

Online Update

Essential Information for Employers



May 2009

In the News

Spotlight on employment claims

The number of Employment Tribunal claims rose by 43% last year according to statistics released by the Employment Tribunals Service. In the period from April 2007 to March 2008, 189,303 claims were accepted by Employment Tribunals, compared to 132,577 the previous year.

Equal pay claims topped the league, with 62,706 claims, followed by 55,712 working time claims and 40,941 unfair dismissal claims. Official statistics are not yet available for 2008/2009, but provisional figures show that, despite a fall in the overall number of claims, there has been a substantial increase in the number of claims arising from redundancy, highlighting the importance of employers having a fair and non-discriminatory redundancy process that is properly documented.

ACAS pre-claim conciliation

On 6 April 2009, the statutory disciplinary and grievance procedures were abolished and replaced with a more flexible ACAS code of practice aimed at encouraging early resolution of disputes. To coincide with this, ACAS is now providing a free early conciliation service for cases which could otherwise become Employment Tribunal claims. Either the employer or employee can refer a dispute to ACAS for conciliation, provided they can show there is a genuine dispute and the parties have made reasonable efforts to resolve it internally. Our previous dealings with ACAS have shown that ACAS officers are generally unwilling to "rubber stamp" terms which are agreed without its input. There is no indication that this stance has changed.

ACAS will prioritise disputes that will benefit most from conciliation – eg where the employment relationship has not broken down permanently or where the issue could lead to a longer Employment Tribunal hearing. At least initially, the early conciliation service will not be available where the potential claims are for only unpaid wages, unauthorised deductions from wages, breach of contract, redundancy payments or holiday pay.

Responding to claims

New rules, also introduced on 6 April, make it more important than ever for employers to get it right when responding to Employment Tribunal claims. Under the new rules, if an employer fails to lodge its response within the time limit (28 days from when the claim was sent to them), the Employment Judge must decide the case without a hearing and issue a default judgment, meaning that the employee will usually win the case automatically. Employers will be able to apply to review the default judgment in some cases, but only after the decision has been made.

The Employment Tribunals Service has also published new forms for bringing claims (ET1) and responding to claims (ET3) to reflect the repeal of the statutory disciplinary and grievance procedures. The old forms will still be relevant to some ongoing disputes where the old statutory procedures apply (see March edition of **Online Update** for details). There may be some confusion within the Tribunal system as to which rules (old or new) apply. Where this occurs, employers may find they receive two separate letters from the Employment Tribunal – one giving the employer 28 days to respond to the claim and the second telling them to hold off responding until a decision is made on which rules apply. If you are in this situation, please speak to your usual Employment Department contact on how to best protect your position and avoid a default judgment against you.

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TUPE employee liability information

TUPE requires a transferor to provide specified employee liability information to the transferee before the transfer, to flag any potential employment liabilities the transferee could inherit from the transfer. On 6 April 2009, the information that the transferor must provide about disciplinary and grievance issues changed to reflect the abolition of the statutory dispute resolution procedures. Previously, the transferor had to provide details of any statutory disciplinary or grievance procedure in relation to a transferring employee – now the transferor must provide details of any disciplinary or grievance procedure covered by the ACAS code of practice on discipline and grievance within the previous two years.

As the statutory disciplinary or grievance procedures will still apply to some ongoing issues after 6 April, liability for these issues could still transfer to the transferee. Transferees should, therefore, also request details of any ongoing statutory disciplinary or grievance procedures.

Working time opt-out

As reported in the January 2009 edition of **Online Update**, the European Union has been considering proposals to abolish the ability of workers to opt-out of the 48-hour working week. The latest talks between member states and the European Parliament have failed to reach any agreement on the issue. This means that there will be no change to the UK's use of the 48-hour opt-out for the foreseeable future, unless fresh proposals are made and agreed in Europe. **Online Update** will report on future developments.

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Case Watch

When discriminations collide

Case 1: The employee was a relationship counsellor for an organisation providing confidential sex therapy and relationship counselling services to couples. As a devout Christian, he expressed concerns about providing sex therapy counselling to homosexual couples. The employer sought an assurance from him that he would comply with its equal opportunities policy and provide counselling to all couples regardless of their sexual orientation. When he refused to do so, he was dismissed.

