

Welcome

This edition of Employment Focus includes several articles addressing topics which pose serious and potentially expensive issues for employers.

Bullying and harassment of employees often makes headlines in newspapers and not just the red tops. Whilst claims for bullying and harassment under the discrimination legislation can be monstrous, employers must also be aware of their potential liability under the Protection from Harassment Act 1997.

Speaking of discrimination, the Sex Discrimination Act has been amended and brought into line with European law. Details of the changes are revealed within.

Finally, the good news! Kate Duffy outlines the Government's proposals to do away with the statutory dismissal, disciplinary and grievance procedures by enacting the Employment Bill currently on its way through Parliament. The current regulations have provided a veritable goldmine for lawyers having produced the exact opposite of their objective – a reduction in cases going to Tribunal. If you wish to see angels dancing on the head of a pin you should read the Law Reports of the numerous cases which have been fought on the interpretation of the Dispute Resolution Regulations.

The Employment and Pensions Team at Hill Dickinson continues to grow. We have been joined by Adrian Fryer, Michael McNally and Rachel Eccles since our last edition of Employment Focus and whilst Tony Huber will be taking life easier, following his retirement on the 30 April 2008, we are delighted that he has agreed to stay on as a Consultant to our Pensions Team under Andrew Ashley Taylor.

Finally, my thanks to Katie Tornes, our new Practice Support Lawyer, who has taken over as editor of Employment Focus and to whom your comments, good or bad, should be addressed.

Michael Morrison
Head of Employment



SEX DISCRIMINATION – EXPLAINING THE CHANGES

In March 2007, the Equal Opportunities Commission successfully brought judicial review proceedings against the UK Government contending that the Sex Discrimination Act 1975 did not adequately implement the European Equal Treatment Directive in relation to harassment, maternity and pregnancy related discrimination.

To bring UK legislation in line with European Law, the Government was required to introduce the Sex Discrimination Act 1975 (Amendment) Regulations 2008 which came into force on 6 April 2008. Below is a summary of the key changes.

Definition of harassment

Harassment is now defined as “unwanted conduct that is related to a woman’s sex or that of another person” replacing the previous definition of “on the grounds of her sex”. The new definition is considerably broader and means that a person will be able to claim harassment against their employer even where the conduct complained of relates to someone else e.g. where a person is offended by sexist comments made to, or about, another person.

The new definition also means that a claim of harassment could be made by a person who is not of the same sex as the person subjected to the comments. For example, a man will be able to claim harassment if he can show that sexist comments aimed at a woman have created an offensive or degrading environment for him even though they were not aimed at him.

Definition of discrimination on grounds of pregnancy or maternity leave

The Regulations remove the requirement for a comparator in pregnancy and maternity related discrimination cases, so that a pregnant woman need only show that she has been treated less favourably on grounds of her pregnancy or maternity leave. This means that an employer will no longer be able to defeat a claim of discrimination by showing that a non-pregnant woman would have been treated in the same way.

Third party acts

The Regulations also make changes to an employer’s liability for acts of harassment carried out by third parties, such as customers or clients. An employer will be liable for harassment by third parties if it fails to take reasonable steps to prevent the harassment of the employee. An employer will only be liable if it is aware that the employee has been subjected to harassment on at least two occasions by a third party (although it need not be the same third party).

Terms and conditions during maternity leave

Women whose expected week of childbirth is on or after 5 October 2008 will now enjoy the same terms and conditions during their Additional Maternity Leave as they do during their Ordinary Maternity Leave. Prior to the Regulations coming into force, during the period of Ordinary Maternity Leave, women were entitled to the same rights, in respect of terms and conditions, as if they were working (with the exception of pay) but did not enjoy the same rights during Additional Maternity Leave. This is a significant change and likely to have cost implications for employers.

Discretionary bonuses

Also, for women whose expected week of childbirth is on or after 5 October 2008, the two week compulsory maternity leave must be treated as time worked for the purposes of calculating discretionary bonuses.

