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Summer 2008 / Issue 7 – Dispute Resolution Reform Special

Work Matters

Employment Law News

In this issue

Changes to the Law on Sex Discrimination

The scope for employees to bring harassment claims against employers has been widened by changes to the law which took effect from April 2008.

Amongst the most significant of the changes is an obligation on employers to protect their employees from harassment from third parties such as customers or clients. Employers will be liable for damages if they do not take reasonable steps to shield their employees from third party harassment when they are aware that the harassment has taken place on at least two other occasions. It is irrelevant for these purposes if the harassment is carried out by different third parties on each occasion.

The potential scope for claims has been further widened due to a change to the definition of harassment. Prior to the changes, sexual harassment occurred when, on the grounds of sex, a person engaged in unwanted conduct that had the purpose or effect of violating another person's dignity or which created an intimidating, hostile, degrading, humiliating, or offensive environment. Under the new law, the words *"on the grounds of sex"* will be replaced by *"related to his/her sex or that of another person"*. This new definition means that even those who are not directly exposed to harassment will be protected and that for harassment to be unlawful it may relate either to the victim's sex or that of someone else. In other words, any harassment which has a sexual connotation will be unlawful, even if not carried out because of the victim's sex.

The rules governing maternity leave are also due to undergo an overhaul later this year that will remove the distinction between Ordinary Maternity Leave and Additional Maternity Leave. The change will bring Additional Maternity Leave rights into line with those enjoyed whilst on Ordinary Maternity Leave meaning that women who continue their maternity leave beyond six months will still be entitled to their contractual benefits (excluding salary).

Agency Workers to Have Equal Rights with Permanent Staff

The Government, the CBI and the TUC have reached agreement on how to promote fairer treatment for agency workers in the United Kingdom. Under the agreement, agency workers will be entitled to equal treatment with comparable permanent employees after twelve weeks in a given job. The obligation will not extend to the provision of pension.

The Government will now work with its European partners to seek to agree the terms of the Agency Workers Directive, which will enable this agreement to be brought into legal effect in the United Kingdom — this is intended to be during the next parliamentary session.

Increases to Statutory Sick, Maternity, Adoption and Paternity Pay

On 6 April 2008, SSP increased from £72.55 to £75.40 and statutory maternity, paternity and adoption pay increased from £112.75 to £117.18.

Flexible Working – Right to Request to Extend to Working Parents of Under-16s

Gordon Brown has confirmed that the right to request flexible working will be extended to parents of children under 16. As yet, there is no timetable for implementation. Potentially, however, this change could benefit 4.5 million employees. We recommend that employers review their guidance (and update their managers) at the earliest possible opportunity.

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Are You a Large Shipbuilder?

As a result of changes outlined in the 2008 budget, any company which currently operates an Enterprise Management Investment scheme ("EMI") should consider granting options in the coming weeks. This is because, as soon as the Finance Bill 2008 is granted Royal Assent (which would usually occur in July), only companies with less than 250 *"full-time equivalent"* employees will be able to grant EMI options. In addition, shipbuilding, producing coal and/or producing steel will now be *"excluded activities"* for the purpose of EMI options. Therefore any company whose trade consists of those activities exclusively or to a substantial extent will no longer be able to operate an EMI scheme.

Headcount? If a company is part of a group, all full-time employees (including directors) within the group will count towards the 250 limit on the number of employees a company can have if it is to be able to grant EMI options. Those on maternity or paternity leave can, however, be excluded. In addition, part-time employees will represent fractions of employees to the extent the company considers it *"just and equitable"* (although it is likely that the Employee Share and Securities Unit will publish guidance on this).

Since there are no anti-avoidance provisions in the legislation, it is arguably possible for a group to restructure to avoid the application of this limit. However, in all but the most exceptional circumstances, the costs involved in such an exercise are unlikely to make this option financially viable. As an alternative, if a company usually exceeds the limit, it could consider granting EMI options when its headcount is temporarily below 250 full-time equivalent employees (for example, because a large number of employees are on maternity leave). This is because the requirement need only be met at the time the options are granted.

