

People

The Employment Review - Autumn/Winter 2007

December 2007

There have been a number of significant employment law developments over the past few months. In fact, there have been very few areas of employment law which have escaped the attention of employment lawyers and HR professionals alike.

This issue of People selects just a few of these areas, rounding off the year by highlighting the key changes which have taken place and recent case law developments. We also provide in-depth analysis on the new increase in annual leave, the developments surrounding illegal working, a recent key decision on the scope of collective consultation and the new corporate manslaughter legislation.

In view

Annual leave

On 1 October, statutory annual leave entitlement for full time workers who work a five day week increased from 4 weeks (20 days) to 5.6 weeks (28 days), to reflect the eight public holidays. This increase comes into force in two stages. It has caused some confusion, so we take a closer look at the new provisions later on in this Issue.

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CEHR or EHRC?

The Equality and Human Rights Commission (EHRC), formerly entitled the Commission for Equality and Human Rights, came into being on 1 October. It provided a single equality body, and merges the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. The EHRC also has additional responsibility for the newer "strands" of discrimination (sexual orientation, religion or belief and age), plus human rights.

NMW on the up

The principal rate of the national minimum wage increased on 1 October from £5.35 per hour to £5.52. For workers aged 18-21, the hourly rate rose from £4.45 to £4.60 and for workers below the age of 18 who have ceased to be of compulsory school age, the hourly rate rose from £3.30 to £3.40.

Retirement claims to be stayed

Following an employee's successful appeal to the Employment Appeal Tribunal (EAT) in *Johns v Solent SD Ltd* against the tribunal's decision not to stay her age discrimination claim, the President of the Employment Tribunals has issued a Direction ordering all current and future claims raising the same issue to be stayed pending the decision of the European Court of Justice (ECJ) in the case brought by the campaign group *Heyday*.

The issue in *Johns* is whether regulation 30 of the Employment Equality (Age) Regulations 2006, which permits employers to dismiss employees who have reached a normal retirement age, is contrary to the Equal Treatment Framework Directive. The ECJ decision in *Heyday*, outlined in the Spring/Summer issue of *People*, is not expected until early 2009.

Maternity/additional paternity leave and pay - delay until April 2010

The Government had intended to extend Statutory Maternity Pay, Maternity Allowance and Statutory Adoption Pay from 39 weeks to 52 weeks and to introduce Additional Paternity Leave and Pay by the end of this Parliament.

These plans have now been put back. HM Revenue & Customs has stated that it has, up to now, been planning on the basis of implementation for babies due on or after April 2009 and that it "will now start planning implementation for babies due on or after April 2010" (although, once again, no firm timing decisions have been taken).

Case update

Partner loses age discrimination claim

Capturing the headlines as one of the first decisions under the new age equality legislation, an employment tribunal has confirmed that a law firm did not discriminate unlawfully on the grounds of age when it made changes to its pension arrangements. The decision sheds some light on the future interpretation of the Employment Equality (Age) Regulations 2006, particularly in relation to the justification defence (which unusually applies to both direct and indirect age discrimination), providing some guidance on the most recent 'strand' of discrimination legislation.

In *Bloxham v Freshfields Bruckhaus Deringer*, Freshfields overhauled its pension arrangements for partners in an effort to address the conflicting interests between different generations of partners. In doing so, it put in place transitional arrangements for those partners close to retirement age. Mr Bloxham subsequently claimed age discrimination on the basis that he was disadvantaged by the transitional arrangements.

The tribunal confirmed that he had suffered direct discrimination as he had been treated less favourably on the grounds of age by virtue of the transitional arrangements (which subjected him to a 20% discount for early retirement). However, it held that the treatment was justified and therefore lawful. Interestingly, the Tribunal noted that the justification test (i.e. that the treatment was justified as a proportionate means of achieving a legitimate aim) was not merely met but 'comfortably passed' by Freshfields.

The tribunal accepted Freshfields' arguments, which included the following:

- the reform of the pension scheme was necessary for the firm and finding a fair and acceptable solution was a difficult matter;
- the solution was arrived at after many months of work and analysis, including expert assistance;
- the consultation process was extensive and adequate and included the direct participation of Mr Bloxham; and
- no alternative less discriminatory solution could be conceived.

Mr Bloxham has now confirmed that he will not be appealing this decision. Although it is a first instance decision and therefore not binding on future tribunals,

the tribunal's consideration of the above factors provides some guidance as to how the concept of justification will be approached in future cases.

ECJ decision in Spanish age discrimination case

The ECJ has confirmed that the Equal Treatment Framework Directive does not prohibit a law which provides for compulsory retirement clauses in collective agreements.

In this case, *Palacios de la Villa v Cortefiel Servicios SA*, the ECJ examined a Spanish legal provision which allows clauses in collective agreements to provide for a contract of employment to be terminated on the grounds that a worker has reached the normal retirement age, providing that he has completed the minimum pension contribution period and satisfied the conditions laid down in Spanish social security legislation for entitlement to a pension.

