Borneo Linnells
Solicitors

EMPLOYMENT LAW NEWSLETTER – SPRING 2008

The last 12 months and the next – what you need to know

Looking back over the last 12 months…

- There were some memorable changes in the workplace during 2007. The smoking room was banished to the ashtray of history with the widespread ban on smoking indoors. A case was reported in Scotland in October 2007 involving a single incident of smoking at work being sufficient to make a dismissal fair. However this was a business where flammable products were used in the production process. It will be important to look at each individual case before deciding on the appropriate sanction for an employee who smokes at work. One of the important factors will be whether there is a policy in place about smoking at work, and whether it is clear that a breach of that policy will amount to gross misconduct, and that this has been made clear to employees. Don't forget that as an employer you could face a fine of up to £2,500 if you are caught allowing smoking in the workplace, which includes company cars!

- The statutory minimum holiday entitlement increased to 24 days per year for people who work 5 days per week. Please see our Autumn 2007 Newsletter for further details on this.

- The right to request flexible working was extended to include people who care for adults. This is essentially the same right as was previously given to parents of children under 6 (or disabled children up to 18) – and is just the right to request. You do not have to allow the application as you can refuse on business grounds. However, you should consider any requests carefully as a refusal without good reason could result in a discrimination claim. More detail is given on potential discrimination claims and carers below.

- The Flexible Working Regulations were also amended to change the definition of 'adopter' so that private foster carers have the right to request flexible working.

- The National Minimum Wage increased on 1 October 2007 from £5.35 to £5.52 per hour for workers aged 22 and over. For workers aged 18-21 the rate increased from ££4.45 to £4.60, and for under 18's the rise is from £3.30 to £3.40.

If you require any clarification or advice or if you need any assistance with updating your contracts or policies please contact one of our Corporate Employment Services team on 01908 300710 or 01908 304427.

Looking forward to the next 12 months….

Illegal workers – tough penalties to come

The first change in employment law to hit the headlines this year is likely to be the new penalties imposed on businesses employing illegal workers. From the end of February 2008 there is a new system of penalties in place which include fines of up to £10,000 in respect of each illegal worker, and a possible prison sentence of up to 2 years.

From 29 February any employer who employs someone subject to immigration control who is not entitled to carry out the work is liable for a civil penalty. The penalty will be on a sliding scale, with matters taken into account to determine the point on the scale, including how many times an employer has been found to be employing illegal migrants and whether the employer has a statutory excuse.

Employers will be able to establish an 'excuse' by checking and copying specific documents. This is not a legal requirement but where an employer has checked such documents they may avoid a penalty even if the employee is found to be working illegally.

There are 2 lists of documents, one set of documents which provide an ongoing excuse and another which provides an excuse for 12 months. Examples of the documents which provide an ongoing excuse are:

- a passport showing the employee has the right of abode in the UK
- a passport or national ID card showing the employee is a national of the European Economic Area (EEA) or Switzerland
- a residence permit or document showing that permanent residence has been issued by the Home Office to a national of a EEA country or Switzerland

These documents must be checked before the worker starts work. The excuse is not available where the employer *knew* that the employee was working illegally. This could also lead to criminal prosecution for knowingly employing an illegal worker, and conviction could lead to up to two years imprisonment. There are numerous other documents on each list, which we will be happy to advise you on.

It is also important to ensure that you avoid discriminating on the grounds of race or nationality while carrying out the requisite checks, as liability under the Race Relations Act extends to job applicants. In order to avoid this it is advisable to ensure that the checks are applied to all job applicants, whether believed to be British or otherwise. It is also advisable to have a clear, written, equal opportunities policy.

Disability Discrimination

A decision of the European Court of Justice is imminent on whether disability discrimination legislation applies to any discrimination on the grounds of disability, not just specifically discrimination of someone who is their self disabled – referred to as associative discrimination. This case involved a lady who cares for her disabled son, and claims that she was discriminated against on the grounds of his disability. A literal reading of the Disability Discrimination Act does not support such an action.

The Advocate General handed down an opinion on 31 January 2008, and said that the Directive does prohibit direct discrimination and/or harassment by association. The ECJ will normally follow the Advocate General's opinion but even then the claimant in this case will need to wait and see if the English courts will interpret the English law to give effect to the Directive. If not a change in the law to give effect to European Law could result.

Working Time Regulations - The implications of long term sick leave

In 2005 the Court of Appeal held that a worker who is on long term sick leave, and does not attend work for their employer at all in the relevant holiday year is not entitled to be paid their annual leave entitlement for that year. The reasoning of the Court was that allowing a worker off sick for the whole year to declare a section of that as 'leave' does not serve the health and safety purpose of the Working Time Regulations and lands the worker with a windfall.

This case has been referred to the European Court of Justice along with another similar case and a decision is expected later this year, although we have had the opinion of the Advocate General which has suggested that leave not taken by a worker due to illness must be granted at a later date – even if this is in a subsequent leave year. She considered that the Regulations provide for a minimum period of paid annual leave, which is a fundamental social right. If the leave cannot be granted at a later date because the employment has terminated then a payment in lieu should be made.

If the ECJ follows this opinion then there may need to be an amendment to the Working Time Regulations, which currently do not allow for annual leave to be carried over to the next leave year.

