




EMPLOYMENT MEMO 2007

Newsletter Issue 4

January 2008

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Welcome to the fourth Employment Memo 2007 newsletter, which consolidates the update items for October through to January and sets out the rate and award changes that come into effect on 1 February. All the changes and developments covered in the Employment Memo 2007 newsletters have been incorporated into our next edition, Employment Memo 2008, which publishes in February. This newsletter also focuses on future developments and proposals - which should serve to emphasise the importance of our updating service over the next year.

We hope that you have found Employment Memo 2007 a useful, practical and up-to-date guide on all employment matters and we look forward to welcoming you to Employment Memo 2008.

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Focus on – future developments and changes

Employment law never stands still and the next year few years will prove to be no exception. Expected developments in the year ahead - and beyond - include repealing the rules on compulsory statutory dismissal and disciplinary procedures, a new regime to make it easier to enforce the payment of the national minimum wage, legislation bringing the various strands of equality law together, the implementation of extended paternity leave, the possibility of extending the right to request flexible working to parents of older children and new law to extend employee pension rights.

A. Bills going through Parliament

Employment Bill (previously Employment Simplification Bill)

1. Of primary importance is that the rules relating to **disciplinary and dismissal procedures** will be substantially and fundamentally reformed. The requirement to follow statutory dismissal and disciplinary procedures, which has been subject to much criticism since the procedures were introduced in 2004, will be removed and the provisions relating to them repealed. Instead tribunals will have the discretion to increase or decrease compensation by up to 25% if either employer or employee unreasonably fails to follow a code of practice issued by ACAS. It seems likely that such a code of practice will be similar to that already in force in relation to discipline and dismissal. However, this change is not likely to come into force until **spring of 2009**.

At the same time, the rules covering the situation where a dismissal is found to be unfair but a tribunal considers that the employee would have been dismissed in any event will return to the position prior to the Employment Act 2002. This means that where a tribunal considers that a fair procedure has not been followed, they will find the dismissal unfair but can reduce the compensation awarded to reflect the fact that the employee would probably have been dismissed.

The third major change will be that ACAS will no longer be restricted to conciliating for a fixed period at the early stages of an employment tribunal dispute, but will continue to have a duty to seek to conciliate right up until the tribunal makes its decision. However, where proceedings have not yet been started, ACAS will be allowed to decline to conciliate if they consider that they are unlikely to succeed in resolving the dispute.

2. There will also be changes to the **minimum wage regulations**, which are geared to make the enforcement of payment of the minimum wage easier, and to give added remedies to employees who are underpaid for long periods. To improve enforcement, instead of a two stage process where Revenue and Customs issues first an enforcement notice and then a penalty notice, it will be able to issue a single underpayment notice.

Further, a new method of calculating arrears will become available, in addition to the current method, which will allow employees to recover a proportion of their arrears at an increased rate of NMW if the rate has increased while they have been underpaid. Workers will also be able to recover sums to compensate them for losses they have suffered as a result of being underpaid, over and above their actual arrears. So, for example, if they would have built up savings and earned interest had they been paid the proper rate, they can be compensated for that loss.

Finally, adult cadet force volunteers will be also excluded from the right to the minimum wage.

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3. Trade union law will be amended to allow trade unions to exclude or expel members of political parties. This follows the case of *ASLEF v UK* [2007] IRLR 311, ECHR where the European Court of Human Rights found that the rules preventing this contravened the union's rights of association under the European Convention on Human Rights.

Pensions Bill

Under this bill, employer obligations with regard to pension provision will be substantially enhanced. At the moment, the only obligations on employers are:

- to provide access to a stakeholder scheme if they employ 5 or more staff; and/or
- to provide a basic minimum level of pension scheme to employees transferred to them under TUPE, if those employees were members of a pension scheme pre-transfer.

It is proposed that with effect **from 2012**, employers must enrol employees aged between 22 and state pension age and earning a minimum salary into a pension scheme, and then make a minimum contribution of 3% of salary into the scheme. Employees will be obliged to contribute 4% themselves, but can opt out of the scheme if they wish. Whether they are likely to opt out will depend on how the new arrangements affect such things as whether the savings built up will have an adverse impact on entitlement to means-tested benefits.

B. Acts awaiting further implementation

Work and Families Act 2006

The Work and Families Act 2006 will allow fathers (in the broad sense used in that act, covering adoptive fathers and others taking parental responsibility) to take up to **additional paternity leave and pay**. Where such leave is taken, it will reduce the period of maternity leave. The right is likely to be available to fathers of children born after April 2009, but a firm implementation date is still awaited and is not expected to be before **April 2010**.

The Act also has provision for the **increase of statutory maternity pay** from 39 to 52 weeks. Again, there is no firm implementation date and it is not expected to be before **April 2010**.

C. Significant cases due to heard in 2008

Stringer and others v HM Revenue and Customs, Case C-520/06: In *Stringer and others v HM Revenue and Customs* (formerly *Commissioners of Inland Revenue v Ainsworth*), the ECJ is considering a reference from the House of Lords on an appeal from the Court of Appeal (*Inland Revenue v Ainsworth* [2005] IRLR 465, CA) on the question of whether statutory annual leave entitlement accrues while an employee is on long-term sick leave.