The employee brought a religious discrimination claim, arguing that it was possible to arrange for homosexual couples to be referred to a different counsellor. However, the Employment Appeal Tribunal dismissed the claim. The EAT said it would have been contrary to the organisation's ethos to allow the employee to refuse to work with particular clients because of their sexual orientation. It was legitimate for the employer to want to provide its services in a non-discriminatory manner and there was no other way to achieve this than by requiring all counsellors to provide services to all clients.

Case 2: The employee, who was a devout Christian, was employed as a social worker and worked as part of the community mental health team of an NHS trust. He was dismissed for, among other things, inappropriately promoting his religious beliefs to service users. He had given one service user a copy of the Bible and another had complained about him promoting his religious views during a phone call. The employee brought a claim alleging, among other things, that his dismissal amounted to religious discrimination. The Employment Appeal Tribunal rejected the religious discrimination claim. The employee had been disciplined, not for his religious views, but for inappropriately promoting them to service users. The Council would have acted in the same way towards any other staff member foisting their personal views on others – religious or otherwise.

*The cases are similar to **Ladele v Islington Borough Council** (reported in the March 2009 edition of **Online Update**) which ruled that a Council was justified in dismissing a marriage registrar who refused to marry same-sex couples. Case 1 shows that, although employees can hold discriminatory views for religious reasons, employers do not have to condone discriminatory behaviour towards others, including customers, clients and work colleagues. Case 2 also confirms that employers do not have to tolerate staff members who inappropriately foist their religious views on others.*

Following these cases, an employer who seeks to promote equal opportunities would not normally have to accommodate an employee who refuses to work with a homosexual colleague or a female manager for religious reasons. By contrast, employers must still consider making allowances for employees whose religious views do not discriminate against others – eg requests for time off for prayer or religious holidays. In these situations, a careful balance must be struck between the employee's religious views and the needs of the business and, in particular, "knee-jerk" refusals should be avoided.

McFarlane v Relate Avon Ltd; Chondol v Liverpool City Council

TUPE – when contracts change hands

Two employees worked in the conveyancing department of a law firm based in Birkenhead. They spent most of their time doing work for a building society client. The building society sought tenders for the work and accepted a joint bid from two new law firms. The employees were offered a relocation opportunity to work at any office of the new solicitors; the closest being in Southport. They were reluctant to move and, after discussions broke down, resigned and claimed constructive unfair dismissal against one of the incoming law firms.

The Employment Tribunal upheld the claims. There had been a service provision change under TUPE when the building society changed law firms. At the time the contract changed hands, the employees were assigned to the building society contract, as they spent most of their time doing this. The employees, therefore, transferred to the new law firm when the contract changed hands. However, they were justified in treating themselves as constructively dismissed, as having to relocate to Southport meant a substantial change in their working conditions which was to their detriment. The constructive dismissals were connected with the transfer and, therefore, unfair.

The case confirms that an employee of a professional services firm who works predominantly for a particular client can automatically transfer under TUPE if that client changes service providers. This could create a number of practical problems, especially where the client changes firms because it is unhappy with that employee's service. It can also give rise to difficulties in enforcing any non-compete restrictions on an employee who transfers to a competitor under TUPE. To avoid the risk of staff transferring, employers should ensure that staff work on a range of client accounts so they are not wholly or mainly assigned to any one particular account.

Royden and others v Barnetts Solicitors

TUPE – is ignorance a defence?

The employer ran a number of post offices and decided to transfer some of these to another company. Before the transfer, some employees were redeployed within the employer's business, some took voluntary redundancy and others could have been redeployed under mobility clauses in their employment contracts. On that basis, the employer assumed that none of its staff would transfer to the new owner under TUPE. The employer, therefore, notified the relevant trade union about the transfer but did not engage in any consultation. The union brought a claim arguing that the employer had failed to comply with its duty to consult under TUPE about the legal implications of the transfer.

