



EMPLOYMENT MEMO 2008

Newsletter Issue 2

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Welcome to the second Employment Law Memo 2008 newsletter, which complements our online updating service. This newsletter reviews the Employment Act 2008, which received Royal Assent on 13 November. We also include a round-up of the changes, which came into force this October and highlight cases of particular interest together with a cumulative list of all case updates published since February.

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. Further, all updates are automatically integrated into the online version of the Memo, 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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Disclaimer

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Employment Act 2008

The Employment Act 2008 completed its passage through Parliament on 13 November. Most of its important provisions are likely to come into force on 6 April 2009, but this still has to be confirmed.

The best publicised provisions are those which **repeal the compulsory discipline and grievance procedures**. The Act also formally **removes fixed conciliation periods**, although in practice Acas has been disregarding these since April 2008, and changes the scope of Acas officers' duty to conciliate in cases where proceedings have not yet been started. Under the new rules they will have a discretionary power to offer conciliation at this stage although they can refuse to do so, even if both parties request it, without having to give a reason. Alongside the new provisions, a new **Acas Code of Practice** has been published in its final form. It will remain a draft for a brief period until it has been approved by Parliament. The Code will be supplemented by an Acas guide.

Finally, to further facilitate early resolution of disputes, tribunals will be able to **decide cases without any hearing** if all the parties have consented in writing. Consent of parties is not required with regard to default judgments issued without a hearing. The Act also gives tribunals the power to order employers to **compensate** workers for any **financial loss** sustained as a result of unlawful deduction from wages or non-payment of redundancy awards.

With regard to **other provisions**, the Act also changes the way the national minimum wage is enforced, enhances the enforcement regime under the Employment Agencies Act 1973 and amends trade union law to give more scope to exclude individuals from membership of a union on the grounds of their political affiliation.

Abolition of compulsory disciplinary and grievance procedures

The current system of compulsory minimum procedures backed by sanctions, including automatic unfair dismissal for failing to follow procedures, the barring of claims, and adjustments in compensation levels will be **replaced by**:

- an obligation on both employer and employee to comply with the new Acas Code of Practice as tribunals will look at whether an employer has followed the Acas Code when deciding whether a dismissal is procedurally fair; and
- a power to increase or decrease any award by up to 25% if a party unreasonably fails to follow the Code.

A further important change is that the defence to a procedurally unfair dismissal that the employer would have dismissed the employee in any event (the *Polkey* reversal provision) will no longer apply. However, the tribunal will be able to reduce the compensation to be awarded for a procedurally unfair dismissal by up to 100% in accordance with *Polkey* to reflect the chance that the employer could have carried out a fair dismissal if he had used a fair procedure. This simplifies the current regime. Under the outgoing system, a *Polkey* reduction is made before any adjustment for failure to follow the statutory procedures, and it is presumed that the same approach will be adopted under the new system i.e. that any *Polkey* reduction will be made before an adjustment for an unreasonable failure to follow the Code. In contrast, the new Act specifically states that adjustments for failure to follow the Code should be made before an award for failure to provide a statutory statement of written particulars.

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Transitional provisions Draft transitional provisions have been published which set out how the new rules are to be phased in and as a consequence the current system will continue to have some, although limited, relevance for a short period after 6 April 2009. The new system will apply to:

- **disciplinary or dismissal procedures** where the employer contemplates dismissal or taking other disciplinary action on or after 6 April 2009; and
- **grievances** relating to events occurring wholly on or after 6 April 2009. The new system will not apply where the grievance relates to matters arising before 6 April 2009 or where the grievance relates to matters arising before 6 April 2009 and is continuing where the employee presents a claim to the tribunal in respect of equal pay claims and claims for redundancy pay on or before 4 October 2009, and, in respect of other claims, on or before 4 July 2009.

Draft Code of Practice

The Code contains many elements recognisable both from the previous Code and from the compulsory minimum procedures it replaces. Case law decided prior to the introduction of the current system and on best practice principles is likely to prove helpful in the interpretation of the Code.

The Code will not apply to collective grievances, redundancy dismissals or the termination of fixed-term contracts. Collective grievances should be dealt with in accordance with the relevant collective agreement. For redundancies, existing principles of good practice should be followed to ensure that dismissals are fair, referring to existing guidance from ACAS. In the case of fixed-term contracts, if an employee has not accrued a year's qualifying service there may be little risk of an unfair dismissal claim, but it may still be advisable to follow basic good practice, for example giving advance warning that the contract is not to be renewed and the reason for non-renewal, to avoid suggestions that there is a discriminatory reason for the non-renewal.