On 24 January 2008, Advocate General Trstenjak gave her Opinion and opined that workers are entitled to accrue the right to paid statutory annual leave while they are on sick leave. However, they cannot take holiday while they are unfit to work and can only opt to take holiday when they return to work. If their employment is terminated they will be entitled to pay in lieu of annual leave which has accrued while they were on sick leave. This Opinion will be considered by the ECJ in making their decision. While they are not obliged to follow the Advocate General's Opinion, they very frequently do. It will be several months before a final ruling is made.

Comment: Readers should note that untaken leave is lost at the end of the annual leave year (see ¶4018) and, if the AG's Opinion is followed, it is presumed that only accrued leave relating to sick leave absence in the annual leave year relating to the worker's return to work will be able to be taken.

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Abbey National plc v Fairbrother: In *Abbey National plc v Fairbrother* [2005] IRLR 320, EAT, the EAT considered the situation where it is alleged that an employer had handled a grievance so badly that it damaged trust and confidence with the employee so that the employee had been constructively dismissed and held that an employer will only breach his implied duty of trust and confidence if his conduct of the grievance procedure as a whole was outside the range of reasonable responses to the grievance presented by the employee. This case has been criticised for importing the “range of reasonable responses” test required in unfair dismissal cases to employers’ handling of grievances. The decision is to be reviewed by the Court of Appeal.

Heyday litigation: The challenge by National Council for Ageing (commonly known as the 'Heyday' or Age Concern litigation) to the Age Regulations has been referred by the High Court to the ECJ (*R(on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2007] EWHCB8 (Admin), see the update to ¶¶5600, 8201 in Recent Cases). The main question to be considered is whether the default retirement age of 65 permitted by the regulations is consistent with the European Equal Treatment Directive. The ET President issued a practice directive last November staying any cases challenging the default retirement age until the case of *Age Concern v Secretary of State for BERR* has been heard.

Oyarce v Cheshire County Council: In *Oyarce v Cheshire County Council* [2007] ICR 1693, EAT, the EAT held that the statutory reversal of the burden of proof, in race discrimination cases, did not extend to claims of victimisation. Such an outcome gives an unsatisfactory inconsistency in the standard of proof in discrimination claims, which is unlikely to have been intended when the legislation was drafted. The issue is to be reconsidered by the Court of Appeal.

Coleman v Attridge Law: The Disability Discrimination Act 1995 does not protect a person who has experienced discrimination on the grounds of someone else’s disability: such as a person who cares for a disabled person, or the parents or children of a disabled person. The Act is narrower than the European Equal Treatment Framework Directive, which prohibits discrimination on grounds of disability, and does not limit this restriction only to disabled people. In *Attridge Law and anor v Coleman* [2007] IRLR 88, EAT, the EAT has allowed a discrimination case brought by a carer for a disabled person to be referred to the ECJ to ascertain whether the Act correctly implements the Directive.

James v London Borough of Greenwich: Last October, the Court of Appeal heard an appeal against the decision of the EAT in *James v London Borough of Greenwich* [2007] IRLR 168, EAT, but the judgment of the court is still awaited. In *James*, the EAT expressed the view that it will only be in the most exceptional case that there will be evidence to support a finding that an agency worker is an employee of the end user where they work. While this has been followed in other EAT judgments and has been treated as authoritative, in a number of previous cases courts and tribunals have been willing to imply such an employment contract, and the Court of Appeal’s decision in this case will be an important indication of how such cases will be decided in the future.

D. Other proposed changes

Right to request flexible work – consultation on extension

BERR has been seeking initial views about extending the right to request flexible working to parents of all older children, not just those with disabilities. Questionnaires for both employers and employees to give their views and share their experiences are available to download from the BERR website, and will be followed up with a formal consultation exercise in spring 2008. Legislative change is unlikely to be in place before **spring of 2009**.

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Atypical workers rights

An open consultation exercise by the EU commission has invited discussion of how it might be possible to promote flexible working patterns such as part time working and home working, whilst maintaining a minimum level of employment protection for such workers. In doing so, they raised the question of whether it would be possible to introduce a Europe-wide definition of employment and self employment, and have revived discussion of the possibility of introducing a directive giving protection to agency workers. This is a matter which has previously been raised, but has not made progress because of strong opposition from a number of member states and organisations. Some additional protection for those working under contracts other than full-time permanent contracts is on the agenda for the next few years, but change will probably be slow to come. The focus is likely to be on controlling undeclared work, moving towards a clearer distinction between employment and self-employment, providing training and social security benefits to facilitate changes of job, and a clarification of the rights of those in sub-contracting chains or three-party agency arrangements.

Harmonising discrimination law

Consultation has taken place on proposals to harmonise and modernise discrimination law, moving from the current 9 separate sets of legislation to a single act. The proposals suggest that although overall, the level of protection will be maintained at the present level, the intention is to introduce a single set of definitions and standards. For example, under the new act, the meaning of "indirect discrimination" will be the same wherever it is used - unlike the present situation. Likewise, where justification is allowed, the defence will be defined in the same way throughout.

Another significant change proposed would be to simplify the definition of disability discrimination; in particular, disability will no longer be defined by reference to a list of factors such as mobility, eyesight or manual dexterity. Some differences will be kept – for example, there is no intention to expand the concept of a "genuine occupational qualification" to cases of disability discrimination. There is some discussion in the paper about the introduction of "balancing measures" to promote equality; these will be purely voluntary, must not amount to positive discrimination, and where used must be shown to be necessary, proportionate and time-limited.