Earlier this year, the Advocate General delivered an opinion in this case, stating that the principle of non-discrimination on the grounds of age under the Equal Treatment Framework Directive did not apply to national laws which set retirement ages. The ECJ, however, did not agree with this reasoning. It considered that the Spanish legal provisions should be regarded as rules relating to 'employment and working conditions, including dismissals and pay', which were within the scope of the Directive.

It did agree, however, with the Advocate General that the Spanish law was introduced in the interests of promoting employment and takes account of the fact that the workers are entitled to financial compensation by way of a retirement pension. The law was therefore objectively justified and not prohibited by the Directive.

Employer can exercise mobility clause in a redundancy situation

In *Home Office v Evans*, the Court of Appeal has confirmed that, in the particular circumstances of this case, there was nothing to prevent the Home Office from invoking a mobility clause in a redundancy situation.

The tribunal had been wrong to treat an earlier case, *Securicor v Curling*, as authority for the proposition that an employer is not legally entitled to invoke a mobility clause in a contract when a redundancy situation might arise or has arisen on the closure of part of a business. The Court therefore distinguished

Curling. The employer in this case was not entitled to rely on the mobility obligations as a defence at the tribunal hearing as it had already implemented the redundancy procedure, in which the employees had participated, and had not sought to rely on the contractual mobility obligations until the hearing - by which time it was considered too late to raise a new point.

In the present case, however, the Court stated there was no question of the Home Office "dodging" from one contractual procedure to another, having left it too late to invoke the mobility obligations and having waived its right to do so. From the time it made the announcement to staff to close the relevant workplace, the Home Office had made it clear to the employees that it was invoking the mobility obligations and would be following that procedure, rather than the redundancy procedure, which it consistently did.

TUPE cannot create rights which did not exist pre-transfer

The Court of Appeal has recently confirmed that the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) do not give a transferred employee access to employment benefits other than those to which he or she was entitled before the transfer took place.

In *Jackson v Computershare Investor Services plc*, Mrs Jackson was employed from 1999 until June 2004, when she transferred from Ci (UK) Ltd to CIS. CIS operated a dual system of redundancy terms which provided more favourable severance terms to those who joined before 2002. When Mrs Jackson was made redundant in 2002, she argued that TUPE operated so as to give her continuity of employment with CIS from 1999, and she was therefore entitled to the more generous severance terms.

Upholding the decision of the EAT, the Court of Appeal confirmed that TUPE could not be relied upon to give Mrs Jackson rights that she did not enjoy prior to the transfer. This was an artificial use of TUPE. The fact that she was treated for statutory purposes as having continuity of employment dating back to 1999 did not affect her entitlement to a scheme that did not exist at her former employer. Mrs Jackson had joined CIS at the point of transfer in 2004 and therefore was not entitled to the more favourable redundancy terms.

Although this case was decided under the old TUPE Regulations, the principle will continue to apply under the 2006 TUPE Regulations and will therefore cover transfers which occur after 6 April 2006.

Constructive dismissal and grievance procedures

The EAT has upheld a claim of constructive dismissal, confirming that it was a fundamental breach of contract to compel an employee to follow a procedure which required her to discuss her grievance with the very manager who was central to her complaint. This was held to be the case even though the procedure concerned had been negotiated with the unions. The EAT's decision emphasises the need for employers to adopt a flexible approach where the rigid application of a grievance procedure would lead to hardship or potential unfairness.

In this case, *GMB Trade Union v Brown*, Ms Brown had a grievance against her line manager, a regional secretary of the GMB, relating to the scope of her duties and the change in her role. Although various meetings took place between Ms Brown and her line manager, their positions became entrenched. This had an adverse effect on Ms Brown's wellbeing and she could no longer attend the office due to stress.

Ms Brown subsequently launched a formal grievance. The GMB's new Dignity at Work procedure had two stages. The first required an employee to raise their complaint formally with the senior manager concerned. If the issue was not resolved at the first stage, the employee could then ask for the grievance to be heard by an independent panel chaired by an ACAS appointed arbitrator.

Ms Brown wanted to skip the first stage and have the matter heard by an independent panel. However, the manager repeatedly refused to depart from the specific stages in the Dignity at Work procedure. Ms Brown eventually resigned, claiming that her attempts to pursue a grievance about the way she had been treated had been frustrated.

Upholding the decision of the Employment Tribunal, the EAT confirmed that the GMB's refusal to depart from the rigid procedure amounted to a breach of trust and confidence and the claimant's constructive dismissal claim succeeded. In the circumstances, it was unreasonable for any reasonable employer to insist upon full compliance with the procedure.

Extending holiday entitlement

1 October often heralds a number of changes in employment and this year saw the Government increase statutory annual leave entitlement for full-time workers who work a five day week to reflect the eight public holidays.

Background

Statutory annual leave entitlement is governed by the Working Time Regulations 1998 (the 1998 Regulations). The 1998 Regulations have suffered some criticism over recent years, not least because of the relationship between statutory annual leave entitlement and public holidays. Whilst the 1998 Regulations formerly provided for a 4 week minimum annual leave entitlement, this entitlement was not stated to be exclusive of public holidays. For example, workers working 5 days a week had the right to 20 days' paid statutory leave, but employers did not have to allow such workers any more than 12 days off in addition to the usual eight public holidays.