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The Employment Appeal Tribunal ruled that the employer had got the law wrong – at least some of its employees automatically transferred to the new owner under TUPE. Even though the employer could have redeployed its staff, it had not done so for everyone, and at least those staff that remained in the relevant post offices at the time of transfer automatically transferred to the new owner. However, the fact that the employer got the law wrong did not mean it failed to comply with its duty to inform and consult about the legal implications of the transfer. An employer who puts forward its genuine understanding of the situation complies with its duty to consult about the legal implications of the transfer even if that understanding is mistaken.

TUPE requires the transferor to inform and consult trade union or elected representatives about, amongst other things, the fact of the transfer and its legal implications for any affected employees. An employer will not be in breach of this duty if it informs the appropriate representatives about the transfer but genuinely gets the legal implications wrong. However, it would not be a defence against a complete failure to inform and consult for an employer to say that it simply did not realise that TUPE applied – ignorance of the law is no excuse.

Unfortunately, the EAT did not decide the trickier question of whether those employees who were redeployed before the transfer nonetheless transferred to the new owner. Arguably an employee who has genuinely been redeployed away from the business being sold prior to the sale will not transfer to the buyer under TUPE. Similarly, an employee who validly objects to the transfer and agrees to remain with the seller would not transfer. However, there is a risk that an employee who is redeployed solely to avoid TUPE might nonetheless transfer to the buyer.

Royal Mail Group Ltd v Communication Workers Union

Negotiating a settlement – when does employment end?

The employee, a teacher, was suspended with pay pending a disciplinary hearing. The hearing was postponed to allow negotiations over a proposed compromise agreement to take place. A draft of the agreement, headed "without prejudice and subject to contract", stated that employment would terminate by mutual agreement on 31 October 2006. Although the agreement was never finalised, the employee was removed from the payroll on this date and notified of this. Over four months later, after negotiations on the compromise agreement had broken down, the employee brought an unfair dismissal claim. The employer argued the claim was out of time, as employment had ended when the employee was removed from the payroll four months earlier.

The Court of Appeal ruled that, because the compromise agreement had not been finalised, there was no binding agreement between the parties as to the termination date. However, the removal of the employee from the payroll, in circumstances where the employee knew he would no longer be paid, was sufficient to show that his employment had ended on that date. The employee's claim was, therefore, out of time.

Where negotiations over a compromise agreement take longer than expected, the parties should be clear about when employment will end. Even if a termination date is initially proposed, if the individual remains employed because negotiations continue beyond this, the employer will usually have to continue paying salary and reconsider the settlement with a later termination date. Alternatively, the employer can bring the employment to an end, while negotiations are still ongoing, by dismissing the employee and stopping pay. However, this will trigger any dismissal-related claims the employee may have without the benefit of a signed compromise agreement. This case suggests that stopping pay alone may sometimes be enough to end the employment and trigger such claims.

Radecki v Kirklees Metropolitan Borough Council

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New Law

National minimum wage enforcement

On 6 April 2009, changes were made to the enforcement of the national minimum wage, including:

- where an employer is required to pay arrears of pay, the arrears will now be calculated by reference to the rate of NMW in force at the date of determination of the arrears, rather than the rate of NMW in force at the time of underpayment
- any employer who has not paid NMW and is issued with a notice of underpayment will also be required to pay a financial penalty within 28 days, consisting of 50% of the total underpayment (subject to a minimum of £100 and a maximum of £5,000). Previously, a financial penalty could only be issued if the employer had been issued with an enforcement notice first and had failed to comply, but financial penalties will now apply from the outset. If the employer pays within 14 days, the financial penalty will be reduced by 50%.
- serious offences for employers who are persistently non-compliant or refuse to cooperate with compliance officers can now include an unlimited fine.

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Consultations

FSA code on remuneration policies

The FSA has published a draft Code of Practice on remuneration practices for the financial services industry. At present, the FSA intends to apply the Code only to large banks, building societies and broker dealers, but has also invited feedback on whether the Code should apply to other FSA-authorized firms.