Other measures under consideration include rules preventing private clubs with more than 25 members from differential treatment of men and women (whilst still permitting single group clubs – e.g. all women, all one age group, or all one religion), and extending protection from harassment beyond the workplace to groups not currently protected – including on the grounds of religious belief or sexual orientation.

Although not mentioned in the Queen's speech, the Government has indicated that it still intends to put forward a draft bill, though when this will happen is not clear.

Facilities for workplace representatives

In November, the Government published its response to consultation regarding protection for, and employers' obligations to provide facilities and training to workplace representatives. Broadly, it concluded that few problems experienced by representatives stemmed from lack of regulation, and the recommendations made mainly promote the provision of online training and the making of statements in support of the role of representatives. Changes are to be made to the existing ACAS code of practice to:

- encourage the provision of access to IT facilities for representatives;
- cover the position of representatives with responsibility for more than one area of responsibility, for example both health and safety and consultation regarding business transfers; and
- emphasise the importance of training for representatives.

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Contract, variation and breach

Terms implied by common law

Collective agreements

Whether term is incorporated in individual employment contracts

1. ¶1279 In a case concerning the incorporation of terms of a collective agreement into individual employment contracts, the EAT considered the situation of three wardens employed under contracts which provided, amongst other things, that salary and conditions were "in accordance with" a particular collective agreement. On a close reading of the contracts it became clear that some provisions of the collective agreement had been adopted wholesale, while other provisions of the collective agreement (including those concerning maternity pay) had been disregarded entirely. It followed that terms in the collective agreement relating to allowances for night time working, which were not mentioned in the individual employment contracts, had not been incorporated into them.

Stenson, Torrie and Marshall v West Dunbartonshire Council [2007] EAT 0089/06

2. ¶¶1279, 6736, 6532 In a case concerning an employee who was accused of harassing a fellow employee, was investigated by his employer and subsequently suffered workplace stress, the Court of Appeal considered the contractual status of two collective agreements, one of which was an equality policy and the other a procedure for investigating complaints of harassment. The first was found to be merely indicative of the sorts of standards that the Council considered appropriate, and not sufficiently precise to be contractual. The second document, although issued in conjunction with the first, was more precise. It was a formal procedure for complaint handling. The Court held that its terms had become contractually binding. Indeed, the Court went further and stated that, as a general principle of law, where an employer has published and implemented with the concurrence of employees' representatives formal procedures providing for the manner in which complaints are to be investigated, it will usually become a term of the contract of employment that those procedures will be followed.

Bristol City Council v Deadman [2007] IRLR 888, CA

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Flexible working

Fixed-term working

1. Discrimination on grounds of fixed-term status

¶1951 In a case concerning the implementation of the Fixed-Term Work Directive, the ECJ has ruled that a provision of a collective agreement operative in the Spanish health service, which provided additional salary to permanent employees only, discriminated against fixed-term workers. The term had come about as a result of a collective agreement. That alone could not be enough for the term to be objectively justified (¶2011).

Alonso v Osakidetza-Servicio Vasco de Salud [2007] Case C-307/05, ECJ

2. Less favourable treatment

¶¶1951, 1965 In a case concerning the implementation of the Fixed-Term Work Directive, the European Court of Justice has ruled that a provision of a collective agreement operative in the Spanish health service, which provided additional salary benefit to permanent employees only and not to workers employed on fixed-term contracts, discriminated against fixed-term workers.

Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud, Case C-307/05 [2007] IRLR 911, ECJ

Comment. The UK government intervened in this case to argue that the protection offered by the Directive extended only to employment conditions and not to pay (¶1965). The Court rejected this approach, holding that unequal pay comes within the scope of the Directive.

Company information

Intellectual property rights

Patents

¶2341 Where an employee makes a registered invention in circumstances such that an invention might reasonably be expected to result, the employer becomes the deemed inventor. Here, a manager at the London Futures Exchange was asked to devise a system to enable various trades to be made. The invention he came up with was however more radical than anything he had been asked to do. The manager then proceeded to patent the invention in the US. The employer sought a declaration that it was entitled to the confidential information. The Court of Appeal held that while the initial contractual duties of the manager had not included work of this character, the task of devising such a system had been assigned to him, and at that point became part of his normal duties. Further, when deciding whether the invention was made in circumstances such that an invention might be expected to result, the task of the court was to assess the question objectively. There was no need to imply any additional test that an invention could only result where it was similar to what might have been expected, or provided a solution to a pre-identified problem. Accordingly, the employer was entitled to the inventions.

LIFFE Administration and Management v Pinkava [2007] ICR 1489, CA

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Remuneration

Refusal to work

Whether quantum meruit applies during non-strike industrial actions

¶¶3007, 7400 If the employee refuses to perform all of his contractual duties, he is not entitled to his full contractual wage and his employer can deduct a sum equal to the proportion of time the employee deliberately refuses or fails to fulfil his contractual duties. This is based on the quantum meruit principle (¶2817). However, a county court has recently held that this does not apply where employees are engaged in non-strike industrial action. In such instances, the employees take the risk that even if they present for work and undertake some or most of their ordinary duties, the employer is under no obligation to pay them and will not be in breach of contract if he does not do so. If the employees get anything, the county court held, it will be more than they are legally entitled to expect. This will be all the more so where the employer has expressly stated that full pay will not be paid to participants of the industrial action and that any payments made will be substantially less than their normal pay.