The Government launched an initial consultation on this issue in June 2006 and published a further consultation document increasing holiday entitlement in January 2007, outlining its proposals to increase holiday entitlement. It estimated that 22% of the British workforce received less than 5.6 weeks holiday entitlement a year. Women and part-timers were found to be particularly affected.

The Government inserted a power in the Work and Families Act 2006, under which annual statutory holiday entitlement could be extended from 4 weeks (20 days) to 5.6 weeks (28 days) for workers working a five day week. This then led to the Working Time (Amendment) Regulations 2007 (the 2007 Regulations), which took effect on 1 October 2007.

Two-stage increase

The initial consultation published last year considered whether to increase statutory holiday entitlement from 4 weeks to 5.6 weeks in one go or, alternatively, whether to phase it in. The latter was the preferred option as it gave businesses time to adjust.

The 2007 Regulations therefore provide for two increases: the first increase from 4 weeks to 4.8 weeks (20 days to 24 days for a worker who works a five day week) took place on 1 October 2007. The second increase from 4.8 to 5.6 weeks has now been delayed, on further consideration of the cost pressures, until 1 April 2009.

Public holidays and contractual entitlement

Both consultation documents state that the Government's proposal was to extend statutory holiday entitlement by making paid leave for public holidays additional to the 4 week entitlement. However, whilst the 2007 Regulations provide an extra 8 days' holidays per year for a full-time worker, they do not provide a new right to take time off on specific public holidays. Workers are therefore not entitled to take leave on public holidays unless it is specified in their contract of employment.

This is a particularly important issue. Some contracts of employment state that workers are entitled to "statutory holiday entitlement plus public holidays". Prior to 1 October, this equated to 28 days' annual leave for full-time workers. This therefore already meets the increased statutory leave which will take effect from 1 April 2009. However, if left unchanged, this basic contractual wording would, on a literal construction, mean that a worker's entitlement would increase from 28 to 32 days (24 + 8 from 1 October 2007) and to 36 days (28 + 8 from 1 April 2009), which is not the intention of the legislation.

The 2007 Regulations anticipate this issue and employers can avoid increasing holiday entitlement for such workers if they satisfy certain conditions. An employer is therefore not obliged to provide extended statutory annual leave where, as of 1 October 2007:

- by virtue of a relevant agreement, the employer already provides **each** worker employed by him with a paid annual leave entitlement of 1.6 weeks or 8 days (whichever is the lesser) in addition to the 4 week statutory entitlement;
- there is no provision for payment in lieu of that leave except on termination; and
- the additional leave may not be carried over beyond the next leave year.

It remains important for employers to revisit the contracts of employment for their entire workforce. Variations are likely to exist in different contracts and it is vital that they are accounted for and amended, if necessary, to clarify the new increase in holiday entitlement.

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Calculating the new entitlement

At first glance, it appears reasonably complicated to pro-rate the increased statutory entitlement for those workers whose leave years do not, conveniently, begin on 1 October 2007.

Where a worker's holiday entitlement begins before 1 October 2007, the increased holiday entitlement for that leave year is calculated by multiplying the proportion of the leave year left to run at 1 October 2007 by the additional statutory entitlement introduced on that date (0.8 weeks). Similar provisions apply in relation to the increase which will take place on 1 April 2009 in respect of workers with leave years beginning between 1 April 2008 and 1 April 2009.

BERR (formerly the DTI) provides a “Holiday Entitlement Ready Reckoner” to assist with calculations. This is available at www.berr.gov.uk/employment/holidays.

First year of employment

Under the 1998 Regulations, a worker's leave during the first year of employment was calculated as a proportion of the 4 week statutory minimum, equal to the proportion of the leave year left to run on the date on which employment began. Where this calculation produced an entitlement to a proportion of the week, that proportion was determined in days and any fraction of a day was to be rounded up to a whole day. The 2007 Regulations have removed this provision from the 1998 Regulations so that, in the first year of employment, the rounding up exercise will no longer take place.

Payment in lieu - transitional arrangements

Under the 1998 Regulations, statutory annual leave entitlement cannot be cashed in for a payment in lieu except where the worker's employment is terminated. This is unaffected by the 2007 Regulations. However, the Government has put transitional arrangements in place. Employers may therefore make payments in lieu of the new additional entitlement (i.e. the extra 0.8 weeks introduced on 1 October 2007) until 1 April 2009. Following this date, the extended leave may not be replaced by a payment in lieu except on termination.

Carrying over

Under the 2007 Regulations, the additional holiday entitlement can be carried over into the following year. This was not previously permitted in relation to the 4 week statutory entitlement. Carrying over leave can be done by using a “relevant agreement”, which is defined under the 1998 Regulations as:

- a workforce agreement which applies to the worker;
- any provision of a collective agreement which forms part of a contract between the worker and employer; or
- any other agreement in writing which is legally enforceable as between the worker and employer.

Conclusion

The changes to statutory holiday entitlement brought into force this year and from 1 April 2009 will affect most employers, irrespective of size and resources. Getting to grips with the changes is therefore vital. Unfortunately, there remains potential for confusion, particularly in relation to the calculation of the additional leave. Employers should therefore act promptly to ensure they understand the changes and communicate the new entitlement to their workforce.