The Code is in two main sections – a foreword which is purely advisory, and a main section which must be followed to avoid a risk of increased/decreased compensation. Following consultation, some elements originally included in the main section have been moved to the non-obligatory foreword to make it clear that the risk of increased/decreased compensation does not apply to them. These include recommendations that parties seek to resolve matters informally in the first instance, or if that is not possible, is or unsuccessful, involving an independent mediator. Full details of the new Code will be included in Employment Memo 2009. In summary, the Code:

- recommends that employers develop written, specific and clear disciplinary procedures with the involvement of employees and/or employee representatives;
- sets out basic principles of procedural fairness, including the need to investigate the facts, to act promptly and consistently, to make sure employees understand the basis of the problem, to give them the opportunity to give their side of the story at a hearing and to let them be accompanied at any formal meeting;
- distinguishes between the investigation stage and the disciplinary stage and recommends that ideally they should be dealt with by different people;
- recommends that any suspension necessary should be kept brief and be kept separate from any sanction;
- requires the employer to notify the employee in writing of the misconduct or poor performance to be dealt with and of the time and place of the disciplinary meeting, and to remind the employee of the right to be accompanied;
- obliges both employer and employee to make every effort to attend disciplinary and grievance meetings called;
- sets out the rules relating to the right to be accompanied in detail;
- requires the employer to notify the employee in writing of his decision and give the employee the right to appeal;

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- recommends that in less serious cases one or two formal warnings should be given before dismissal is considered, but allows for dismissal without warning in cases of gross misconduct, after a fair disciplinary process;
- deals with special cases such as disciplinary action against trade union representatives and employees who are accused of criminal offences;
- allows an employer to take action on the basis of the information available to him if the employee is persistently unable or unwilling to attend a hearing, without good reason;
- requires employees to raise grievances promptly in writing and sets out a two stage process for dealing with them; and
- provides that where a grievance and a disciplinary procedure are connected they may be dealt with concurrently. Otherwise a disciplinary process may be suspended pending the outcome of a grievance.

Enforcement of the national minimum wage

The system of enforcement of the national minimum wage has been overhauled and strengthened, with new mechanisms and penalties. The date these provisions will come into force is still to be confirmed. In addition, the Act clarifies points relating to the position of certain volunteers and these provisions come into force on 13 January 2009. As a result of these amendments, adult volunteers involved in the cadet forces are not entitled to be paid the minimum wage and it is clarified that volunteers (i.e. those who are employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body and have no right to pay under their contract) who receive payment of expenses (other than accommodation expenses) reasonably incurred in order to enable them to perform their duties are also excluded from the right to minimum wage.

The existing system of enforcement notices will be replaced by notices of underpayment, which will require employers to pay any arrears of underpayment within 28 days, and will also impose a financial penalty. This new financial penalty will be fixed at 50% of the arrears, subject to a minimum of £100 and a maximum of £5,000. There will be an incentive for employers to pay promptly; if they pay both arrears and half of the financial penalty within 14 days of the date of the notice of underpayment they will be regarded as having settled the whole of the financial penalty. As before, there will be no power to serve a notice in respect of underpayments made over 6 years before the date of the notice.

An important change is the rate of national minimum wage (“NMW”) to be applied when calculating arrears. Workers who have been paid less than the minimum wage will be entitled to a rate which takes into account the rate current at the time the employer is ordered to pay the arrears rather than, as before, simply the rate current for the period covered by an enforcement notice. The formula to be used is:

$$\frac{\text{Amount of arrears due}}{R1} \times R2$$

R1

where R1 is the NMW rate in force during the period of underpayment and R2 is the rate in force at the time of the notice of underpayment.

Where criminal proceedings against the employer are likely, or under way, officers will be able to suspend a notice of underpayment. If a conviction is secured the notice will be withdrawn, but otherwise it will be revived, in which case the 6 year limitation will run to the date of the original notice.

Finally, fines for offences under the act, including wilfully failing to pay the NMW, failing to keep the required records, and obstructing enforcement officers are increased. In the magistrates' court the maximum fine remains £5,000, but offences may now also be dealt with in the Crown Court where fines are unlimited.

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Employment agency standards

From 6 April 2009, under the amendments to the Employment Agencies Act 1973 (the "EAA"), NMW officers will have greater powers to require those operating employment agencies and employment businesses to produce documents and information. This will include financial records held by banks. Officers will have the power both to copy documents and remove them for inspection, provided they are returned as soon as practicable.

The potential fines for breaches of the EAA are also increased. On conviction in the magistrates' court, the maximum fine remains £5,000, but there is now also scope for offences to be dealt with by the Crown Court which has power to impose unlimited fines.