In this test case, S, a lecturer, was unsuccessful in seeking to recover some or all of the 30% deduction to her wages which was deducted for the period in which she took part in an industrial action short of a strike even though S claimed that she had performed nearly all of her of her contractual duties.

Spackman v London Metropolitan University [2007] IRLR 744, CC

Parents' and carers' rights

Maternity rights

Dismissal prepared during maternity leave

¶4448 Workers have a right to return to work after maternity leave (¶¶4448, 4473). This implements the protection given in EC Directive 1992/85.

In a case concerning a worker who was dismissed eleven weeks after her return to work, the ECJ has ruled that the Directive extends protection not merely to those workers who are actually dismissed during their maternity leave, but also to those who are dismissed where the employer has taken preparatory steps for such a decision before the end of the maternity leave period.

Nadine Paquay v Société d'architectes Hoet + Minne SPRL, Case C-460/06, ECJ

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Health and safety

Statutory duties

Reduction of risk in manual handling operations

¶4870 As an example of the rules concerning the reduction of risk in manual handling operations, the Court of Appeal has considered the case of an employee whose back was injured while working as part of a group of four employees moving large machines in a factory. Preventive measures which the employer could have taken would have included the use of mechanical lifting devices or the use of more personnel in the group. Further the employer had not carried out a risk assessment. The Court held that the employer had not taken all reasonable and practical measures to reduce the risk.

Gravatom Engineering Systems Limited v Parr [2007] EWCA Civ 967

Stress

Caused by failure to follow procedures

¶¶4947, 6736, 6532 In a case concerning an employee who was accused of harassing a fellow employee, was investigated by his employer, and subsequently suffered workplace stress, the Court of Appeal considered the argument that the stress had been induced by employer's failure to correctly follow disciplinary procedures at work, rather than by the work itself. On a close reading of the council's equality and harassment policies, the Court held that the relevant breaches were two-fold. First, there was a failure on the part of the employer to convene a panel of three members to investigate the complaint. The panel, as assembled, had only two members. Second, having realised this fault, the employer decided to reconvene the panel, and it informed the employee of this decision by leaving a letter on his desk, which he received on arriving at the office to start work in the morning. The Court held that the first breach was a breach of contract and a breach of the employer's duty of care, but it was not reasonably foreseeable (¶4947) that such a failure would result in psychiatric harm. Neither was it foreseeable that the manner of the delivery of the letter would result in harm.

Bristol City Council v Deadman [2007] IRLR 888, CA

Drugs and alcohol

Unfair dismissal

¶4974 In a recent EAT case, an employer's alcohol policy provided for suspension of disciplinary action where an employee sought help to cure his alcoholism. The employer dismissed an employee who was drunk at work, but without providing a copy of the alcohol policy to the employee until immediately before the hearing which resulted in his dismissal. Further, the employer failed to consider any steps the employee could take which might have resulted in the disciplinary action being suspended. The EAT found that the employee had been unfairly dismissed. It also however approved a reduction in the award to reflect the extent that the employee's alcoholism had contributed to his dismissal (¶8635). Further, it remitted the matter back to the tribunal to consider the appropriate percentage, which on the facts the EAT held was 25 percent or greater.

Sinclair v Wandsworth Council [2007] EAT case 0145/07

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Equality at work

Discrimination — key concepts

Worker's liability

¶5233 A male firefighter sued his employer for sex discrimination, naming as a second respondent a senior officer in the local fire service. The officer sought to have this part of the claim struck out at a pre-hearing on the basis that primary responsibility for eradicating unlawful discrimination should rest as a matter of policy with the employer. The Tribunal allowed the claim to proceed, as did the EAT, observing that the SDA specifically allows claimants to bring an action against a worker who knowingly discriminates as well as against the employer.

With regard to what amounts to knowingly discriminating, the EAT interpreted this phrase to mean that if a fellow employee does an act in the course of his employment which has the effect of discriminating against the claimant employee, and that result can be concluded to have been in his knowledge at the time that he carried out the act, the requirements of the statute are met. The EAT further held that discrimination can only be shown, or refuted, on the basis of evidence, and therefore it was not appropriate to strike out such a claim without a full hearing.

Allaway v Reilly [2007] IRLR 865, EAT

Racial and religion or belief discrimination

Meaning of philosophical belief

¶5383 Since 30 April 2007, the definition of religion or belief has been extended to cover "any religion" and "any religious or philosophical belief" including "a lack of religion" and "a lack of belief" (see Newsletter 1 and earlier update to ¶5383). A recent and high-profile EAT case has addressed the meaning of philosophical belief.

M was a Justice of the Peace, sitting on the Family Panel which, amongst other things, places children for adoption. He was concerned by the thought of same sex adoption. The magistrate believed that arguments in favour of allowing same sex couples to adopt were inadequately supported by evidence. In the absence of such evidence, he felt that to subject children to same sex adoption would be to treat them like guinea pigs. Rather than continue with duties, in the course of which he might have been required to order such an adoption, M resigned and claimed discrimination on the ground of religion or belief. The EAT held that for a belief to be protected, there must be a religious or philosophical viewpoint in which the party concerned actually believes. A concern based on lack of evidence was not enough to constitute a belief for the purpose of the Regulations. Accordingly, M's opinion was not protected, and his case was lost.