The draft Code consists of one rule which must be complied with – “a firm must establish, implement and maintain remuneration policies, procedures and practices that are consistent with and promote effective risk management”. The rule is supported by 10 principles, which have evidential status, in that non-compliance with one of the principles is evidence of a failure to comply with the rule.

Although the Code is in draft, FSA-regulated employers should consider how their remuneration practices and incentive arrangements comply with the Code. Among the principles in the Code are that:

- performance-related remuneration should be assessed on longer-term performance and linked to non-financial performance metrics (eg effective risk management)
- the majority of a bonus should be deferred if it is significant when compared to the fixed component of remuneration and
- deferred bonuses should be linked to future performance of an employee's division or business unit.

It is intended that the Code will become part of the FSA Handbook after consultation on it is complete. The FSA plans to publish the final version of the Code in late July 2009 with a view to it coming into force in November 2009. Comments can be made on the proposals to implement the Code for larger banks and broker dealers until 18 May 2009 and feedback on the possibility of extending the Code to other FSA-authorized firms can be made until 18 June 2009.

Watch This Space

Retirement and age discrimination

The European Court has delivered a preliminary ruling in the *Heyday* case – the legal challenge to the default retirement age which is being brought by the National Council on Ageing, under the name Heyday. The European Court has ruled that the UK mandatory retirement rules are, in principle, capable of being justified, but has referred the case back to the UK courts to decide the issue. A decision from the UK courts is not expected until late 2009 at the earliest. In the meantime, employers can continue to retire employees at or above the age of 65, provided the statutory retirement procedure is followed. Any age discrimination claims are likely to be put on hold until the outcome of the *Heyday* challenge is known.

Equality Bill

The Government has published the Equality Bill, which aims to harmonise existing discrimination law and also introduce new measures to strengthen equality. The Bill covers discrimination on the grounds of sex, race, disability, sexual orientation, religion or belief and age not only in employment, but also in the provisions of goods and services, education, private members' clubs and the duties of public authorities. The Bill is not expected to become law until October 2010.

Key changes proposed in the Bill include

- a power for the Government to make regulations requiring large employers (with at least 250 employees) to publish information about the differences in pay between male and female employees. The Government has committed not use this power before April 2013 and aims to encourage voluntary disclosure of this information in the meantime.
- outlawing "gagging" clauses which prevent employees from discussing their pay – a change that could affect the way some employers operate bonuses and other incentives which are intended to be confidential
- extending "positive action" so that employers could take into account underrepresented groups as a "tie-breaker" when selecting between equally qualified job candidates (eg choosing a woman over an equally qualified man to balance a male-dominated workforce)
- allowing Employment Tribunals to make wider recommendations in discrimination claims that apply to the whole workforce and not just the claimant (eg a recommendation that the employer revises its equal opportunities policy and training)
- making direct discrimination and harassment unlawful where it is because of a person's association with someone of a particular sex, race, disability, religion or belief, sexual orientation or age – eg harassing an employee because her partner is Jewish
- extending the current liability for sexual harassment of staff by third parties – eg customers and clients – to all strands of discrimination
- making age discrimination in the provision of goods and services unlawful.

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Stop Press

Increase to statutory redundancy pay

The Government has announced plans to increase the cap on a week's pay for the purpose of calculating statutory redundancy pay from the current £350 per week to £380 per week. This would increase the maximum statutory redundancy payment from £10,500 to £11,400. No formal announcement has been made on when the change will take effect, but there has been some suggestion this could happen in October this year.

Online Update will report on developments.

Our Work

Since the last edition of **Online Update**, our work has included:

- advising an employer on its response to unlawful strike action including possible dismissals of employees and claims against a trade union
- advising an employer on its trade union collective bargaining structures and differentiating between national and local consultation issues
- training line managers to prepare for redundancy discussions with 'at risk' employees
- advising on a consultative process involving both TUPE and redundancy consultation
- creating a complex bonus scheme to replace an informal discretionary arrangement
- advising on claims against a former employee for breaches of restrictive covenants and confidential information provisions
- defending sex discrimination allegations brought by a company director.

If you have any queries on this edition of **Online Update**,
please contact any member of the Employment Department

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