In conclusion, the introduction of the Regulations considerably broadens the scope for individuals to bring a claim of sex discrimination against their employers and covers a much wider range of conduct than before. Employers should note the changes and ensure that their harassment policies, maternity policies and practices, training policies, benefits programmes and bonus schemes are updated in accordance with the Regulations. Employers running businesses where contact with third parties is part of daily life should make it clear to customers and contractors that subjecting staff to offensive, intimidating and unwanted conduct will not be tolerated and appropriate action will be taken.

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UPDATE – HARASSMENT AT WORK

Nearly two years have passed since the House of Lords' decision of Majrowski -v- Guy's and St. Thomas' NHS Trust, in which the Court found that an employer can be liable under the Protection from Harassment Act 1997 for the actions of its employees during the course of their employment.

This decision led to fears that the floodgates would be opened for litigants bringing protection from harassment claims when they were not covered by the discrimination legislation. In a couple of recent cases, the courts have provided a degree of reassurance by confirming that only serious conduct will fall within the meaning of "harassment".

According to the Protection from Harassment Act 1997 ("the Act"), it is unlawful for a person to pursue a course of conduct (meaning more than one incident) which amounts to harassment of another and which he knows, or ought to know, amounts to harassment of the other. Harassment is not defined by the Act, but is stated as including "alarming a person or causing them distress".

In the 2007 case of Hammond -v- International Network Services UK Limited, Mr Hammond was a Systems Engineer who had made several allegations of harassment against his employer,



including being shouted at for being late and accused of not being interested in his work. Mr Hammond had issued claims for unfair dismissal and race discrimination in the Employment Tribunal which had subsequently failed. In the High Court, the Judge found that the allegations did not amount to a deliberate course of conduct and that none of the allegations constituted harassment. The Judge found that "to be actionable under the 1997 Act, the conduct in question will be criminal and might even attract a custodial sentence. It must, therefore, have an element of real seriousness." Having found that the allegations made by Mr Hammond either did not occur or had been reasonable managerial decisions, the Judge commented that, if employers were faced with an allegation of harassment every time they made those sort of operational decisions, the commercial world would shudder to a halt.

In a case decided only a week after Hammond, the Court underlined the point that only serious incidents would constitute harassment. In the case of Conn -v- Sunderland City Council, Mr Conn claimed that he had been harassed and threatened by his foreman on several occasions and that he had suffered psychiatric injury as a result. He brought claims under the Act as well as claims for negligence. Whilst, in the first instance, the Court upheld Mr Conn's claim, this decision was overturned by the Court of Appeal. The lower Court had found that two of Mr Conn's allegations had been proven: the first, in which a manager shouted at Mr Conn and threatened to smash a window; the second, in which the same manager threatened to hit him. The Court of Appeal decided that the first incident was not sufficiently serious to constitute harassment as there was no immediate physical threat, only a threat to property. Whilst this incident was undoubtedly unpleasant, it did not justify a criminal sanction. As a result, even if the second incident was sufficiently serious so as to amount to harassment, there was no "course of conduct" and so Mr Conn's claim failed.

Guidance for employers

Although recent cases have indicated that the courts are unwilling to elevate more unpleasant behaviour to the status of harassment under the Act, employers must still be aware that such claims remain a risk. Employers should, therefore, maintain a bullying and harassment policy indicating to employees that such behaviour will not be tolerated and, also, clearly setting out what employees should do if they feel they have experienced such behaviour. Employers should ensure that they fully investigate any complaints of bullying and/or harassment and deal with any perpetrators in an appropriate manner.

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THE EMPLOYMENT BILL

Out with the old and in with the new!?

Kate Duffy summarises the changes proposed in the new Employment Bill, the key one of which is the long awaited repeal of the statutory dismissal, disciplinary and grievance procedures.

The statutory procedures were introduced in October 2004 with a view to encouraging the resolution of disputes in the workplace and to avoid an increase in claims being referred to the Employment Tribunal. Although employers and employees must continue to comply with them until at least 2009, the introduction of the Employment Bill rings the death knell for the much maligned procedures.