McClintock v Department of Constitutional Affairs [2008] IRLR 29, EAT

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Disability discrimination

1. Method to investigate whether adjustments were reasonable

¶5530 The EAT has held that where a tribunal investigates a worker's claim that an employer has failed to comply with a duty to make a reasonable adjustment, the tribunal must identify, in the following order:

- a. the provision, criterion or practice applied by or on behalf of an employer, or the physical feature of premises occupied by the employer;
- b. the identity of non-disabled comparator(s); and
- c. the nature and extent of the substantial disadvantage suffered by the Claimant.

Unless the Employment Tribunal has identified the matters above, the EAT held, it cannot go on to judge if any proposed adjustment is reasonable.

Environment Agency v Rowan [2008] IRLR 20, EAT

2. Reasonable adjustment: objective determination

¶5553 When the duty to make a reasonable adjustment has arisen, the employer must make such adjustments as are reasonable in order to prevent the disadvantage. Whether any particular adjustment is reasonable will be determined objectively.

As an example of these rules, the Court of Appeal in Northern Ireland considered the case of a person with mild to moderate dyslexia who applied for a management trainee post with a housing executive. Psychometric tests were set to determine who would be interviewed, and the candidate was allowed 20% extra time. The candidate scored poorly and was not invited to interview. He claimed that the result was discriminatory, and in breach of the executive's disability code of practice, which provided that "testing will only be applied to disabled candidates where appropriate." The Court of Appeal held that despite the provisions of the employer's code, the employer's legal duty was only to put the candidate on an equal footing with other non-disabled candidates, and this had been done.

Arthur v Northern Ireland Housing Executive [2007] NICA 25

Age discrimination

1. ECJ challenge

¶¶5600, 8201 In a long-standing case (commonly known as the 'Heyday' litigation) concerning the compatibility of the UK regulations outlawing discrimination on grounds of age with the EC Equal Treatment Amendment Directive, the High Court has finalised the questions which are to be referred to the ECJ. In essence, they ask:

- whether the parts of the regulations that concern retirement are compatible with the Directive;
- whether the Directive gives a general scope for direct age discrimination to be objectively justified, or does it require that justification be founded upon a given reason, such as those listed in the Directive; and
- whether there should be any significant practical differences between the tests for the justification of direct and indirect age discrimination?

R (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform [2007] EWHC B8 (Admin)

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2. Justification

¶5615 In a widely-reported case, concerning a senior lawyer who was reported to be claiming £4.5 million in damages for age discrimination, an employment tribunal has considered the scope of justification that is allowed as a defence.

In this case, the tribunal dismissed the lawyer's claim on two grounds:

- the parts of the Regulations that prohibit discrimination in the terms of pension schemes came into force on 1 December 2006, and at the time that the lawyer left the law firm in question they had not yet come into force; and
- even if the scheme was potentially discriminatory, the means adopted by the firm (including a lengthy and thorough consultation) were proportionate (¶5616), and the intention of the firm (to make the scheme more financially sustainable and fairer for younger partners) was legitimate (¶5617). It followed that any discrimination was justified.

Bloxham v Freshfield Bruckhaus Deringer [2007] ET case 2205086/06

Equal pay

1. Appropriate pool for comparison

¶5665 Before 1994, British Airways operated a policy that cabin crew could be employed on one of two grades. Those agreeing to work full-time had the benefit of a salary, plus cost of living pay rises and incremental pay rises. Those working part-time received a proportion of the same salary and the cost of living pay rises but not the incremental pay rises. Inevitably, their pay fell behind. Relatively few employees worked part-time, but of those who did a majority were women. In 1994 there were 495 part-time staff out of a total of 9,915: 471 of them were women and 24 were men. In deciding on appropriate pools for comparison, the Court of Appeal had to consider whether it was right to begin from the advantaged group or the disadvantaged group. If the former approach had been adopted, the evidence of sex discrimination would be slight: women were a majority in both the advantaged and the disadvantaged groups. On the other hand, if the comparison began from the disadvantaged group, then women outnumbered men considerably, by a ratio of 20 to 1.

The Court held that there is no universal rule for choosing the appropriate comparator, the answer will depend on all the facts of the case. There is however no rule of law that it is better to begin from the advantaged rather than the disadvantaged group. Here, the latter was the appropriate starting point.

Grundy v British Airways Plc [2007] EWCA Civ 1020

2. Defence

¶5682 The Court of Appeal has confirmed the EAT decision's in *Redcar and Cleveland Borough Council v Bainbridge and ors* (see Newsletter 1 and earlier update to ¶5682) and dismissed the Council's appeal.

Redcar and Cleveland Borough Council v Bainbridge and ors [2007] EWCA Civ 929 now reported at [2007] IRLR 984, CA

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Remedies

Time limit for bringing an equal pay claim following transfer

¶5723 In a case concerning the time limit for bringing an equal pay claim following a TUPE transfer, the EAT has considered the case of two union employees whose employment was transferred to their current employers in 1993.

As a matter of statutory construction the EAT held that the correct time limit for bringing an equal pay claim is 6 months. The TUPE legislation which protects the rights of employees during business transfers does not extend the limit. Where there is a business transfer, the time limit is 6 months from the termination of the employment with the transferor. This limit applies to all categories of equal pay claim, whether the reimbursement is a bonus, salary, pension, or in any other form.