Union membership

Following the judgment of the ECHR in the case of *Aslef v UK* [2007] IRLR 361, ECHR, Trade Union and Labour Relations (Consolidation) Act 1992 will be amended to permit unions to enforce rules excluding members of a political party from membership. The date these provisions will come into force is still to be confirmed. In the *Aslef* case, the court decided that a union's right to freedom of association would be infringed if it were not allowed to exclude those who belong to political organisations holding views incompatible with the union's aims.

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Pre-employment

Right to work

¶771 The Government has introduced a new points-based system (PBS) to replace most of the work-based categories of limited leave for non-EEA nationals with effect from 27 November. Tier 2 of the PBS, relating to skilled workers, replaces the current work permit scheme and tier 5 covers temporary workers entering the United Kingdom for a short period. Employers wishing to bring non-EEA migrants to the UK under these tiers will need to be a licensed sponsor. Sponsors will be responsible for issuing certificates of sponsorship to migrants and ensuring that their sponsor obligations are fulfilled. Migrants will be able to use the certificate of sponsorship to apply for entry clearance. Further details can be found at: www.ukba.homeoffice.gov.uk/employers/points/

Remuneration

National minimum wage

¶¶2869 On 1 October, the principal rate of the national minimum wage increased from £5.52 to £5.73 per hour, the rate paid to workers aged between 18 and 21 from £4.60 to £4.77 per hour and the rate to be paid to workers aged below 18 who have ceased to be of compulsory school age from £3.40 to £3.53 per hour. The daily rate of accommodation benefit increased from £4.30 to £4.46.

National Minimum Wage Regulations 1999 (Amendment) Regulations 2008 SI 2008/1894

Sickness, injury and absence

Statutory sick pay

- *agency workers on short term contracts*

¶4165 Regulations have been made giving all agency workers on fixed term contracts of less than 3 months' duration the right to statutory sick pay with effect from 27 October.

The Fixed Term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations SI 2008/2776

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Rights of parents and carers

Maternity rights

- *terms and conditions during additional maternity leave*

¶¶4410, 4469 Employees whose baby is due on or after 5 October now have the same rights to their contractual terms and conditions during their additional leave as they do during their ordinary leave. This greatly reduces the difference between ordinary and additional leave.

Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations SI 2008/1966

- *bonuses during compulsory maternity leave*

¶¶4450+, 4447, 5320 For employees whose baby is due on or after 5 October, the Sex Discrimination Act 1975 has been amended to enable them to make claims in relation to non-contractual bonus payments for the 2 week period where an employee is on compulsory maternity leave.

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

- *terms and conditions during additional maternity leave*

¶¶4469, 5320 The Sex Discrimination Act has also been amended to enable employees whose baby is due on or after 5 October to make claims in respect of discrimination in relation to terms and conditions of employment for periods of additional maternity leave to the same extent as they can claim for periods of ordinary maternity leave.

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

Adoption rights

- *terms and conditions during additional adoption leave*

¶¶4520, 4544 Employees who are due to have a child placed with them for adoption on or after 5 October now have the same rights to their contractual terms and conditions during their additional leave as they do during their ordinary leave.

Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations SI 2008/1966

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Health & safety

Record keeping

¶4807 The rules on keeping records of compulsory insurance have been relaxed. Employers may make a copy of the insurance certificate available in electronic format, such as on an intranet, rather than displaying a copy at each of its premises. The obligation to retain a copy of the certificate for 40 years has also been removed.

The Employers' Liability (Compulsory Insurance) (Amendment) Regulations Order SI 2008/1765

Main social benefits

¶9990 Employment and support allowance replaced incapacity benefit and income support paid on incapacity grounds from 27 October. Those on existing incapacity benefit or income support will initially continue to receive their existing benefits, so long as they satisfy the entitlement conditions.

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Recent cases

We send email updates which detail all the recent changes that have been added to our online updates page and the online version to all subscribers. 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 a few 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

Types of employment relationship

Employee or self-employed - mutuality of obligation

¶¶38, 53, 2046 This case involved Polish workers brought to the UK to work under contracts with an agency which contained an “obligations” clause stating that the agency was not obliged to provide them with work and that they did not have to accept work. There were also clauses to the effect that they could provide substitutes to carry out work on their behalf, and permitting them to work for other organisations only if it did not prevent them carrying out work for the agency. In the tribunal and EAT it was held that the obligations clause was a sham and that there were implied terms that the agency had to provide work, and that the workers were obliged to accept work, so as to create an umbrella contract between periods of work. The Court of Appeal overturned this finding, because there was not enough evidence to show that the written terms did not reflect the reality of the situation. To support such a finding it is necessary to show the parties intended to create a misleading impression by the written agreement. Unless that were the case, there is no scope to imply terms to contradict an express term.

