



EMPLOYMENT MEMO 2008

Newsletter Issue 1

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Welcome to the Employment Law Memo 2008 newsletter, which complements our online updating services. This newsletter rounds up all the changes which have come into force this April, and highlights cases of particular interest. Further, it also provides a cumulative list of all case updates published in February, March and April.

For the online update service, please click [here](#) for a month-by-month listing of the cases, legislation and proposals covered, and for the facility to search by topic or specific paragraph. We also send emails detailing our updates.

New for 2008: We are delighted to now provide all readers with an online version of the Memo. All the updates are automatically integrated into this service, which means that you can be confident that you are fully up to date.

We hope you find our service useful and informative and welcome any comments you may have as to how we can improve our service.

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[Round up of legislative and other changes](#)

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Disclaimer

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Legislative and other changes in April 2008

Directors

Accounts

- *companies' disclosure obligations under CA 2006*

¶¶2120, 2155 The two sets of regulations detailing companies' disclosure obligations under the Companies Act 2006, one for small companies and groups and one for large and medium-sized companies and groups came into force on 6 April.

Small Companies and Groups (Accounts and Directors' Report) Regulations SI 2008/409

Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations SI 2008/410

- *maintaining up-to-date accounting records and file annual returns*

¶2155 Certain provisions of the Companies Act 2006 relating to accounts and reports came into force on 6 April. These apply to a company's accounts or reports for financial years commencing on or after 6 April. Generally speaking, this means that the Companies Act 1985 position will continue to apply to most accounts and reports for an initial period.

Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order SI 2007/3495

Remuneration

Tax

- *liability for incorrect classification of earnings*

¶3101 Following the decision in *Demibourne Ltd v HM Revenue and Customs*, Revenue and Customs have introduced new PAYE regulations. The regulations allow Revenue and Customs to extend all or part of a liability for payment of a PAYE debt due from the employer to an employee. The purpose of the new regulations is to allow credit for any tax and NIC paid by the employee under self assessment, against the liability due when assessing an employer for PAYE. The regulations came into force on 6 April, but may apply to periods ending before that date in certain circumstances.

Income Tax (Pay As You Earn) (Amendment) Regulations SI 2008/782

- *car fuel benefit*

¶3229 When private fuel is provided for a company car, the benefit in kind is calculated by multiplying a fixed sum by a percentage which is based on the car's carbon dioxide emissions. From 6 April 2008, this fixed sum increased to £16,900, which will result in larger income tax and Class 1A NIC liabilities.

Pre-Budget Report 2007

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- EMI share scheme change

¶3350 From 6 April, the value of EMI options granted to an eligible employee increased from £100,000 to £120,000.

Budget 2008: Budget Note 18

- 183 and 91 day residency test

¶¶3373, 3374 From 6 April, days of arrival and departure will be included when counting the number of days.

Time off

Increase to statutory annual leave entitlement

¶4005 A worker whose annual leave year begins after 1 April 2008 but before 1 April 2009 will be entitled to 4.8 weeks' statutory leave, as well as a proportion of a further additional 0.8 weeks, depending on what proportion of his leave year is after 1 April 2009.

The Working Time (Amendment) Regulations SI 2007/2079

Sickness, injury and absence

Increase to statutory sick pay

¶4165 The fixed weekly rate from 6 April has been confirmed at £75.40.

The Social Security Benefits Up-rating Order SI 2008/632

Rights of parents and careers

Increase to statutory maternity pay, statutory adoption pay and statutory paternity pay

¶4401 The set weekly rate from 6 April has been confirmed at £117.18.

The Social Security Benefits Up-rating Order SI 2008/632

Health and safety

New Health and Safety Executive

¶5050 The Health and Safety Commission and the Health and Safety Executive have merged with effect from 1 April. With effect from that date, the HSE has become the single national regulatory body responsible for all the statutory powers and functions of both bodies.