Unison v Allen [2007] IRLR 975, EAT

Best practice

Dress code and worker's hair

¶5383 In a case concerning a dreadlocked Rastafarian driver, who was dismissed for his untidy appearance, the EAT held that the reason for the dismissal was not a company prohibition against dreadlocks (a policy which would indirectly discriminate against Rastafarians) but a prohibition against untidy hair. Accordingly, there was no discrimination.

Harris v NKL Automotive Ltd and First Matrix Consultancy UK Ltd [2007] EAT case 0134/07

Trade unions and industrial action

Individual trade union rights

Method of calculating remedy for unjustifiable discipline approved

¶7147 The EAT has approved the approach of the EAT in *Massey v Unifi* (previously *Massey v Amicus*, see Newsletter 1 and earlier update to ¶7147) where a successful complaint of unjustifiable discipline by a union resulted in an award of damages based on the scales used for in compensation in sex or race discrimination cases. On appeal by the union member, it was held that the original award had been at the wrong point in the scales: and the award of £17,000 was increased to £25,000.

Massey v Unifi [2007] EWCA Civ 800

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Transfer of the business

Transfer of employees

Employee objection to transfer

¶7968 Employees have the right to object to the automatic transfer of their contracts of employment. As the consequences are severe (and potentially deny the employee protection under TUPE), there must be clear evidence of the objection.

The High Court has recently held that there was sufficient evidence of an employee's refusal to transfer after he resigned once details of the transfer were known by him 2 days after the transfer.

New ISG Ltd v Vernon [2007] EWHC 2665 (Ch)

Transfer of rights and liabilities

No conference of additional rights

¶7980 The Court of Appeal has recently held that while the aim of the TUPE regulations and Acquired Rights provisions is to prevent an employee in an undertaking from being prejudiced as a result of a transfer of the undertaking and enable the length of the employee's service with the transferor to be used in the determination of certain rights of the employee (e.g. calculation of redundancy and severance payments, calculation of length of notice and of qualifying periods), it is not their objective to confer additional rights on the employee or to improve his situation.

In this case, J, a transferred employee, brought proceedings against her new employer, CIS, for damages for non-payment of enhanced contractual severance pay. J had joined her original employer in 1999 and was transferred to CIS in 2004. CIS made her redundant in 2005. Her employment contract with her original employer contained no provision for enhanced severance pay. However, CIS operated an enhanced severance pay scheme based on a dual system of redundancy terms which distinguished between employees whose date of entry was pre-1 March 2002 (who were entitled to enhanced severance pay) and "New Entrants after 1 March 2002" (who were not so entitled). While these terms were incorporated in, and became part of J's contract under TUPE when she transferred in 2004, the Court of Appeal held that J was not entitled to be treated as a pre-1 March 2002 joiner of CIS by virtue of her deemed continuity of employment with CIS (¶7981). The pre-1 March 2002 right was an enhanced right which the employee was not entitled to on transfer in 2004.

Jackson v Computershare Investor Services Plc [2007] EWCA Civ 1065


Varying terms and conditions

Favourable conditions agreed on transfer

¶¶8015+ The Court of Appeal has confirmed the EAT decision in *Power v Regent Security Services Ltd* (see Newsletter 2 and earlier update to ¶8015).

Power v Regent Security Services Ltd [2008] IRLR 66, CA

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Ending employment

Retirement

Whether compulsory retirement constitutes age discrimination

¶¶8201, 5639 Non-discrimination on grounds of age is a general principle of European Community law. It does not follow, however, that compulsory retirement ages are in fact contrary to European law.

In a case concerning a collective agreement which regulates the Spanish textile trade (see Newsletter 1 and earlier update to ¶8201 for the Advocate General of the ECJ's opinion), the ECJ has now delivered its judgment and has held that, compulsory retirement ages are not contrary to European anti-discrimination law where they are objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market, and where the means put in place to achieve that aim are not inappropriate or unnecessary.

Palacios de la Villa v Cortefiel Servicios SA, Case C-411/05, ECJ now reported at [2007] IRLR 989, ECJ

Unfair dismissal

Some other substantial reason

¶8545 The Court of Appeal has confirmed that a SOSR may apply to a genuine but mistaken belief that continued employment would be unlawful (for example, a breach of the immigration rules).

In this case, K, a Russian national, was granted, in 1999, limited leave to remain for a period of 5 years until May 2004. In November 2000 she entered the Council's employment. The Council summarily dismissed her in August 2005 on the grounds that K had lost the right to work after her original limited leave to remain had expired. In fact K had made an in-time application to the immigration authorities at the Home Office and as her application had not been properly determined at the date of her dismissal she could have lawfully continued in employment pending its proper determination. The Court of Appeal held that the Council did have a fair reason for dismissing K as its genuine but mistaken belief was that to continue employing K would be unlawful. However, as the Council had failed to follow the prescribed dismissal procedures K's dismissal was procedurally unfair.

Klusova v London Borough of Hounslow [2007] EWCA Civ 1127

Redundancy

Alternative employment (statutory trial period)

¶8872 The EAT has confirmed that an employee that he will lose his redundancy entitlement if he works beyond the end of the trial period (without agreeing an extension), or the end of the agreed extended period.

Optical Express Ltd v Williams [2007] IRLR 936, EAT

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Collective consultation

1. ¶8917 The EAT has confirmed that all voluntary redundancies must be included in determining the number of proposed redundancies for the purposes of collective redundancy obligations.