Transfer of Undertakings

A case was heard in the High Court in 2007 concerning an employee's right to object to a transfer of his employment under Regulation 4(7) of the 2006 TUPE Regulations. The case in question involved a transferee who sought to enforce restrictive covenants in the employee's contracts with the transferor. The employees had objected to the transfer of their employment two days after the transfer.

The Court found that in a case where an employee does not know the identity of the transferor until after the transfer, an objection can be registered after this. Two days was not held to be too long to object, having the effect that the contracts did not transfer and the transferee could not enforce the restrictive covenants.

The case will be heard in the Court of Appeal in the summer. Whilst it is possible for an employee to object to a transfer it leaves the employee unemployed and without a remedy for unfair dismissal as their contract is deemed to have terminated without being deemed a dismissal. However, there is some value for some employees in this situation who are then released from onerous restrictive covenants.

Age Discrimination

This young piece of legislation, which came into effect in October 2006 is working its way through the court system. The mandatory retirement procedure provided for in the Regulations is subject to challenge and is now on its way to the European Court of Justice. We are unlikely to get a decision before 2009, and it could even be 2010.

There has been a recent Employment Tribunal decision about a law firm – Clarkson Wright and Jakes – whose partnership deed provided for compulsory retirement at 65. The Regulations provide that dismissal for retirement will not be unlawful age discrimination where the statutory dismissal procedures are followed. However this applies to employees only, and as this case concerned a partner the compulsory retirement needed to be objectively justified in order to avoid being discriminatory on the grounds of age.

In this case the Tribunal held that the compulsory retirement age was objectively justified. It considered the need of the firm to offer advancement to solicitors; the fact that it was applied equally to all partners; and that the partner who had brought the claim had not previously attempted to have the compulsory retirement age removed. The Tribunal held that the compulsory retirement age was a proportionate means of 'creating a congenial and supportive culture' as it avoided the need to expel partners who were underperforming when approaching retirement. It may be useful to remember that this is a decision of the Employment Tribunal – not any of the higher courts – and it may be worth questioning the rationale of a decision on age discrimination that considers people may underperform when they are approaching retirement.

Dispute Resolution Procedures

Perhaps one of the most welcome changes will be the likely repeal of the infamous dispute resolution procedures. The new Employment Bill has been laid before Parliament but unfortunately it looks like we will have the current procedures in place until April 2009 at least. There has been a huge amount of case law about these procedures which has served to make the system more complex than ever.

The mishandling of a grievance raised by an employee has always had risks for the employer. If the case ends up in Tribunal there will be a mandatory uplift in any award of 10% and the Tribunal has the discretion to increase this to up to 50%.

A recent case has also found that where an employee resigns because the employer mishandled their grievance this could be a breach of the implied term of mutual trust and confidence and may sustain a claim for constructive unfair dismissal. A decision on appeal in this case is due from the Court of Appeal this year.

Similarly, an employer who does not follow the dismissal and disciplinary procedures could find that the dismissal will be found to be automatically unfair, with an increase of 10-50% in any award of compensation in the Employment Tribunal.

Corporate Manslaughter – The New Law

The Corporate Manslaughter and Corporate Homicide Act will come into force on 6 April 2008. This Act provides that an organisation can be found guilty of corporate manslaughter if:

The way in which its activities are managed or organised:
(a) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased; and
(b) causes a person's death.

Furthermore it is necessary for there to be a finding that the way in which the organisations activities are managed or organised by its senior management comprises a substantial element of the breach.

The new offence does not apply to individuals but to companies, public bodies listed in the Act, police forces and a partnership, trade union or employers' association that is an employer.

The offence is punishable by an unlimited fine, an order to remedy a failing within the Company or an order for the Company to publicise the offence in a specified manner.

Of course it is already a legal requirement to ensure the health and safety of your employees, but this is a timely reminder to review your health and safety procedures, and ensure that these are adhered to throughout the organisation from the senior management down to the shop floor.

Sex Discrimination

The European Court of Justice has decided that a woman who is having treatment for in vitro fertilization (IVF), who has had her ova fertilized but not yet implanted is not pregnant, and so is not protected from dismissal by the EC Pregnant Workers Directive.

However, the ECJ did find that a dismissal in these circumstances could still be discriminatory on the grounds of sex.

Currently pregnant women have special protection in law, as there is settled law to the effect that as pregnancy is a uniquely female condition, discrimination on the grounds of pregnancy is sex discrimination. This has been enshrined in the Sex Discrimination Act 1975, as amended.

The ECJ applied the facts as analogous, and found that as IVF "directly only affects women" then if a woman suffers a detriment as a result then this will be discrimination on the ground of sex contrary to the Equal Treatment Directive.

We may see other changes in the law in England and Wales due to decisions in Europe on pregnancy and maternity. Currently women can take 26 weeks ordinary maternity leave (OML) and 26 weeks additional maternity leave (AML). There is no longer a qualifying period of employment for entitlement to AML. Currently a woman's rights during AML are limited by legislation. A recent decision of the ECJ found that it is discrimination on the grounds of sex to treat a woman unfavourably in relation to her working conditions during any period of statutory maternity leave. It may be that in the future we find that all women on statutory maternity leave, whether ordinary or additional, will be entitled to the benefit of all terms and conditions of employment except the terms relating to remuneration.

Our Corporate Employment Services Team is available to advise you on any queries you have in relation to this Newsletter or any other employment law issues.

Please contact one of the team on 01908 300710 or 01908 304427. Alternatively you can email rosine.dawson@borneolinnells.co.uk

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