



All change...

Both novelty and caution affect (or afflict?) employment law.

The novelty is most obvious in the rules on additional paternity leave (APL) and the changes to flexible working. The right to APL applies to parents of babies due after 2nd April 2011 or to those matched with a child for adoption after that date. It allows a father or same-sex partner to take leave during the first year of the child's life or adoption, provided that the mother or partner has terminated statutory leave by returning to work.

The duration of APL can be from 2 weeks (an initial two weeks is already available under the original paternity leave rules) to 26 weeks – it is *not* determined by the amount of unused maternity or adoption leave when the mother/partner returns. But, additional statutory paternity *pay* will be available for the APL *only* to the extent that the mother or partner has not already exhausted entitlement to SMP or maternity allowance.

The flexible working regime has undergone less dramatic change. In essence, from 6th April, the right to make a request extends to the parents of 17-year old children.

And, while some aspects hark back to the Thatcher years, the Government's current proposals for change to the tribunals and unfair dismissal promise some innovation.

So, alongside reversion to a 2-year qualifying period for general unfair dismissal, there are other moves afoot:

to charge a fee to submit a claim; to make conciliation with ACAS mandatory *before* a claim is submitted; to extend the scope of provisions to strike claims out and to award costs; to require more information from claimants about the losses claimed; to record rejected offers of settlement; and to speed up tribunal hearings. But there could be some price to pay for employers.

Also mooted are penalties for respondents who threaten costs against unrepresented claimants and those who are found to have breached employment rights.

In contrast, as well as slowing down activation of bits of the Equality Act (see separate feature), the Government has announced that it will not proceed with extending the right to 'time for training' to employers of fewer than 250 but more than 49 people, originally scheduled for April.

And, although some might say it is not truly 'employment law', the Bribery Act hit choppy water soon after it was featured in our January issue. Implementation was postponed while the Guidance material was re-worked to give businesses greater confidence about what hospitality or entertaining might be 'bribery' and about the type of procedures necessary to avoid corporate liability under Section 7.

Late last week the revised guidance was published. It can be found on the Ministry of Justice website. The Act now comes into effect on 1st July.

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The abolition of the retirement age – what does it mean?

After 5th April 2011, the statutory fair retirement procedure can no longer be initiated to dismiss people fairly. But can employers still operate a company-wide retirement age?

Well, it will not be unlawful simply to refer in employment documentation to a normal retirement age (NRA). And it will always be open to an employee to choose to leave at that age, often to take up a pension (entitlement to which generally arises at the same time).

However, if an employer wants actually to enforce an NRA, it must be justified (an 'employer-justified retirement age' - EJRA) as being a 'proportionate means of achieving a legitimate aim'. So, how readily can a compulsory, company-wide, retirement age be an EJRA?

Some purposes generally considered capable of being 'legitimate aims' of a uniform retirement age are: to plan succession; to give younger people more opportunities; to allow proper planning for retirement; and to avoid extra costs of employment and undignified processes for managing performance.

But, often, the real difficulty in establishing an EJRA arises in showing that the NRA is a 'proportionate way' of achieving the objective. The case law on this is young and developing. And there is a general divergence between the European Court of Justice and the UK courts. The former has been more ready to accept an NRA as justified – particularly when a pension provides replacement income or there are particular occupational demands. But, unless and until it is overruled by Europe's, the UK's less accommodating stance is unlikely to relax now that the Government has abolished a general default retirement age.

So, with that uncertainty, should employers adopt other methods to the same ends?

These will generally concern aspects of capability – performance or health. And the need to consider personal circumstances rather than just age will complicate the matter. The demands increase because the response to a 'capability issue' need not be termination. Even non-disability cases can feature adjustments of working patterns and responsibilities.

Now, back to whether reference to an NRA should be removed from employment documents. As we said earlier, a reference is not, in itself, unlawful. And it might be a psychological prompt, sometimes encouraging employees to retire voluntarily, whether or not in response to enquiries from the employer about their intentions (enquiries that would also be legitimate without the survival of an NRA).

If the decision is to remove reference to the company-wide retirement age altogether, there are, strictly, consultative processes to go through – because an NRA tends to be part of terms and conditions of employment. However, in practice, the absence of consultation would rarely cause legal problems. There is no real 'down side' for employees: even without a stated NRA, they can still choose to leave and take their pension at that age.