Is it worth it? Since the loss of taper relief, the tax benefit of EMI options when compared, for example, with share options under a Company Share Option Scheme (CSOP) is negligible. That said, it is now possible to grant an individual employee up to £120,000 worth of EMI options (since the limit was increased in April) as opposed to £30,000 worth of CSOP options. In addition, since EMI schemes do not require prior approval by HMRC they are undoubtedly quicker and easier to set up than other HMRC "approved" schemes.

The Limits of Homophobia

As a result of the Employment Appeal Tribunal decision in *English v Thomas Sanderson Blinds Ltd,* if an employee's colleagues constantly rib the employee for being gay, even though they know that employee is straight, the employee will not, as the law currently stands, be able to claim under the Employment Equality (Sexual Orientation) Regulations 2003 (the "Regulations").

This is because the Regulations only prohibit discrimination, victimisation and harassment based upon an individual's actual or perceived sexual orientation (i.e., a mistaken belief that a person has a particular orientation) whether towards persons of the same sex, opposite sex, or both sexes. In the *English* case, the claimant was not, nor did any of the colleagues who subjected him to the treatment complained of believe him to be, homosexual nor did the claimant believe that his colleagues actually thought him to be gay. His colleagues did, however, subject him to *"banter of a homophobic nature"*, a course of conduct which was claimed to have originated from a manager who had become aware that the claimant lived in Brighton and had attended a boarding school.

In seeking the protection of the legislation, the claimant argued that his colleagues treated him in the way that they did because they perceived him as having stereotypical characteristics which they associated with a gay man. Consequently, he argued that the Regulations should apply since they extend to discrimination based on perception, association and instructions (as confirmed in the Explanatory Notes on the legislation produced by what was then the DTI). The EAT rejected this argument and held that the homophobic banter complained of was a *"vehicle for teasing"* the claimant rather than based on a perception or incorrect assumption that he was gay.

The EAT did, however, grant leave to appeal to the Court of Appeal since it was driven to conclude that the Regulations did not properly implement the European directive from which the protection on the basis of sexual orientation derives. In doing so, the EAT drew on the conclusions of Burton J in *EOC v Secretary of State for Trade & Industry* which concerned the United Kingdom's implementation of the Equal Treatment Directive in relation to the Sex Discrimination Act 1975 ("SDA"). In summary, in both cases the Directives are concerned with behaviour *"related to"* an individual's sex or sexual orientation. The United Kingdom's construction, that the behaviour must be *"on the grounds of"* the protected character is arguably much narrower. As a

result of the *EOC* case, the SDA has now been amended (as reported above). It seems likely that a similar change to the Regulations will not be far behind.

In any case, the *English* case should not be seen as excusing or legitimising banter, whether homophobic or related to one of the other characteristics protected by discrimination legislation, in any circumstances. Treatment of this sort may in any event constitute constructive (and unfair) dismissal and an employer's reaction to complaints about such behaviour may lead to claims based upon the whistleblowing legislation. Consequently, employers should adopt dignity at work policies to guide employees on what is considered inappropriate in the workplace and provide training on its policy at regular intervals.

Hefty Fines and Criminal Penalties – Immigration Checks Following a TUPE Transfer

The last edition of *Work Matters* highlighted the increased penalties for illegally employing foreign nationals. The maximum civil penalty for each illegal worker is now £10,000 and there is a new criminal offence for employers who knowingly employ illegal migrants — the penalty for which is a potentially unlimited fine or two-year prison sentence.

It is relatively straightforward for an employer to insist that prospective employees produce evidence of their entitlement to work in the UK — for example, by requiring employees to provide an EU passport or work permit on their first day of work. However, difficulties may arise following a relevant transfer (for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")) — such as the sale of a business.

On a TUPE transfer, the new employer will generally inherit all rights, duties and liabilities in relation to the transferring employees. However, the Home Office Code of Practice confirms that a new employer will not inherit the benefit of immigration checks previously carried out by the old employer.

Instead, new employers have a 28-day grace period following a TUPE transfer in which to conduct the necessary immigration checks — else they themselves will face the substantial fines and potential criminal liability.

Reminder – Grievances during a Disciplinary Procedure

The statutory grievance procedures do not apply where an employee's grievance relates to his/her dismissal or "*relevant disciplinary action*". The only exceptions are where it is alleged that the employer's actions constitute unlawful discrimination, or where the real reason for the employer's action is unrelated to the explanation given to the employee.