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Illegal working

Illegal working has been a hot topic this year. Whether it has hit the headlines because the number of illegal workers is on the increase or simply because it is the latest item on the political agenda, the issue has been almost impossible to miss.

Behind the headlines and often unreliable statistics, however, tackling the problem of illegal working in the workplace is undergoing significant change. We outline below both the current position and the legislative developments, highlighting key areas of interest for employers.

The starting point

At the time of writing, the general position is governed by the Asylum and Immigration Act 1996 (the 1996 Act), which obliges employers to ensure that their employees are entitled to work in the UK. Under section 8 of the 1996 Act, employing an illegal worker is a criminal offence and, at present, an employer can be fined up to £5,000 per illegal worker employed.

The 1996 Act provides an employer with a statutory defence if, before the start of employment, it has checked and copied certain documents that confirm the prospective employee's right to work. These checks require inspection of certain documents (which include a variety of documents, ranging from a passport, P45 and birth certificate).

However, section 8 of the 1996 Act has been unsatisfactory from the start. The list of problems is significant, spanning the inadequate impact of the penalty, confusion regarding the documents needed to establish the statutory defence, the ongoing fear of discrimination when putting the requirements into practice and ineffective enforcement.

Proposed changes

In May 2007, the Government published consultation documents on the implementation of new powers to prevent illegal migrants working in the UK. The Minister of State for Borders and Immigration stated that "to protect our country from illegal immigration we must stop 2 things – illegal journeys and illegal jobs". This core aim provides the background to the Government's approach to illegal working, which encompasses seven key points:

- tougher checks abroad – the creation of secondary off-shore border controls and harnessing biometric visas are seen as key to securing the border;
- identity cards for foreign nationals – this would

require foreign nationals subject to immigration control who are residing in the UK for over 6 months to apply for a biometric immigration document, reducing the range of documents that employers are required to check;

- checking service – a pilot verification service introduced (in conjunction with the Identity and Passport Service) to enhance the service offered by the existing employer telephone helpline;
- sponsorship – the new 5 tiered points based system, providing employers with a way of sourcing labour legally from overseas if skills are not available at home;
- new penalties – comprising civil penalties and a "tough" new criminal offence (outlined further below);
- tougher enforcement – based on a co-ordinated approach with other Government bodies and between workplace enforcement agencies to promote intelligence-sharing;
- ensuring people know the rules – by conducting highly visible national media and direct mail campaigns on illegal working and employing migrant workers.

Under the Immigration, Asylum and Nationality Act 2006 (the 2006 Act), the existing regime under section 8 of the 1996 Act will be swept away. Key to the new proposals are civil penalties for those employers who employ illegal migrant workers as a result of negligent recruitment and employment practices, and a new criminal penalty for those found to be knowingly employing illegal migrant workers.

Consultation on the proposed new powers under the 2006 Act took place between May and August 2007. The proposals relating to the suggested new penalties are outlined further below.

Civil penalty

The proposed civil penalty is reasonably complex. It has recently been confirmed that the maximum penalty for illegally employing someone subject to immigration control will be increased to £10,000, by virtue of the Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty)

Order 2007, which is due to come into force on 29 February 2008.

Determining the level of the fine will involve considering a number of factors, including whether the employer:

- has been issued with any previous penalties or warnings;
- has complied fully or partially with the specified checks;
- has reported suspicions about an employee's entitlement to work in the UK; and
- co-operates with the Border and Immigration Agency in any investigation.

The statutory defence outlined above is due to give way to a "statutory excuse" from liability for a civil penalty. The Immigration (Restrictions on Employment) Order 2007, which also comes into force on 29 February 2008, sets out in what circumstances an employer will be excused from paying the civil penalty. This is based on the production of specified documents, which are similar in some respects to the documents referred to under section 8 of the 1996 Act. The employer must also:

- take all reasonable steps to check the validity of the document;
- retain the copy or copies for at least two years after the employment comes to an end;
- satisfy itself that any photograph in the document is of the prospective employee or employee;
- satisfy itself that any date of birth in the document is consistent with the appearance of the prospective employee or employee;
- take all other reasonable steps to check that the prospective employee or employee is the rightful owner of the document;
- retain a copy of the whole of any document which is not a passport or other travel document in a format which cannot be subsequently altered; and
- copy specified pages of a passport or other travel document in a format which cannot be subsequently altered.

Employers will also be required to carry out follow-up document checks on employees with time-limited leave to remain, no less frequently than every 12 months. A Code of Practice, entitled "Civil Penalties for Employers", will come into force on 29 February 2008, providing further guidance on how the penalty scheme will work in practice.

Criminal penalty

The Government consultation paper outlines the new criminal offence of knowingly employing illegal migrant workers, which could result in employers being imprisoned for up to 2 years and/or receiving an unlimited fine. Views have also been invited on whether courts should be routinely invited to consider disbarring directors who knowingly employ an illegal migrant worker.