Optare Group Ltd v Transport and General Workers' Union [2007] IRLR 931, EAT

2. ¶¶8926, 8924 The principle that an employer is not required to consult about the reasons for whether or not a plant should close (*R v British Coal Corporation, ex parte Vardy* [1993] IRLR 104, QBD) has been held by the EAT to be no longer good law. In a closure context where it is recognised that dismissals will inevitably, or almost inevitably, result from the closure, dismissals are proposed at the point when the closure is proposed. Consequently, it is artificial to distinguish between the reason for the closure and the reason for the dismissals, since they will be inextricably interlinked and the obligation to consult over avoiding the proposed redundancies will inevitably involve engaging with the reasons for the dismissals, and that in turn requires consultation over the reasons for the closure. Consultation as to the reasons for the closure is required from when the closure is fixed as a clear, albeit provisional, intention i.e. when it is a possibility though not when it is merely mooted as a possibility.

In this case the EAT upheld maximum protective awards for failure to consult properly over mass redundancies due to a colliery closure. CM started formal consultation for the proposed redundancies on the grounds that they had to cease production at the colliery for safety reasons. This was not true; the real reason for the closure was the economic difficulties facing the employers. The EAT held that CM had failed to comply with the duty to consult when it gave a deliberately misleading reason for the closure. Firstly, this affected the nature of the subsequent consultation. Secondly, despite CM's argument that it was not obliged to consult over the reason for the colliery closure and consequently it did not matter that it gave misleading information as to it, the EAT held that, given the increased requirements regarding domestic consultations, the collective redundancy consultation requirements must now be interpreted to require consultation over the decision to close a workplace which meant that CM had failed to properly consult with the unions.

UK Coal Mining Ltd v (1)National Union of Mineworkers (Northumberland Area); (2) British Association of Colliery Management [2007] EAT Case 0397/06 and 0141/07

Employment claims

Tribunal claims

Time limits (electronic submission)

¶9473 The EAT has recently confirmed that where a claim is submitted electronically, a strict view will be taken about whether the claim has been submitted in time. In this case, the claimant electronically submitted his claim at 23.59.59 on the last day he had to make his claim. It was received at 00.00.08 and was held to be 9 seconds out of time.

Miller v Community Links Trust Ltd [2007] EAT case 0486/07

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Time and limits

Discretion to extend: disability

¶9475 In cases where the time limit for submitting a tribunal claim may be extended beyond 3 months where it is just and equitable to do so (for a list of the relevant jurisdictions, see ¶9490), the tribunal is entitled to take into consideration any factors which it considers to be relevant, including whether the claimant can show a good reason for not presenting the claim in time and whether he acted reasonably promptly once it became apparent to him that a claim was appropriate.

Here, the Court of Appeal considered the case of a chief executive who was subject to an accusation of fraud. Suffering from depression, and on the advice of his doctors, he failed to attend various investigatory and disciplinary hearings and was dismissed. He submitted a claim of unfair dismissal within time and a further claim of disability discrimination, outside the three-month time limit. The Court held that the tribunal should have exercised its discretion and allowed the claim to be heard, since the main reason for the employer presenting his claim late was his reluctance to admit that he was so ill as to be disabled.

Department of Constitutional Affairs v Jones [2007] EWCA Civ 894

EAT appeal

Extension of time to serve notice of appeal

¶9758 The EAT has given detailed guidance as to when it will allow an extension of time if the time limit to submit a notice of appeal is missed, emphasising that such extensions will only be granted in exceptional circumstances and that the Registrar should focus on the following three questions: 1. What is the explanation for the delay? 2. Does it provide a good excuse for the default? 3. Are there circumstances which justify the Tribunal taking the exceptional step.

The guidance is summarised as follows:

- the EAT will be more strict about time limits on appeal than at first instance and the 42 day time limit will only be relaxed in rare and exceptional cases.
- there is no excuse even in the case of an unrepresented party for ignorance of the time limits or procedure, however the fault of a legal adviser with regard to the time limit may be a factor which when combined with others might contribute to the exercise of discretion;
- the EAT must be satisfied that there is a full honest and acceptable explanation of the reasons for the delay and it will be astute to any evidence of procedural abuse or intentional default; and
- the EAT will have regard to the length of delay and why a notice of appeal was not submitted through the entirety of the time limit. With regard to the latter point, this means that an analytic approach should be taken to different parts of the period. For example, if a claimant receives the judgment and resolves to appeal in week 1 but suffers a stroke and is physically unable to lodge an appeal in time, a sympathetic approach would be forthcoming for the second segment and also for the first as it would not be just to debar someone for not acting immediately on receipt of a judgment. However, a less sympathetic approach to the first segment might be taken if the stroke occurred in week 6. All would depend on the facts adduced in explanation for not acting during that time.

Muschett v London Borough of Hounslow; Khan v London Probation Service; Ogbunike v Minister Lodge and ors; Tallington Lakes Ltd v Reilly and anor [2007] EAT Cases 0281/07, 0400/07, 0285/07 and 1870/06

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Legislation and other changes

A week's pay and awards

Increase from 1 February 2008

¶¶2923, 7147, 7149, 7569, 8575, 8577, 8587 The current maximum for a week's pay will increase to £330 for cases in which the calculation date (¶2955) falls on or after 1 February 2008 (Employment Rights (Increase of Limits) Order SI 2007/3570).