However, "*relevant disciplinary action*" does not include warnings (whether written or oral) or periods of paid suspension. Accordingly, if an employee submits a written grievance about a disciplinary warning, his/her employer must then follow the statutory grievance procedure — and should (as the ACAS guidance recommends) consider suspending the disciplinary appeal process until the grievance has been addressed.

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This update was authored by Charles Wynn-Evans (+44 20 7184 7545; charles.wynnevans@dechert.com), Nicholas Jackson (+44 20 7184 7512; nick.jackson@dechert.com), Emma Byford (+44 20 7184 7866; emma.byford@dechert.com), and Karen Ferries (+44 20 7184 7892; karen.ferries@dechert.com).

Dispute Resolution Reform

In March 2007, the Gibbons Report on employment dispute resolution in the United Kingdom (the ''Report'') recommended that the statutory procedures be repealed. It suggested that they be replaced with *"clear, simple, non-prescriptive guidelines on grievances and discipline and dismissal in the workplace, for employers and employees."*

The Employment Bill, published in December 2007, unveiled the Government's proposals in this regard. Its plan is to:

- repeal the statutory dismissal and grievance procedures; and
- give tribunals the power to increase/decrease awards of compensation by up to 25% if an employer unreasonably fails to comply with a Code of Practice to be developed and published by ACAS.

The Government invited the views of interested parties on the proposals in the Report, most of which are reflected in the Employment Bill. Last week, the Government published its response to the consultation and outlined its plans for further modernisation of employment dispute resolution in the United Kingdom.

The Government Response

The ACAS Code of Practice (the ''Code'')

The intention is that the Code (discussed below) will allow Tribunals to consider the appropriateness of parties' behaviour in the particular circumstances of a case rather than assessing compliance with a set procedure. The Government considers that the detailed guidance to be published by ACAS in due course will provide clarity for employers and employees who are looking for practical ideas as to how to resolve their differences.

The penalty for a failure to follow the Code

The Response reveals that a number of consultees thought that compliance with the Code should be dealt with by way of costs orders.

Currently, Tribunals may only make an award of costs against a party who, in bringing or conducting the proceedings, has acted *"vexatiously, abusively, disruptively or otherwise unreasonably"* in bringing a claim. It was suggested that this should be extended to allow Tribunals to make costs orders against employers and employees who unreasonably fail to follow the Code. The Government has decided against extending the current costs regime in order to avoid any disproportionate effect on employees and less well-informed employers.

The Employment Bill therefore continues to propose that Tribunals will have the power to increase/decrease compensatory awards by up to 25% for any unreasonable failure to follow the Code.

New advice service

The Government intends to invest up to £37m in ACAS over the next three years to enable it to expand its existing helpline. The new and improved helpline is intended to:

- offer prospective claimants *"clear, up-front advice"* about their options and what bringing a claim involves;
- allow advisers to discuss the experience of bringing a claim and the potential outcomes; and
- advise on the help available to find alternative ways of resolving disputes.

Fast-track system

The Government intends to establish a fast-track procedure within the Tribunal system for dealing with straightforward claims without the need for a hearing.

The main features of this paper-based system would be as follows:

- all parties would have to consent to the fast-track and an Employment Judge must consider it appropriate;
- only the following claims would be eligible for the fast-track — unlawful deductions from wages, breach of contract, redundancy pay, holiday pay and the national minimum wage; and

- there will be no monetary limit on these claims (save that the limit of £25,000 will still apply to breach of contract claims).

Removal of time limits on ACAS' duty to conciliate

The length of time for which ACAS is allowed to conciliate in employment disputes currently varies depending on the type of claim. For example, discrimination claims have no fixed conciliation period, whereas *"straightforward claims"* have a fixed conciliation period of seven weeks. ACAS has rarely exercised its discretion to extend these periods.

However, following advice that the fixed periods did not improve settlement rates, the Government has recommended that they be abolished. Although it is likely to be April 2009 before the Employment Bill comes into force, ACAS has decided that its conciliators may exercise their discretion to extend the conciliation period if either party requests it or if, in their opinion, there is a reasonable prospect that it may encourage settlement.

Simplification of claim forms

The Government proposes to simplify ET1s in due course, building on the changes that will be necessary to accommodate the changes in Tribunal procedure detailed above.