Discriminatory issues

Employers have always struggled with the fact that undertaking checks on migrant workers could be discriminatory. A revised Code of Practice will therefore come into force on 29 February 2008 alongside the new provisions, to provide employers with guidance on how to avoid unlawful discrimination in recruitment practice. The draft Code recommends:

- building the requisite checks into normal recruitment procedures to provide the employer with the benefit of the statutory excuse;
- when making checks, ensuring they are made in a non-discriminatory way by applying them to all applicants at the same stage of the recruitment process; and
- having clear written procedures for the recruitment and selection of all staff, based on equal and fair treatment for all applicants, as a matter of good practice.

The future

It remains to be seen what impact the 2006 Act and the proposed penalties will have on the workplace. The new regime is undoubtedly intended to provide more certainty and control than section 8 of the 1996 Act. The checks required are likely to be more onerous, requiring employers to put systems in place to ensure they comply fully with the checks. Employers, at the very least, need to understand the scope of the new penalties before February 2008.

Illegal working is never an easy topic to address, whether in the public arena or the workplace. However, to obtain best practice and comply with the law, employers are advised to take steps as soon as possible to prepare for the forthcoming changes and incorporate them into their standard procedures.

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Unions in the board room?

The “credit squeeze” and talk of an economic downturn are causing many employers to dust off their old redundancy policies and procedures and either make employees redundant or at least brush up on the legal basics just in case. However, getting up to speed with the law requires more than merely a memory refresher. The case law on redundancy consultation has been quietly developing in the last few years in a number of dramatically significant ways.

The latest development is *UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area) and others*, in which the Employment Appeal Tribunal confirmed the need for collective consultation on a proposal to close a business rather than merely on the consequences of that proposal. The dictum of Glidewell LJ in *R v British Coal and Secretary of State for Trade and Industry ex parte Vardy* to the effect that no such consultation was required was held to be no longer good law in the light of changes to the statutory provisions.

Collective and individual obligations

The obligation to consult in relation to potential redundancies arises on two levels: the collective and the individual. The collective obligation is contained in section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (see boxed section). The individual obligation has developed out of the statutory right not to be unfairly dismissed - under section 98(4) of the Employment Rights Act 1996 an employer must act reasonably when treating redundancy as a sufficient reason to dismiss an employee and consultation is almost always an integral part of the process of acting reasonably.

Penalties

There are potentially hefty penalties for an employer that fails to comply with either the collective or individual consultation obligations. The sanction for a failure to comply with the collective obligation is a protective award of up to 90 days' pay per affected employee. Since *GMB v Susie Radin Ltd* protective awards have been recognised as punitive rather than compensatory: the starting point is the full protective award with the Tribunal having power to reduce that amount if there are circumstances justifying a reduction. A failure in respect of individual consultation risks an unfair dismissal claim with compensation of up to £60,600.

The *UK Coal Mining* case concerns collective

consultation obligations. However, it may influence the attitude of Employment Tribunals to individual consultation in unfair dismissal cases.

The UK Coal Mining case

The Tribunal had made maximum protective awards (90 days) for failure to consult properly over the redundancies of over 100 employees at the Ellington Colliery in Northumberland. The employers appealed against the Tribunal's approach. The two trade union respondents made a cross appeal that the Tribunal was wrong to take the view that there was no obligation to consult over the reason for the closure itself.

Ellington was the last deep mine in the north east coalfield. There had been a number of financial concerns over the viability of the pit over the years. At the start of 2004, the colliery was deemed not to be profitable, but after a promise of £1.8 million of Government aid and renegotiation of a contract with an Alcan smelting plant (which the colliery supplied) it remained open. On 12 January 2005 technical issues at the colliery led to major flooding and pumps were brought in to try to resolve the problem.

On 26 January 2005, representatives of the two recognised unions attended a meeting with Mr Spindler, the company's Managing Director, who indicated that the mine was to be closed on both safety and economic grounds. Full and meaningful consultations were requested, but no further meetings with the unions were held. A letter purporting to be a formal letter under section 188 was sent out citing safety reasons, and stating that there would be ongoing consultation. Some employees were dismissed only 4 days later, with no prior consultation. The rest were placed on gardening leave. Compulsory redundancies of 158 employees took place on 26 February 2005.

In the Tribunal the company sought to rely on an “exceptional circumstances” excuse for circumventing the normal consultation timeframe. The EAT expressed surprise that neither Mr Spindler nor the manager of the colliery chose to give evidence in the Tribunal. The Tribunal held there had been no

consultation with the unions and that it was “blatantly untrue” that the colliery was closed on grounds of safety and not economic viability.

For our purposes it is the cross appeal which is of most interest. The EAT accepted the submission of the unions that the premise that the employer was not obliged to consult at all over the closure was wrong. The obiter comments in *Vardy* were made at a time when section 188 only required consultation “about the dismissals”. This was amended in 1995 to bring in consultation on ways of avoiding dismissals. The EAT took the view that the obligation to consult over avoiding the proposed redundancies inevitably involves engaging with the reasons for the dismissals and that in turn requires consultation over the reasons for the closure.