What about benefits that hinge on age? It will not be age-discriminatory to exclude those over 65 or the state retirement age (whichever is the greater) from being covered by insurance-related benefits, such as death-in-service cover, private medical expenses provision and permanent health insurance. Of course, if they are based on a different NRA, this exemption will not be automatic but will have to be an EJRA. Finally, share option schemes are not specifically contemplated by the laws giving effect to the abolition of the default retirement age. But they often define those retiring as 'good leavers' and those simply resigning as not. So they are likely to merit reappraisal and redrafting.

Progress of the Equality Act

The Equality and Human Rights Commission has explained the provisions of the Equality Act 2010. Its Statutory Codes of Practice on employment and equal pay can be downloaded from its website.

The Government Equalities Office has announced that the *general* duty of equality in the public sector will come into force on 5th April 2011. But the *specific* duties, much changed, will not be implemented until July 2011.

Section 159 of the Act will come into force on 6th April 2011. It will permit employers faced with candidates of equal merit to favour those with a protected characteristic, to tackle under-representation in the workforce of people with that characteristic.

There is currently no date for the implementation of section 14 of the Act, which would allow claims of direct discrimination on grounds of less favourable treatment because of a combination of two protected characteristics.

Reasonable adjustment

In *RBS v Ashton*, the Claimant's sick pay was withheld under the terms of the employer's sickness absence policy. The Claimant argued that her absences were disability-related. So the employer had failed to make reasonable

adjustments under the laws on disability discrimination. The EAT disagreed. Only exceptionally would withholding sick pay in accordance with a sickness policy have this effect.

Running along with TUPE

Sometimes, we think that we should produce a separate TUPE newsletter, such is the pressure its case law places on space in this publication. But, for the time being, here is this month's compendium of cases.

First, there is *First Scottish Searching Services v McDine*, in which the EAT considered the common problem of assessing, in a post-transfer redundancy exercise, employees who all do a similar job but who are in two pools, one consisting of the recently transferred staff. The rationale for this approach is unsurprising – each group has its own managers, who know their people well. But is the scoring consistent? The EAT ruled that the fact that an employer had foregone some system of moderation was not enough for the redundancies to be unfair. But, before everybody rushes to apply this ruling keenly, we should add that the facts of *McDine* did not suggest either an actual scoring imbalance or bad faith. Generally, a comparison of the overall scoring profiles of the two groups would still be prudent.

Harking back to a subject featured in our newsletter 12 months ago, the EAT in *OTG v Barke* (overruling *Oakland v Wellswood*) has found that a 'pre-pack administration' will

never be 'insolvency with a view to liquidation' so as to disapply TUPE altogether. If you buy a business from an administrator who tries to assure you otherwise, do not be taken in – the employees of the insolvent business will have most protections/rights under TUPE.

In *CLECE v Socorro*, a municipal authority terminated its contract with CLECE, a cleaning company, in order to do its own cleaning. Mrs Socorro, the sole employee of CLECE, was not taken on by the authority. Should her employment have transferred in law? The ECJ ruled that, if a change of service-provider was not accompanied by the transfer of assets or the assumption of the employees working on the service, there was no transfer under the Acquired Rights Directive (the EU's 'parent' of TUPE). It was the activity (cleaning) not the entity (manpower) that had transferred.

This gives businesses elsewhere an easy way of sometimes avoiding obligations. But, beware - at present, TUPE, with its specific rules on 'service provision change', gives workers more protection than the ARD does (although the coalition government has threatened to end what it chooses to describe as the 'gold-plating' of EU directives).

Pub discriminated against gay customers and employee

In April, we featured *English v Sanderson*. Repeated homophobic taunting of a man known to be heterosexual was still discrimination *on grounds of* sexual orientation. The EAT revisited the meaning of this phrase in *Lisboa v Realpubs*. Mr Lisboa, who is gay, complained about such discrimination when his employer attempted to transform the pub where he worked from a 'gay pub' to a gastro pub. Families were seated in prominent positions, and an e-mail made clear that the venue was no longer exclusively gay.

The EAT ruled that the employer's decision to change the pub was lawful. But the way it had been done was not. A

director had disparaged the staff and customers and had suggested a sign saying 'This is not a gay pub'. It was clear that gay customers were treated less favourably *on grounds of their sexual orientation*. Mr Lisboa had been discriminated against on the same grounds.

The phrase *on grounds of* in the former Regulations has been replaced with *because of* in the Equality Act 2010. But the meanings are intended to be the same. So cases such as this, decided under the old legislation, remain good law.