ACAS Code of Practice

ACAS has been working on revising its Code of Practice since the Employment Bill was published. The revised Code was published on 2 May 2008 and ACAS is currently inviting comments on the draft. You can download a copy at www.acas.org.uk.

The aim is for the Code to take effect at the same time as the provisions that replace the statutory procedures which, it is hoped, will be April next year.

The status of the Code

The status of the Code will not change. It is intended to act as a guide for employers and employees when dealing with disciplinary issues within the workplace. Unlike the statutory procedures, failure to follow the Code will not of itself render the dismissal unfair or prevent an employee from bringing Tribunal proceedings.

The incentive for parties to follow the Code will be a financial one — under current proposals, Tribunals will be empowered to adjust awards of compensation by up to 25% for an *unreasonable* failure to follow *any* aspect of the Code. This will be a power, not a duty.

ACAS's aim was to produce a shorter code *"which concentrates on the key principles that underpin the handling of disciplinary and grievance situations in the workplace"*. This explains why the Code is just six pages long (the current version is 36 pages long excluding the annexes). ACAS intends to supplement the Code with detailed guidance which will contain model disciplinary and grievance procedures.

Guidance

One of the main complaints about the statutory procedures is that they force parties to focus on ensuring that all of the technical requirements of the procedures are fulfilled, rather than examining ways of resolving the underlying problem. The Code is intended to help parties move away from this approach and focuses upon the key principles of fairness, transparency, and consistency.

The guidance is very straightforward. It will feel very familiar to HR practitioners and is unlikely to involve any departure from their current practices when handling disciplinary and grievance procedures. For example, the Code states that employers should:

- initially aim to resolve disputes informally;
- deal with issues promptly;
- carry out appropriate investigations; and
- ensure that individuals who are the subject of or involved in the complaints are not involved in any grievance or disciplinary meeting.

One rather specific point is that where the employer is raising a performance problem, it should involve the employee's immediate manager in any disciplinary meeting. This provision, although sensible, is not one which features in ACAS' current guidance.

Discipline

This section of the Code is structured by way of a list of *"keys to handling disciplinary problems in the workplace"*. These are:

- establish the facts of each case;
- inform the employee of the problem;
- hold a meeting with the employee to discuss the problem;

- allow the employee to be accompanied at the meeting;
- decide on appropriate action; and
- provide employees with an opportunity to appeal.

The Code provides very little guidance on how an employer should deal with disciplinary issues in practice. It does, however, mention two 'special cases' which stand out amongst the other, very general, guidance. The first is that if it is necessary to discipline a trade union lay official, it may be advisable (with the employee's agreement) to discuss the matter with the union at an early stage. The second is that criminal convictions cannot, in themselves, be grounds for disciplinary action.

Grievance

Again, the guidance on grievances is very short. The employer should:

- let the employer know the nature of the grievance;
- hold a meeting with the employee to discuss the grievance;
- allow the employee to be accompanied to the meeting;
- decide on appropriate action; and
- allow the employee to take the grievance further if not resolved.

The Code states that a grievance is *"best"* raised in writing. This is presumably to address the concerns of smaller employers that the requirement to put matters in writing was counter-cultural, and that it tended to exacerbate the problem rather than help solve it.

Conclusion

The review that preceded the Employment Bill recommended that the Government should *"produce clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace, for employers and employees."* The Code has clearly been drafted with this recommendation in mind.

It will come as a relief to employers that the statutory procedures are to be replaced with the Code. As it is based on normal HR good practice, it is unlikely to affect the way that most HR professionals deal with disciplinary issues and grievances. What it should do is allow smaller, more inexperienced employers some leeway when resolving workplace disputes and avoid technical breaches of fair process having a disproportionate impact on the outcome of employment litigation.

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This special feature was authored by Charles Wynn-Evans (+44 20 7184 7545; charles.wynnevans@dechert.com) and Kate Holbrook (+44 20 7184 7346; kate.holbrook@dechert.com).

Practice group contacts

For more information, please contact one of the lawyers listed, or the Dechert lawyer with whom you regularly work. Visit us at www.dechert.com/employment.

Jason Butwick
London
+44 20 7184 7569
jason.butwick@dechert.com

Charles Wynn-Evans
London
+44 20 7184 7545
charles.wynnevans@dechert.com

Dechert LLP

www.dechert.com