Notwithstanding the 1995 amendments, problems still remain between Article 2(2) of Council Directive 98/59/EC and its domestic transposition in section 188. In particular, the Directive envisages consultation when redundancies are *contemplated* whereas section 188 envisages consultation only after a *proposal* has been made. Notwithstanding the obligation to interpret domestic law consistently with EU law, *Vardy* and subsequent cases have held that it is not possible to construe “proposed” as the equivalent of “contemplated”. However, the EAT did not see the limitation imposed by the word “proposed” as being an obstacle to extending the obligation to consult over closures leading to redundancies. From a timing point of view, the obligation to consult will not arise when closure is mooted as a possibility but only when it is fixed as a clear, albeit provisional, intention. But from that point there is now an obligation to consult over the reason for the closure.

Ramifications

It was the view of the lay members of the EAT that in practice this decision will not:

“alter arrangements very much. Most employers will already inform union representatives why they are considering the need to close a plant and will respond to any observations, even if they do not feel themselves legally obliged to do so.”

There is however, a considerable difference between “responding to any observations” and consulting with a view to reaching agreement as required by section 188. It seems likely that unions will seek to interpret this new obligation as widely as possible and in effect take a place in the board room of any employer contemplating business decisions that might lead to redundancies.

Whereas the obligation to provide information about

the reasons for the proposed redundancies has previously been interpreted in practice as a short explanation that the employer is proposing to, for example, close a factory. For there to be effective consultation on the reason for the closure or relocation, an employer will now potentially have to produce detailed accounts information, business plans and projections for the range of options considered by the board or senior management team. Quite how much detail is involved and whether union leaders have sufficient understanding of business to analyse such information remains to be seen.

There is also no reason to assume that this decision will be limited to redundancy situations arising on the closure of an establishment. The same issues potentially arise on partial closure or on relocation. And will those involved in mergers and acquisitions now have to consult unions on whether or not to merge or acquire? Such activities inevitably result in redundancies – indeed the desire for economies of scale is a major M&A driver – so the easiest way of avoiding dismissals would be not to merge or acquire. Perhaps this is a step too far, but that is not as certain now as it was pre-*UK Coal Mining*.

Collective consultation

Under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992:

Trigger

The obligation to consult collectively arises where an employer is proposing to dismiss as redundant 20 or more employees from one establishment within a period of 90 days or less.

Timing

Consultation shall be begun in good time and in any event either 90 days or 30 days before the first of the dismissals takes effect depending upon whether the employer is proposing 100 or more redundancies or 20 or more, respectively.

Parties

Consultation shall be with appropriate representatives of the affected employees, being either a recognised trade union or, where no union is recognised, (at the employer’s choice) either (i) employee representatives who have already been appointed or elected by the affected employees separately but nevertheless have authority to represent the affected employees, or (ii) employee representatives elected by the affected employees by secret ballot.

Information

For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives:

- the reasons for its proposals
- the numbers and descriptions of employees whom it is proposed to dismiss as redundant
- the total number of employees of any such description employed by the employer at the establishment in question
- the proposed method of selecting the employees who may be dismissed
- the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect
- the proposed method of calculating the amount of any redundancy payments to be made (other than statutory redundancy pay) to employees who may be dismissed

Scope

Consultation shall include ways of:

- avoiding the dismissals,
- reducing the numbers of employees to be dismissed, and
- mitigating the consequences of the dismissals

Objective

Consultation shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

Effect on unfair dismissal

The obligation to consult on an individual basis in a redundancy situation has traditionally, as with collective consultation, been focussed on the consequence for the individual of a business decision (e.g. objective selection and alternative employment), not on the decision itself.

In *Moon v Homeworthy Furniture (Northern) Ltd* unfair dismissal claims were brought on the basis that a factory was economically viable, and that the decision to close it and make the staff redundant was therefore

“Given the risk of hefty penalties for non-compliance it is vital that an employer understands when its obligation to consult first arises and its scope.”

wrong. The Employment Appeal Tribunal considered that it need only be satisfied that a redundancy situation existed. The scope of its enquiry did not extend to consider the reasons for the redundancy situation and whether or not they were appropriate or meritorious.

Moon v Homeworthy has been cited with approval in many subsequent cases, including in the 1990 Court of Appeal case of *James W Cook & Co (Wivenhoe) Ltd (in liquidation) v Tipper & Ors*. In this judgment it was confirmed that an Employment Tribunal is entitled to consider whether the closure of a business (or generally the alleged redundancy situation) is in fact genuine. However, it is not open to the Tribunal to investigate the commercial and economic reasons which prompted the closure. Lord Justice Neill stated that it may be that in order to ensure fairness for the workforce, the court should have the power to investigate the commercial and economic reasons which prompted a closure, but it does not have that power at present. However, since unfair dismissal law is rooted in the inherently nebulous concept of reasonableness, it is possible that a lack of consultation on the underlying reasons for the redundancy could now begin to creep into the fairness consideration.

Conclusion

For many employers the concept of consulting unions or employee representatives on major strategic business decisions that may lead to job losses will be surprising. For others it will be an unconscionable intrusion into management's "right" to manage. However, given the risk of hefty penalties for non-compliance it is vital that an employer understands when its obligation to consult first arises and its scope. If that necessitates a change of approach to certain business decisions, employers will have to adapt or risk the consequences.

Due to be published in Employment Law Journal, 2007.