The following table sets out when the statutory cap applies and maximum limits to the amount of any award:

Entitlement or right subject to the statutory cap for a week's pay: £330	Maximum limit	Para.
Employer's insolvency: guaranteed debts	£2,640 (arrears of pay)/ £1,980 (holiday pay)	¶9053
Flexible working: failure to consider/correctly consider employee's request	£2,640	¶4788
Redundancy pay: statutory (SRP)	£9,900	¶9005
Right to be accompanied: disciplinary/grievance hearing	£660	¶6790
Right to be accompanied: flexible working hearing	£660	¶4788
Trade unions: refusal of employment or employment services of agency on grounds of trade union membership	£63,000	¶7569
Trade unions (statutorily recognised): employer's failure to consult on training	£660	¶7300
Trade union: unjustified discipline, or unreasonable exclusion or expulsion, by union	£72,900 (maximum)/ £6,900 (minimum if applicable)	¶¶7147, 7149
Unfair dismissal: basic award	£9,900 (minimum in certain cases: £4,400)	¶¶8575, 8577
Unfair dismissal: compensatory award	£63,000 (no limit where dismissed unfairly or selected for redundancy for reasons connected with health and safety)	¶8587
Unfair dismissal: additional award (employer's failure to follow statutory disciplinary/grievance procedures)	£1,320	¶8577
Unfair dismissal: additional award (failure to re-employ or reinstate employee)	between £8,580 and £17,160	¶¶8689, 7597
Written particulars: employer's failure to provide statement/incomplete or inaccurate statement	£660 or £1,320	¶1461

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Guarantee payments

Increase from 1 February 2008

¶2924 Guarantee payments will also increase on the 1 February and the new daily limit will be £20.40 for a workless day.

Employment Rights (Increase of Limits) Order SI 2007/3570

Employing illegal migrant workers

New system of civil penalties

¶780 From 29 February 2008, a system of civil penalties will be introduced to penalise employers who unlawfully employ illegal migrant workers. The Border and Immigration Agency will have responsibility for issuing warnings under this scheme and civil penalties. It is envisaged that the amount of a penalty will vary in proportion to:

- the number of warnings that an employer has received;
- the extent to which the employer has previously reported suspected illegal workers to the Border and Immigration Agency; and
- the extent to which the employer has co-operated with the Agency.

The maximum fine will be £10,000 per illegal worker employed.

Comment This scheme is in line with proposals made in a previous government consultation (see Newsletter 2 and earlier update to ¶780).

New statutory Codes of Practice

¶¶780, 785 Two statutory Codes of Practice will come into force on 29 February 2008, and will be of particular relevance to employers who employ migrant workers. 'Civil Penalties for Employers' is a guide to the new system of civil penalties, which the government has introduced to penalise employers who employ illegal migrant workers.

'Guidance for Employers on the Avoidance of Unlawful Discrimination in Employment Practice While Seeking to Prevent Illegal Working' is an update of Home Office guidance, which advises employers on how to avoid racial discrimination claims, while simultaneously maintaining robust procedures to prevent the employment of illegal migrant workers.

Sex and sexual orientation discrimination

Regulations delayed

¶¶5320, 5322, 5360 Following the case of *R (on the application of Equal Opportunities Commission) v Secretary of State for Trade and Industry* (see Newsletter 1 and earlier updates to ¶¶5320, 5322 and 5360), the Government was obliged to introduce regulations to amend the Sex Discrimination Act 1975 (SDA) so as to fully implement the EC Equal Treatment Amendment Directive. The Government initially stated an intention for these regulations to come into force on 1 October; this date has now been put back. Regulations are still expected, however, later this year.

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Employment Judges

¶9605 The Tribunals, Courts and Enforcement Act 2007 has now received Royal Assent. Under one of its provisions, chairmen of employment tribunals will now be referred to as Employment Judges.

s 48(1), Sch 8, para 36 Tribunals, Courts and Enforcement Act 2007 which inserts a new s 3A into the Employment Tribunals Act 1996

Tribunals, Courts and Enforcement Act 2007 (Commencement No. 1) Order SI 2007/2709

Enforcement of ACAS-supervised compromise agreements

New provisions for direct enforcement in county courts

¶¶9305, 9353 The Tribunals, Courts and Enforcement Act 2007 has now received Royal Assent. One of its provisions provides for the direct enforcement for the recovery of sums payable under ACAS-supervised compromises (i.e. an ACAS brokered settlement, or compromise, to avoid proceedings or bring proceedings to an end) in the county courts. This will remove the need to register such agreements with the county court before proceeding to apply for enforcement.

It is not yet clear when the relevant section will come into effect.

s 142 Tribunals, Courts and Enforcement Act 2007 which inserts a new s 19A into the Employment Tribunals Act 1996

Enforcement of tribunal awards

New provisions for direct enforcement in county courts and High Court

¶9715 The Tribunals, Courts and Enforcement Act 2007 has now received Royal Assent. One of its provisions provides for the direct enforcement of tribunal awards in county courts and the High Courts. This will remove the need to register the award or settlement with a county court or the High Court before proceeding to apply for enforcement.

It is not yet clear when the relevant section will come into effect.

s 27 Tribunals, Courts and Enforcement Act 2007

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