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Corporate manslaughter

¶5073 The Corporate Manslaughter and Corporate Homicide Act 2007 came into effect on 6 April. It abolishes the previous common law offence of gross negligence manslaughter in so far as it applied to companies and other organisations (including partnerships) within the Act. It replaces it with a statutory offence of corporate manslaughter (corporate homicide in Scotland).

Corporate Manslaughter and Corporate Homicide Act 2007

Equality at work

Harassment related to sex

¶¶5360+ Regulations have been made to amend the Sex Discrimination Act. Among other changes, the regulations introduce from 6 April a new concept of harassment related to sex. This is designed to cover two situations.

First, where a man or woman is subject to less favourable treatment which is not on grounds of his or her sex, but related to his or her sex. The classic situation would be where a male manager enters a woman's toilet to reprimand the female occupant. The woman has not been badly treated because of her sex; but her sex is relevant to the decision of whether this conduct has violated her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her.

Second, the new phrasing also outlaws harassment related to the sex of a person other than the claimant. This change enables claims to be brought by someone who is not subject to the unwanted conduct himself or herself but who witnessed the unwanted conduct and whose dignity is nevertheless violated, or who finds that an intimidating, hostile, degrading, humiliating or offensive environment has been created for him or her.

Sex Discrimination Act 1975 (Amendment) Regulations SI 2008/656

Employer liability for third-party harassment

¶¶5360+ Regulations have been made to amend the Sex Discrimination Act. Among other changes, the regulations introduce from 6 April a new concept employer liability for third-party harassment.

An employer will now be liable for harassment where he fails to take reasonable practical steps to protect employees from harassment by third parties, for example clients and customers, where such harassment is known to have occurred on at least two other occasions. Employers will not be liable for conduct beyond their control.

Sex Discrimination Act 1975 (Amendment) Regulations SI 2008/656

Payroll and NIC

PAYE - leaving employees

¶6853 From 6 April, a new form P46(Pen) should be used instead of form P160.

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Information and consultation in the workplace

Domestic information and consultation

¶¶7658, 8915, 3448 The effects of the Information and Consultation of Employees Regulations 2004 have been extended on 6 April to businesses with at least 100 employees

Handling disputes and alternative resolution

ACAS conciliation officers involvement

¶¶9218+ ACAS have announced that with regard to all cases live at 1 April and those received by ACAS on or after that date, in advance of the removal of fixed conciliation periods by the current Employment Bill, it will make use of its power to conciliate in all employment tribunal cases, including where a fixed conciliation period has expired.

Employment claims

Tribunal and EAT cost orders

¶¶9709, 9801 From 6 April, the hourly rate used to calculate the amount of preparation time payable has increased to £28.

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Recent cases

We now send email updates which detail all the recent changes that have been added to our online updates page and the online version. These can be accessed by clicking on the updates in the emails, by using the online updates page or by using the online version of your Memo. We have selected ten of the cases most likely in our view to have a widespread impact followed by a cumulative list of all the cases covered by our 2008 updating service to date.

Highlights

Flexible working

Agency workers - test of necessity approved

¶2049 The Court of Appeal has approved the EAT decision in *James v London Borough of Greenwich*. Where there is no express contract of employment between the agency worker and the end-user, an agreement may be implied only where it is "necessary" to do so. Further, where a tribunal applies the correct test of necessity, the question of whether a contract should be implied will be a matter of fact rather than law.

James v London Borough of Greenwich [2008] EWCA Civ 35

Comment The Court of Appeal has offered some guidance as to the rigour of the necessity test, suggesting that there is no assumption that either a contract will or will not be implied, in the words of Mummery LJ: "Just as it is wrong to regard all agency workers as self-employed temporary workers outside the protection of the 1996 Act, the recent authorities do not entitle all agency workers to argue successfully that they should be treated as employees in disguise. As illustrated in the authorities there is a wide spectrum of factual situation."