Resolving statutory dispute resolution

For some years now, the statutory dispute resolution procedures have been central to resolving workplace disputes. Governed by the Employment Act 2002 (Dispute Resolution) Regulations 2004 (the Regulations), the procedures were intended to promote dispute resolution in the workplace so that fewer cases ended up before a tribunal. Unfortunately, they have not been entirely successful and there has been much litigation concerning the scope and interpretation of the procedures.

To the relief of many, this year has seen both an independent review call for the complete repeal of the procedures and a Government consultation paper seek views on new measures to resolve workplace disputes.

Whilst change may be on the horizon, however, it is vital that employers do not lose sight of the current requirements. We therefore recap the key principles of the statutory procedures and outline the recommendations and issues raised in the consultation paper.

Back to basics

The statutory procedures impose mandatory minimum disciplinary and grievance procedures on all employers and employees from the outset of employment. When managing disciplinary grievance hearings before October 2004, broadly speaking, an employer needed to consider three key areas:

- The right of an employee not to be unfairly dismissed under the Employment Rights Act 1996.
- The right to be accompanied to a disciplinary or grievance hearing as set out in the Employment Relations Act 1999, and extended by the Employment Relations Act 2004.
- Good practice as set out in the ACAS Code of Practice and company disciplinary procedures, which may be incorporated into the contract of employment or, preferably, set out in a non-contractual policy.

The Regulations and statutory procedures provide a fourth area for consideration and are divided into two areas: statutory grievance procedures, and statutory disciplinary and dismissal procedures.

Statutory grievance procedures

Subject to certain exceptions, the statutory grievance procedures apply in relation to any grievance about action by the employer that could form the basis of a complaint by an employee to the employment tribunal under certain jurisdictions (e.g. unfair dismissal, equal

pay and discrimination).

The statutory grievance procedures take two forms: "standard" and "modified".

Standard procedure

The standard procedure has three steps:

1. the employee gives to the employer a written statement of the grievance;
2. a meeting takes place. After the meeting, the employer must inform the employee of its decision and the right to appeal; and
3. if the employee informs the employer of his or her wish to appeal, the employer must invite the employee to attend a further meeting, after which the employer must inform the employee of the final decision.

Modified procedure

The modified grievance procedure applies only after termination of employment. The employer should not have been aware of the grievance before the employment ceased, or if it was aware, the standard grievance procedure should not have been commenced or completed before the last day of employment. Both parties must also have agreed in writing to apply the modified procedure. This has two steps:

1. the employee gives to the employer written notice of the grievance and the basis for it; and
2. the employer sets out its written response.

Statutory disciplinary and dismissal procedures

The statutory disciplinary and dismissal procedures do not apply where an employer gives oral or written warnings, but do apply if the threatened sanction goes further (e.g. suspension without pay, demotion or dismissal). There are also two forms of this procedure: 'standard' and 'modified'.

Standard procedure

The standard procedure has three steps:

1. the employer writes to the employee setting out the employee's alleged conduct that led it to contemplate dismissing or taking disciplinary action, inviting him or her to a disciplinary meeting;
2. A meeting takes place. After the meeting, the employer must inform the employee of its decision and of the right to appeal against the decision; and
3. if the employee informs the employer of his or her wish to appeal, the employer must invite the employee to attend a further meeting, after which the employer must inform the employee of the final decision.

Modified procedure

The modified procedure, for use in cases of gross misconduct after the decision to dismiss has already been made, has two steps:

1. the employer sends the employee a letter setting out the alleged misconduct and what the basis was for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct; and
2. if the employee wishes to appeal, he must inform the employer and the employer must invite him or her to attend a meeting, after which the employer must inform the employee of its final decision.

Time limits

Where one of the statutory grievance procedures applies, an employee may not bring a claim in the employment tribunal unless he or she first submits a written grievance to the employer and waits 28 days. If the employee submits a grievance within the normal time limit for presenting a tribunal claim, the time limit

will be automatically extended by 3 months from the date when it would have otherwise expired.

Where the statutory disciplinary and dismissal procedures apply, and an employee has reasonable grounds for believing that a disciplinary or dismissal procedure was being followed at the time when the normal time limit expires, the time limit will automatically be extended by 3 months.

Effect on tribunal awards

The Regulations do not give employees or employers free-standing statutory rights to sue each other for failure to comply with the procedures. Rather, tribunals currently make adjustments to any compensation awarded.

For example, if an employer fails to follow the statutory dismissal procedure, the dismissal will be automatically unfair (although the requirement of one year's service for unfair dismissal claims still applies). In such a case, the tribunal must increase any award it makes to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances, increase it by up to 50 per cent. Where an employee fails to follow the procedures, any award may equally be reduced.

All change?

As noted above, an independent review of employment dispute resolution was undertaken by Michael Gibbons in March 2007. The review was wide-ranging and called for a radical overhaul of the current approach to dispute resolution in the workplace, including the complete repeal of the statutory dispute resolution procedures.

