health and safety law not only risk having to pay fines and possible prosecution but also lay themselves open to claims for damages from employees who suffer injury as a result of poor workplace practices. We can advise you on any aspect of the law on health and safety at work.

Collective Redundancy Consultation – Protective Awards

In *Evans, Motture and Hutchins v Permacell Finesse Ltd.*, the Employment Appeal Tribunal considered an appeal concerning the amount of the protective award payable when there has been a serious breach of the collective consultation provisions of the Trade Union and Labour Relations (Consolidation) Act 1992.

In its view, a serious breach must put the award near the maximum payable and there is now no specific link between the consultation period and the protected period. The Employment Tribunal should have started at a protective award of the maximum 90 days and worked downwards if there were mitigating factors.

This case serves as a further reminder to employers of the potentially serious financial consequences of failing to consult when making collective redundancies. Even if the obligation to consult is for a minimum 30 day period, a serious breach of the requirement can result in employees being granted a 90 day protective award.

New Minimum Wage Rates Announced

The Government has announced increases in the national minimum wage rates in line with the recommendations of the Low Pay Commission. These will apply from October 2008.

will rise from £5.52 to £5.73 an hour. The minimum rate for 18- to 21-year-olds will increase from £4.60 to £4.77 an hour and for 16- to 17-year-olds the rate will be £3.53 an hour instead of £3.40.

the funding available for enforcement of the national minimum wage legislation and the Employment Bill currently before Parliament contains measures to deter non-compliance by introducing tough new penalties for rogue employers who underpay staff.

The adult national minimum wage

The Government has also boosted

Unfair Dismissal and Retirement on Grounds of Ill Health

The Employment Appeal Tribunal (EAT) has ruled (*First West Yorkshire Limited t/a First Leeds v Haigh*) that where an employee is on long-term sick leave and his pension scheme contains provisions entitling him to an ill health pension on grounds of permanent incapacity, an employer will generally be expected to give consideration to ill health retirement before dismissing the employee for incapacity.

Mr Haigh worked as a bus driver for First West Yorkshire Limited and had nearly 30 years' service. In June 2005, he suffered from a suspected stroke while driving a bus. As a result, the DVLA suspended his PSV licence for a minimum of 12 months. In October of that year, the company's occupational health adviser reported that Mr Haigh remained unfit but might be able to undertake alternative duties before the licence suspension period expired. Mr Haigh then suffered a second episode and so it was unlikely that he would regain his PSV licence until October 2006, by which time he

would be 60 years old. The company's pension scheme allowed retirement on the ground of permanent incapacity.

In November 2005 Mr Haigh was dismissed on the ground of incapacity. He appealed and the appeal meeting was adjourned as the medical picture was at that time incomplete. The appeal was resumed on 24 February, before up-to-date information on Mr Haigh's condition had been received from his specialist. He was then given a choice – either he took some further sick pay but lost all opportunity to seek an ill health pension, or he was dismissed. Mr Haigh declined to accept the company's terms and was dismissed.

The Employment Tribunal (ET) was critical of the company's failure to consider sufficiently the medical evidence, particularly with regard to the question of ill health retirement. In the ET's view, Mr Haigh was unfairly dismissed. It appeared that the company wanted to avoid the cost of his ill

health retirement but it was not entitled to deprive him of this right if, ultimately, it should turn out that he was permanently unfit to work. First West Yorkshire appealed against this decision.

The EAT dismissed the appeal. As a general rule, before dismissing an employee who is absent through ill health for an extended period, an employer will be expected to take reasonable steps to consult him, to find out by means of appropriate medical evidence the nature of and the prognosis for his condition and to consider alternative employment. The EAT went on to say that where an employer 'provides an enhanced pension on retirement through ill health, it seems to us that an employer will also be expected to take reasonable steps to ascertain whether the employee is entitled to the benefit of ill health retirement'.

Managing long-term sickness can present significant challenges. Contact us for individual advice on this issue.



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