Contract, variation and breach

Unilateral variation by the employer - imposition of new contract

¶¶1652, 1710 In this case, the EAT considered the options open to an employee whose employer attempts to impose a unilateral change in his contract terms. An employee responded to a proposal to change his terms and conditions with a letter in which he said he wanted to reserve his right to claim damages for breach of contract while working under protest to the new terms. However, he then refused to comply with the new contract and continued to work to his original terms and conditions. As a consequence he was dismissed for misconduct. The EAT summarised the four options open to an employee in such a situation. He may:

1. agree to the change;
2. refuse to agree and leave it to the employer to decide what steps to take in response to the request;
3. if the change is a fundamental one, resign and claim that he has been constructively dismissed; or
4. work on under protest and claim damages for breach of contract.

Here, the employee was fairly dismissed. Although he appeared to want to take the fourth option, he declined to work at all under the new terms and so his employer could dismiss him for refusal to work under the new contract.

Robinson v Tescom Corporation [2008] EAT case 0567/07

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Time off

Annual leave - whether annual leave accrues during sick leave

¶¶4007, 4102 The ECJ is considering a reference from the House of Lords on an appeal from the Court of Appeal (*Inland Revenue v Ainsworth*) on the question of whether statutory annual leave entitlement accrues while an employee is on long-term sick leave. Advocate General Trstenjak has expressed her opinion 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. A final ruling is expected later on this year.

Stringer and others v HM Revenue and Customs, Case C-520/06, Advocate General's Opinion

Comment Readers should note that untaken leave is lost at the end of the annual leave year and, if the Advocate General'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.

Health and safety

Bullying - Protection from Harassment Act 1997

¶4959 In this case, the Court of Appeal have clarified the scope of civil liability for harassment under the Protection from Harassment Act 1997, applying *Majrowski v Guy's & St Thomas's NHS Trust* (¶4959). An employee complained of a number of incidents of verbal abuse and intimidation by a site foreman at his place of work. The county court found that only two of these allegations were made out but held that they amounted to harassment. The first incident consisted of the foreman becoming angry, threatening to damage the windows of the room they were in and report the employee to the personnel department, and on the second occasion, he was abusive and threatened violence against him.

The Court of Appeal overturned the decision of the county court. In the first place, they considered that the conduct of the foreman on the first occasion was not serious enough to be oppressive and unreasonable, which was the standard required for liability under *Majrowski*. Although the second incident had crossed that line, the claim could not succeed, because the Act requires there to be a "course of conduct". This means that there must be conduct which is oppressive and unreasonable on at least two occasions, and this had not been proved. The Court also expressed the view that the standard of conduct needed to show harassment will vary according to the context, so that what might be acceptable in an industrial setting might not be acceptable in an office or retail setting.

Conn v City of Sunderland [2007] EWCA Civ 1492

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Equality at work

Disability discrimination - whether covers those associated with a disabled person

¶5451 In a high profile case, Advocate General Poirares Maduro has expressed his opinion that the EC Equal Treatment Directive should be interpreted as protecting those who, although not themselves disabled, nevertheless suffer discrimination or harassment owing to their association with a disabled person.

Coleman v Attridge Law, Case C-303/06 [2008] Advocate General's Opinion

Comment The essence of the Advocate General's Opinion was that the Directive prohibits discrimination on grounds of disability, and that a grounds test is wide enough to catch discrimination by association. The Opinion of the Advocate General is not binding on the ECJ. Were however the ECJ to reach the same decision, the result would have considerable effects in the UK. In contrast to the Equal Treatment Directive, the Disability Discrimination Act merely extends protection to those who are defined as disabled. Amendments to the Act would be necessary, certainly to protect those who care for disabled people, probably also those who have other relationships with disabled people (such as relatives without caring responsibilities who are less favourably treated at work as a result of their relationship to a disabled person), and possibly also those who are wrongly perceived to be disabled. The Government has already announced plans to publish an Equality Bill some time in 2008 or 2009. Depending on the ECJ's decision, it may be necessary to bring forward some parts of that Bill.