The DTI (now BERR) issued a consultation document in response to this review, seeking views on the recommendations. The measures proposed in the consultation break down into three areas and we list some of the measures below:

Resolving more disputes in the workplace

- Repeal the Regulations and examine any other consequential changes to other areas of law
- Provide clear guidelines on good practice for resolving disputes, building on the work currently done by ACAS
- Encourage good practice in resolving disputes, which could include penalties for those who make

“The review was wide-ranging and called for a radical overhaul of the current approach to dispute resolution in the workplace”

little or no attempt to resolve their dispute before an employment tribunal hearing

Helping resolve disputes beyond the workplace

- Provide a new advice service on dispute resolution accessible by telephone and internet
- Provide a new swift way to settle straightforward monetary disputes without the need for employment tribunal hearings
- Encourage earlier conciliation in appropriate cases and remove the time limits on ACAS' duty to conciliate employment tribunal claims

Making the employment tribunal system simpler and cheaper

- Simplify employment tribunal forms
- Unify time limits and the grounds for extension
- Improve the handling of weak claims and vexatious claimants

Consultation on the above measures closed in June 2007.

Both the review and consultation have undoubtedly been welcome developments. Employers have struggled with the statutory procedures, finding them cumbersome and ineffective at the best of times. A change to the status quo is therefore long overdue.

However, although many may be anxious for change, the proposed measures raise almost as many questions as the existing statutory procedures. For example, will 'clear guidelines' be sufficient to resolve workplace disputes? How comprehensive will the proposed new advice service be? What constitutes a 'straightforward monetary dispute'? As welcome as these initial developments are, any measures to replace the Regulations must be thoroughly considered if they are to avoid the range of difficulties experienced with the statutory procedures to date. Like many of the employment law developments of 2007, it is now a matter of watching this space...

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Corporate manslaughter: The new law

The old law of corporate manslaughter was such that it proved to be impossible successfully to prosecute large organisations for deaths caused by their activities. That will all change with the new Corporate Manslaughter and Corporate Homicide Act which received Royal Assent on 26 July 2007 and which comes into force on 6 April 2008.

When we last reported on the issue of corporate manslaughter in 2006, the Corporate Manslaughter and Corporate Homicide Bill was progressing through the House of Commons. One year on, the potential impact of the new legislation on organisations is much clearer.

The new offence

An organisation will be guilty of corporate manslaughter if its activities cause a person's death because of the grossly inadequate way in which its activities are managed or organised. More particularly, an organisation will be guilty of the new offence if:

1. 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; and
2. the way in which its activities are managed or organised by its senior management is a substantial element in the breach.

The new offence will apply to companies, the public bodies listed in the Act (subject to broad limitations), police forces and also a partnership, trade union or employers' association that is an employer. The offence will also apply to foreign companies and partnerships that carry out activities in the UK. The key ingredient is that the harm resulting in death must have been sustained in the UK. The new offence will not apply to individuals.

If found guilty, a company may be subject to an unlimited fine, a Court order to remedy a particular failing within the company and also, to many eyes the most brutal punishment, an order to require the company to publicise the offence in a manner specified by the Court.

A gross breach of a relevant duty of care?

The offence will be committed if there is a gross breach of a relevant duty of care. That means that, firstly, the organisation must have owed a duty of care to the deceased as an employer; an occupier of premises; or in connection with the supply of goods and services, the carrying on of construction or maintenance operations, the carrying on of any other activity on a commercial basis, or the use or keeping of any plant, vehicle or other thing.

Secondly, the breach of the duty of care must be gross, that is, conduct which falls far below what can reasonably be expected of the organisation in the circumstances. In order to decide this question, the jury may consider any relevant factor but in particular:

1. The jury must consider whether the company had failed to comply with any health and safety legislation.
2. The jury may also consider:
 - (a) the safety culture of the company; and
 - (b) any health and safety guidance which relates to the death.

Finally, in assessing any failings, the new Act specifically requires consideration of whether or not the way in which senior management organised the company's activities created those failings. Senior management means those who play significant roles in the making of decisions about how the whole or a substantial part of the organisation's activities are to be managed or organised, or who are actually involved in the managing or organising. Essentially, both strategic and operational managers will be considered to be senior managers. This very much links into the importance which the new Act places upon "the safety culture" within a company.

Conclusion

The Act will come into force next April. It will not be retrospective. There is therefore still a window of

opportunity (should one be needed) to take action to minimise the risk of liability under the new offence. The modern approach to safety is well illustrated by the following extract from the Baker report which was produced following the tragic accident at BP's Texas City refinery in March 2005 which resulted in 15 deaths and more than 170 injuries:

"A positive safety culture is important for good process safety performance...leadership from the top of the company, starting with the Board and going down, is essential."

Accordingly, the following issues in particular must be addressed:

- How effective are your health and safety systems?
- Are they rigorously followed or are breaches tolerated?
- Are you complying with all health and safety legislation that is relevant to your organisation?
- What are the health and safety attitudes, policies, systems or accepted practices within your organisation?
- Who are your senior management?

Whilst these questions may be difficult and time consuming to answer, there will be a huge desire to make the new offence work and to secure convictions where the old law failed to do so.

If you would like to hear more about what we can do to help you prepare then please do not hesitate to contact Peter Stewart, Partner, or Rhys Griffiths, Solicitor, of the Corporate Risk Management Group at Field Fisher Waterhouse LLP.

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