Only two years after their introduction, it became apparent to practitioners and Employment Tribunals that the statutory procedures were not working in practice. Indeed, many HR professionals and employment lawyers would go as far to say that the procedures have had the reverse effect by encouraging parties to take a more formal approach from the outset of a complaint and making proceedings more complicated by requiring the Tribunal to address numerous jurisdictional points before allowing a claim to proceed.

In 2007, Michael Gibbons was commissioned to review the procedures as part of his review of dispute resolution in the workplace. The resulting Gibbons Report recommended that the procedures be abolished. Following a consultation period on the Report's findings and recommendations, the Government published the Employment Bill.

So, what does the new Bill hold in store for the future?

If enacted, the Employment Bill will become the Employment Act 2008 and will make the following changes:

- Repeal of the standard and modified disciplinary and dismissal procedures.
- Removal of the requirement for claims to be preceded by a grievance.
- Abolition of the compensation uplifts/reductions for non compliance with the statutory procedures and the consequential adjustments of time limits.
- Repeal of section 98A of the Employment Rights Act 1996 which allows for an otherwise procedurally unfair dismissal (other than for non compliance with the statutory procedures) to be fair where the Respondent proved that it would still have dismissed the Claimant had it followed the procedure, returning to the "Polkey" approach. This does not affect the fairness of the dismissal, only the level of compensation recoverable in such circumstances.

Although employers and employees are freed from the shackles of the statutory procedures, the repeal of the procedures will not mean that parties are left with carte blanche in resolving issues in the workplace. The Bill goes on to introduce a number of provisions that are designed to "replace" the current procedures and proposes to introduce a discretion for the Tribunal to reduce, or increase, any award by up to 25% if the employer, or employee, has unreasonably failed to follow a relevant code of practice.

This discretion will apply to all major employment claims and will operate so that where the relevant code of practice applies, and either the employer or employee fails to comply with that code, and such failure was unreasonable, the Tribunal has the power (if it considers it just and equitable) to increase or reduce the award by up to 25%.

A relevant code of practice is deemed to be one issued by ACAS or the Secretary of State. Although ACAS is still working on putting together a new code of practice covering workplace disputes, it is expected that the code will be based on general principles of fairness and reasonableness and will hopefully avoid being prescriptive. Practitioners and employers await, with interest, the publication of the new codes!

Aside from the repeal of the statutory procedures, the Bill also includes the following proposed changes:

- The ability of a Tribunal to determine proceedings without a hearing when the parties have been given a right to request a hearing and consent to determination without a hearing. This will apply to claims for unlawful deductions, breach of contract, redundancy pay and holiday pay and national minimum wage claims.
- The abolition of the fixed periods for ACAS to conciliate in proceedings and a widening of their powers to conciliate before proceedings are instigated.
- A power for a Tribunal to order an employer to compensate an employee for any financial loss attributable to the unlawful deduction of wages or non payment of a redundancy payment, such as bank and interest charges.
- The introduction of a civil penalty for businesses who do not comply with the National Minimum Wage Act.
- The creation of powers for the Employment Agency Standards Inspectorate to inspect a wider range of documents, including financial information.
- The right of trade unions to refuse membership or expel members on the grounds of previous or current membership of a political party.

Conclusion

It is hoped that the provisions of the new Employment Bill will simplify matters for employers and employees alike and encourage early and effective resolution of employment disputes.

For the time being, practitioners remain cautious until the publication of the new ACAS codes that will add flesh to the bones of the current bill and provide a more definitive guide to how the new regime will operate in practice. Watch this space!

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DEVELOPMENTS ROUND-UP

From 6 April 2008, the following statutory payments have been increased:

Statutory maternity pay (higher rate) - 90% normal weekly earnings

Statutory maternity pay (basic rate) - £117.18 a week or (90% of normal weekly earnings if lower)

Statutory paternity pay - £117.18 a week or (90% of normal weekly earnings if lower)

Statutory adoption pay - £117.18 a week or (90% of normal weekly earnings if lower)

Statutory sick pay - £75.40 a week

Parental benefits

Plans to increase Statutory Maternity pay/leave from 39 weeks to 52 and to allow fathers to enjoy increased Statutory Paternity pay/leave have been put back until April 2010. Originally intended for implementation in April 2009, the additional year will give employers time to prepare for the increased benefits and ensure that their parental friendly policies are up to date.