Consistent Group Ltd v Kalwak and ors [2008] IRLR 489, CA

Rights of parents and carers

Time off to care for dependants - unexpected disruption of childcare arrangements

¶4740 The EAT have considered the scope of the provisions allowing parents to take time off necessary to deal with unexpected disruption in child care arrangements. An employee had some weeks' warning that her usual childminder would not be available for one day. After she had unsuccessfully tried to make other arrangements for cover, she made a request for time off to care for her children on that day. Her request was refused two days before she needed the time off. She took the day off anyway and was given a verbal warning for unauthorised absence. The EAT held that although there was advance warning of the need for leave of absence, it was still an unexpected event and therefore she was entitled to take the time off. The fact of advance knowledge might in some cases mean that it is not necessary for an employee to take time off, but that was not the case here, as she had no other option but to stay at home.

Royal Bank of Scotland v Harrison EAT Case 0093/08

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Equality at work

Discrimination - religion or belief

¶¶5383, 5826 The Administrative Court has reviewed the decision of a school not to allow a devout Sikh girl to wear a narrow bangle known as a Kara. Having had the benefit of expert evidence on its significance, it found that while it was not strictly a compulsory requirement of Sikhism, she wore the bangle believing, on reasonable grounds, that it was an important symbol of her religious and racial identity. In the circumstances, preventing her from doing so amounted to a detriment and indirect discrimination on the ground of both race and religion.

R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls' High School [2008] EWHC 1865, Admin

Discrimination - another's religion or belief

¶¶5384, 5435 The EAT has held that where an employer subjected an employee to detrimental treatment in an attempt to pressure him to support attempts to remove another employee on the ground of the second employee's religion, it amounted to unlawful discrimination. Here, the employer called the claimant to a number of investigatory meetings without proper explanation of what was going on, required him to produce files at short notice and kept him in a state of uncertainty as part of a campaign to dismiss his supervisor on the grounds of his Hindu faith. The employer's conduct was found to be unfavourable treatment on the grounds of religion.

Saini v All Saints Haque Centre and ors [2008] EAT case 0227/08

Disability discrimination - those associated with a disabled person

¶5451 The ECJ has given its judgment in this case, which was a referral from a tribunal on the question of whether the EC Directive dealing with disability discrimination protects non-disabled people who suffer discrimination because of their association with a disabled person. The case was brought by a former legal secretary who suffered discrimination by her employers because she took time off to care for her disabled son. The ECJ ruled that the Directive does protect her on the ground that it deals with discrimination on specific grounds, including disability, not discrimination against specific types of people. The case will now be considered again by an employment tribunal, which will decide whether the Disability Discrimination Act can be read to give effect to the terms of the Directive without further legislation being needed. The case will also be taken into consideration in the drafting of the forthcoming Equality Bill (see updates to Employment Memo ¶5252).

Coleman v Attridge Law [2008] ECJ Case-303/06

Comment The Directive under consideration also covers sexual orientation, age, and religion or belief, and the relevant legislation is likely to need amendment to provide cover for those who suffer discrimination by association on these grounds.

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Equal pay – objective justification

¶¶5684+ The Court of Appeal has considered the decision in *Middlesbrough Borough Council v Surtees* and held that the indirect pay discrimination involved in a pay protection scheme was unlawful, and on the facts, was not justified. However, the court accepted that, in principle, objective justification could be used as a defence to an equal pay claim. The court also pointed out that the employer's knowledge of the existence of pay equality, its motive and intentions were not relevant to the question of whether there was a pay inequality, but could be taken into account when considering whether such equality could be justified.

Redcar & Cleveland Borough Council v Bainbridge, Surtees v Middlesbrough Borough Council [2008] EWCA Civ 885

Discipline & grievance

Statutory minimum requirements - effect of delay

¶6513 The Court of Appeal have overruled the decision in *Yorkshire Housing Ltd v Swanson*. A dismissal will not automatically be unfair in the case of delay by the employer in handling the disciplinary procedure, provided that the procedure has otherwise been completed.

Selvarajan v Wilmot [2008] IRLR 824, CA

Ending employment

Retirement - exception for compulsory retirement over 65

¶8201 The Advocate General's opinion has been released in the Heyday case. In his view: .

- there is no incompatibility with European law in allowing compulsory retirement over the age of 65, provided that it can be shown to be objectively justified; and
- it is permissible to allow a general defence of justification.

If the ECJ take the same view in their judgment, the case will then return to the national courts for a decision on whether objective justification for the exclusion of retirement has been shown.

Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform Case C-388/07 [2008] Advocate General's Opinion, 23 September 2008

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