Disability discrimination - relevance of later history of condition

¶5476 The decision of the EAT in the case of *McDougall v Richmond Adult Community College* (¶5476) has been reversed by the Court of Appeal. In deciding whether a condition is likely to recur, subsequent events are irrelevant. The tribunal is restricted to the knowledge of the employer at the time he took the decision.

Richmond Adult Community College v McDougall [2008] EWCA Civ 4; now reported at [2008] ICR 431, CA

Discipline and grievance

Status of spent warning

¶6632 The decision of the EAT in the case of *Airbus UK Ltd v Webb* to follow *Diosynth Ltd v Thomson* and hold that it was unfair to take account of a spent warning (see the example to ¶6632) has been reversed by the Court of Appeal.

An employer dismissed an aircraft fitter for watching television in a locker room when he ought to have been working. Four other workers in the same position were not dismissed. In contrast to his colleagues who had clean disciplinary records, the worker had been given a final warning for a similar act of misconduct some 13 months before. However, the final warning given with respect to the earlier misconduct had expired after 12 months. These facts raised the question of how to deal with the spent warning. There is no rule of law, the Court held, that a dismissal will never be fair where an employer has taken account of a spent warning. Whether an employer should take account of a spent warning will depend entirely on the facts of each case.

Airbus UK Ltd v Webb [2008] IRLR 309, CA

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Transfer of the business

Types of transfer— outsourcing services abroad

¶¶7919 The EAT has confirmed that TUPE may apply to business transfers and service provision changes where the business transferred is situated in the United Kingdom before the transfer and is transferred overseas, including outside the EU.

Holis Metal Industries Ltd v GMB and Newell Ltd [2007] EAT case 0171/07; now reported at [2008] IRLR 187, EAT

Comment This decision is potentially very far reaching, particularly with regard to the outsourcing of services abroad, and gives rise to many practical and commercial problems. In the case of business transfers not involving service provision change, TUPE may be excluded by the fact that the business entity does not retain its identity after the transfer when a business is transferred outside the UK, but this restriction does not apply to service provision changes.

Ending employment

Retirement - stay of cases

¶¶8201, 5611 In a case concerning a 70 year old employee who was retired against her wishes and brought claims of unfair dismissal and unlawful age discrimination, but whose claims were struck out by the tribunal as showing no prospect of success, the EAT has ruled that such cases are likely to be affected by the outcome of the High Court's decision to refer the *Heyday* case to the ECJ. The tribunal had accepted that in the light of other recent decisions of the ECJ, the outcome of *Heyday* could be predicted with certainty. The EAT found, by contrast, that the arguments in *Heyday* must have been considered arguable by the High Court, otherwise they would not have been referred to the Court. All that could be said was that *Heyday* might be favourable to the claimant, and if it was the claimant would have a reasonable chance of success. Accordingly, the case was stayed awaiting the outcome of *Heyday*.

Johns v Solent SD Ltd [2008] IRLR 88, EAT

Comment In the aftermath of this case, the President of the Employment Tribunals, Judge Meeran, has issued a practice direction that all claims regarding the issue of compulsory retirement as raised by *Heyday* should be stayed pending the decision of the ECJ. Meanwhile, the unsuccessful employer in *Solent* has appealed the case to the Court of Appeal. The Practice Direction will be reviewed in the light of the outcome. While the decision in *Solent* was perhaps necessary, it will cause some difficulties. Litigants face lengthy delays while the matter is brought to the ECJ (which will not be before 2009). Employers also face uncertainty as to whether it is lawful to operate mandatory retirement policies in the interim.

Unfair dismissal - calculation of damages

¶¶8590, 1719 The Court of Appeal has considered what compensation should be awarded where an employee is dismissed in circumstances where they have already lost earnings as a consequence of their employer's prior breach of contract. In this case a breach of trust and confidence by the employer had led to the employee being absent from work as a result of stress, and prior to dismissal she had been receiving only sick pay. She claimed loss of earnings based on her full rate of pay.