Age discrimination

Employers who rejected the job application of a 59 year old had not discriminated against him on the grounds of his age despite marketing the post as attractive to a person with "youthful enthusiasm". In cases such as these, it is for the employer to prove that the refusal of the post was based on reasons other than age, in order to defeat an unlawful discrimination claim.

Office banter or harassment?

An employee who brought a claim against his employer complaining of having been harassed on the grounds of sexual orientation has been granted leave to appeal to the Court of Appeal.

Although the Employment Appeal Tribunal sympathised with the Claimant over the bullying which he received, they found that homophobic banter and sexual innuendo dished out to the Claimant by his colleagues could not constitute harassment on the ground of sexual orientation as the Claimant was not, in fact, homosexual.

Whilst the perpetrators knew very well that the Claimant was not homosexual, they regularly teased him as being such based purely on the fact that the Claimant had once gone to boarding school and lived in Brighton. As it was undisputed by all parties that the Claimant was heterosexual, the Claimant could not rely upon the protections afforded by the Sexual Orientation Regulations. Had the Claimant been teased for being heterosexual, the Regulations would have been triggered and that conduct would have been regarded as harassment.

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FUTURE DEVELOPMENTS

Holiday pay for sick workers

In *Stringer and ors -v- HM Revenue and Customs* the Advocate-General in his opinion determined that workers on long-term sick leave, extending for the entire leave year, accrue entitlement to holiday pay under the Working Time Regulations 1998. The Advocate General held that these workers should accrue entitlement to the minimum annual leave set by the Working Time Directive. However, workers may not take holiday whilst on sick leave. Although not forced by the Advocate-General's opinion, the European Court of Justice (ECJ) nearly always follow it. The decision is expected late summer/autumn 2008.

Discrimination by association

In *Coleman -v- Attridge Law*, Miss Coleman brought a claim of disability discrimination against her employers. She alleged less favourable treatment when she took time off to care for her disabled son. Although not disabled herself, Miss Coleman's claim was based on her association with a disabled person. The Advocate General recommended to the ECJ that they extend the scope of the Disability Discrimination Act 1995 to include discrimination by association with a disabled person. The ECJ will deliver its decision later this year.

Checking suitability of potential employees

In autumn 2008, the phasing in of a single vetting system for checking the suitability of potential employees to work with children and vulnerable adults will commence. The system will be introduced under the Safeguarding Vulnerable Adults Act 2006.

Holiday pay

In October 2007 the Working Time (Amendment) Regulations 2007 increased a worker's minimum entitlement to paid leave from four weeks to 4.8 weeks. For workers working 5 days a week, this meant an increase from 20 days to 24 days a year paid annual leave.

A further increase to 5.6 weeks (or 28 days for full time workers) was due to take place in October 2008 but has been postponed and will now take effect from 1 April 2009.

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HAPPY AT HOME, PRODUCTIVE AT WORK

How many HR Managers face distressed employees on return from a wet bank holiday weekend. An employee who has matrimonial problems will chat to his or her colleagues reducing productivity of all. Problems are compounded when both husband and wife are employed within the same team or company. Hill Dickinson recognises that many employers want to ensure that key personnel resolve family problems as quickly as possible to minimise the impact on the employee and thus on the company. Hill Dickinson's specialist family department provides expert pragmatic advice through the traditional Court process or the collaborative law process. Collaborative law can be particularly attractive to couples who want to separate or divorce amicably whilst continuing in employment together.

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About Hill Dickinson

Hill Dickinson offers a comprehensive range of legal services from offices in Liverpool, Manchester, London and Chester, and its associated firm Hill Dickinson International has offices in London and Greece. Collectively the firms have over 150 partners and a complement of more than 1000 staff.

Hill Dickinson is a major force in insurance and is well respected in the company and commercial arena. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK following a merger with Hill Taylor Dickinson on 1 November 2006. The firm has an award winning property practice and is widely regarded as a leader in the fields of commercial litigation, employment, intellectual property, NHS clinical/health related litigation and private client.

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