Confusing alcohol policy led to unfair dismissal

Liberty Living plc had two policies dealing with alcohol. Its disciplinary policy listed *being under the influence of alcohol...during working hours* as an example of gross misconduct. Its alcohol and drug policy stated that *consumption of alcohol or being under the influence of alcohol ... while performing company business or in the workplace* could result in disciplinary action up to and including dismissal.

Mr Reid left work one afternoon and visited a bar, where a manager found him drinking a lager shandy. He was invited to a disciplinary hearing and sent the disciplinary policy. The drugs and alcohol policy was not sent to him until he had been dismissed for *being under the influence of alcohol* and *consuming alcohol during working hours*.

The EAT decided that Mr Reid had been unfairly dismissed. The policies were confusing. They did not prohibit all drinking during working hours. And the company did not understand its own policies. It had confused the charges against Mr Reid, and the reasons for dismissal.

It is good practice for employers to have comprehensive policies on employees' conduct at work. But those policies must be consistent. Faced with an employee who has drunk alcohol during working hours, an employer should consider all the relevant circumstances, including the amount of alcohol consumed, the reason for the employee's drinking, and the potential impact on working duties.

Whistleblowing

In *Fecitt and others v NHS Manchester*, three nurses reported their colleague for exaggerating his qualifications. When confronted, he admitted this and apologised. So his employer took no further action. The complainants pursued the matter, causing working relations to deteriorate. The employer's solution was to remove managerial responsibilities from one; re-deploy another; and offer no more work to the other, a bank nurse. Unsurprisingly, they claimed to have been treated detrimentally because of their protected disclosure. The EAT agreed and set out the correct approach. If a worker has made a protected

disclosure and has subsequently suffered detrimental treatment, it is up to the employer to prove that the former and the latter are *in no sense whatsoever* linked. It is common for workplace relationships to break down after allegations of whistleblowing. But it was no answer for this employer to say that its actions were the only feasible way of resolving the problem. This decision means that employers will have to be more careful than ever to make sure that any steps taken to repair damage do not amount to detrimental treatment of the whistle-blower.

Selecting in or selecting out?

Since *Akzo Coatings v Thompson* in the early 1990s, we have been advising clients that the guidelines on fair selection for redundancy laid down in the famous *Williams v Compair Maxam* judgment do not apply fully to the process of choosing which redundant employees to consider for retention in a new job. And the EAT has recently made the point again in *Morgan v WRU*. The *Compair Maxam* strictures, based on objective and consistent standards, are for selecting, from a pool, one or more to be made redundant from the current job.

But, if two people whose jobs are redundant are applying for one new post (as in *Morgan*), the employer's failures to adhere rigidly to the content of the job description and to adopt a uniform approach to interviews does not render unfair the subsequent dismissal for redundancy of the unsuccessful candidate. But this is not a recipe for a free-for-all. Completely arbitrary or unconsidered decisions may still attract an adverse decision about dismissal.

Ballots

Last June, we looked at the laws on union ballots for industrial action. We predicted that tight interpretation of the rules, a feature of many decisions in 2010, was likely to remain the norm. Well, what do we know? ... In a set of cases sailing under the flag of *NURMT v Serco*, the Court of Appeal, removing injunctions against both RMT and ASLEF, relaxed the standard to be demanded of trade unions in various respects. It reinforced the rule about accidental balloting errors that are clearly immaterial (in this case, two members voting when they were not entitled

to do so). Ignoring the earlier decision in *EDF v NURMTW*, it devalued the importance of any difference between the descriptions of job categories used by a union in required notices and those used by the employer operationally or for pay systems or negotiation. And it reduced the onus on unions to keep records for reporting. So, if there is a political desire to control industrial action more rigorously, it seems it will be satisfied only by new legislation.

A break is as good as a rest

Workers in security and surveillance, are excluded from the general right to an uninterrupted rest break. But they are entitled to an equivalent period of compensatory rest. This was confirmed in *Hughes v Corps of Commissionaires*. A security guard who was expected to remain on call during his break could choose when to take that break and could

retake it if he was interrupted. This, the EAT found, provided adequate compensatory rest to safeguard his health. If work requires continuous attention or is subject to surges of activity, employers should find means to permit employees to take uninterrupted breaks, such as temporary cover, or rest during quiet periods.

Although care has been taken in the preparation of this Newsletter, Collinson Grant cannot accept responsibility for errors, omissions or advice given. Readers should note that only Acts of Parliament and Statutory Instruments have the force of law and only the courts can authoritatively interpret the law.



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