The Court held that her loss in a claim for constructive unfair dismissal must be calculated on the basis of her actual earnings – i.e. sick pay, not the earnings she would have received if the employer had not been in breach of contract. In such circumstances employees may only recover losses which flow from the dismissal itself, not earlier breaches of contract.

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However, there is no bar to separate proceedings to recover loss of earnings in respect of contractual breaches prior to dismissal (£1725).

GAB Robins (UK) Limited v Gillian Triggs [2008] EWCA Civ 17

Comment It should be noted that the dismissal in this case was constructive with the employee resigning as a result of the employer's repudiatory breach of trust and confidence. The Court held that whilst the employer's repudiatory conduct was an essential condition of a constructive dismissal, it was not that conduct that effected the dismissal. It was the employee's acceptance of it. Consequently, damage caused by the conduct prior to the dismissal has to be claimed as a separate cause of action and not as part of an unfair dismissal claim.

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Types of employment relationship

[43](#) *Clark v Clark Construction Initiatives Ltd and Utility Consulting Services Ltd*, EAT

Pre-employment

[704](#) *Jatto v (1) Messrs Godloves Solicitors, (2) Kay, and (3) Goldman*, EAT

Employment contract, variation and breach

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[1307](#) *Grace v BF Components Ltd, Enfield Technical Services Ltd v Payne*, EAT

[1652, 1710](#) *Robinson v Tescom Corporation*, EAT

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[1951](#) *Ashbourne and anor v Department of Education and Skills and ors*, EAT

[2049](#) *James v London Borough of Greenwich*, CA

[2050](#) *National Grid Electricity Transmission Plc v Wood*, EAT

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[4007](#) *Stringer and others v HM Revenue and Customs, Case C-520/06, AG's Opinion*

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[5360](#) *English v Thomas Sanderson Blinds Ltd, EAT*

[5390](#) *Carter v Ahsan, HL*

[5451](#) *Coleman v Attridge Law, Case C-303/06, AG's Opinion*

[5476](#) *Richmond Adult Community College v McDougall, CA*

Equality at work cont.

[5680](#) *Chief Constable of West Midlands Police v Blackburn and anor, EAT*

[5685](#) *Cumbria County Council v Dow and ors and conjoined appeal (No. 1), EAT*

[5723](#) *Cumbria County Council v Dow and ors (No. 2), EAT*

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[6632](#) *Airbus UK Ltd v Webb, CA*

[6773](#) *Royal Mail Letters and others v Muhammad, EAT*

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[7919](#) *Holis Metal Industries Ltd v GMB and Newell Ltd, EAT*

[7983](#), [7990+](#) *Coutinho v Vision Information Systems (UK) Ltd & Rank Nemo (DMS) Ltd, EAT*

Ending employment

[8201](#) *Johns v Solent SD Ltd, EAT*

[8285](#) *Jones v Friction Dynamics Ltd (in administration) and ors, EAT*

[8460](#) *The Governing Body of Hastingbury School v Clarke, EAT*

[8520](#) *Kelly v University of Southampton, EAT*

[8590](#) *GAB Robins (UK) Limited v Gillian Triggs, CA*

[8591](#), [8630](#) *Henderson and ors v Mite Olscot Ltd, EAT*

[8592](#) *Cowen v Rentokil Initial Services Ltd t/a Initial Transport Services, EAT*

[8665](#) *Patel v Clemence Hoar Cummings, EAT*

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[9426+](#) *Wright v Weed Control Ltd, EAT*

[9479](#) *Chandrika Joshi v Manchester City Council, EAT*

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[9615](#) *Tuntum Housing Association v Aryeetey, EAT*

[9620](#) *Farooq v Commissioner of Police of the Metropolis, EAT*

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