

People

The Employment Review - Spring/Summer 2007

This year has already seen some major developments in employment law and practice. This issue examines the significant tribunal decisions which are already impacting on the workplace and focuses on key areas of interest for employers, including the status of agency workers, how to check criminal records and insurance cover for the older employee.

In view

Mandatory retirement ages - referral to ECJ

Following our Winter issue of *People*, which reported that the Employment Equality (Age) Regulations 2006 would be subject to judicial review, we can confirm that the matter has now been referred to the European Court of Justice (ECJ).

Heyday, a member organisation for people approaching retirement,

originally applied to the High Court for judicial review of the Regulations on the basis that the decision to permit mandatory retirement ages forced workers into retirement. The High Court subsequently referred the case to the ECJ.

The challenge is clearly of great significance to the future of this new legislation. However, a recent case examining Spanish legal provisions on compulsory retirement may present a further challenge for Heyday, as outlined in our 'case update' section below.

Review of statutory disciplinary and grievance procedures

The DTI recently published an independent review of employment dispute resolution, which calls for the complete repeal of the statutory dispute resolution

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procedures introduced by the Employment Act 2002 (Dispute Resolution) Regulations 2004.

The review notes that the current statutory procedures carry an unnecessarily high administrative burden for both employers and employees and have had unintended negative consequences which outweigh their benefits. The recommendations made by the review include the following:

- Repeal the statutory dispute resolution procedures.
- Produce clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace, for employers and employees.
- Introduce a simple process to settle monetary disputes without the need for tribunal hearings.
- Increase the quality of advice to potential claimants and respondents, through an adequately resourced helpline and the internet, including as to the realities of tribunal claims and the potential benefits of alternative dispute resolution.
- Offer a free early dispute resolution service before a tribunal claim is lodged for those disputes likely to benefit from it. The Government should pilot this approach.
- Simplify employment law, recognising that its complexity creates uncertainty and costs for employers and employees.

In response to the review, the DTI has issued a consultation document entitled 'Resolving disputes in the workplace', which seeks views on a wide range of issues arising from the recommendations. The closing date for responses to the consultation is 20 June. For many employers, who find the statutory procedures cumbersome and ineffective, both the review and the consultation are undoubtedly welcome developments.

Extension to right to flexible working

The extended right to request flexible working came into force on 6 April 2007. The right will apply to an employee with caring responsibilities for an adult who:

- is married to, or is the partner or civil partner of the employee; or
- is a relative of the employee (this definition includes parents, parents-in-law, adult children, siblings, uncles, aunts, grandparents and step-relatives); or
- lives at the same address as the employee.

The impact of this extension in the workplace is likely to be significant. According to Carers UK, over 1.5 million carers may take advantage of this new right.

April changes

A number of employment law changes take place in April. Here is a selection of the changes so far:

1 April

- Statutory paternity pay, statutory adoption pay and the basic rate of statutory maternity pay increased from £108.85 to £112.75 a week.
- The much talked about changes to maternity and adoption leave (e.g. the extension of paid maternity leave from six to nine months and the introduction of "keeping in touch days") apply where the expected week of childbirth or placement for adoption falls on or after 1 April.

2 April

- The ban on smoking in enclosed or substantially enclosed public spaces and workplaces started to apply to Wales on 2 April. A similar ban will apply to Northern Ireland from 30 April and to England from 1 July.

6 April

- The right to request flexible working arrangements extended to carers of adults.
- Statutory sick pay increased from £70.05 to £72.55 a week.
- The Information and Consultation of Employees Regulations 2004, which establish a framework for informing and consulting employees, now applies to all employers with 100 or more employees.
- All public authorities will now need to comply with the new "gender equality duty", requiring them to eliminate unlawful discrimination and harassment and to promote equality of opportunity for women and men.

30 April

- A duty was imposed on certain listed bodies to put in place a gender equality scheme.
- Discrimination on the grounds of sexual orientation, and religion or belief, became prohibited in the provision of goods, facilities and services in education and the execution of public functions.

Case update

Setting a retirement age - is it discriminatory?

The Advocate General has delivered an opinion which may have a significant impact on age discrimination legislation in the UK.

In *Palacios de la Villa v Cortefiel Servicios SA*, a case concerning Spanish legal provisions which permit compulsory retirement, the Advocate General stated that the principle of non-discrimination on the grounds of age under the Equal Treatment Framework Directive does not apply to national laws which set retirement ages. He also suggests that even if the Directive does apply to such laws, setting a retirement age would be justified.

A full judgment from the ECJ in this case is expected before the end of the year. Whilst the opinion of the Advocate General is not formally binding upon the ECJ, it is usually followed. As noted above in the 'news' section, if the ECJ agrees with the Advocate General, its judgment will undoubtedly be a setback for Heyday, the retirement organisation, following its recent challenge to the UK mandatory retirement age.

Government fails to implement Directive

The High Court has now confirmed that UK sex discrimination legislation does not properly implement the EU Equal Treatment Amendment Directive (the Directive).

The Sex Discrimination Act 1975 (the Act) was amended in October 2005 by the Employment Equality (Sex Discrimination) Regulations 2005 (the Regulations). The amendments introduced new provisions, which expressly outlawed harassment on the grounds of sex and sexual harassment, and discrimination on the grounds of pregnancy and maternity leave. The new provisions also sought to clarify the circumstances in which a woman on maternity leave could bring a claim for discrimination.

The Equal Opportunities Commission (EOC), however, recently lodged judicial review proceedings to challenge the way in which the Government implemented the Directive in the form of the Regulations. In *Equal Opportunities Commission v Secretary of State for Trade and Industry*, the High Court confirmed that the Act should be amended in order to:

- widen the current provisions relating to harassment, which require that the harassment should be "on the grounds of sex", rather than, as the Directive requires, be "related to the sex of a person";
- enable a complaint of harassment to be made by a woman when the conduct complained of is directed at, and relates to the sex of, a third party;
- clarify that employers can be liable for harassment if they fail to take steps to prevent harassment by others e.g. clients/suppliers;
- eliminate the requirement for a comparator in cases of discrimination on the

grounds of pregnancy/maternity leave;

- clarify that a woman can bring a sex discrimination claim if deprived of non-contractual benefits, such as a discretionary bonus, during the compulsory maternity leave period (i.e. the two week period immediately following the birth); and
- ensure that the same rights to bring a sex discrimination claim apply during both ordinary and additional maternity leave.

This is a significant decision. The clarification now required by the High Court will lead to new provisions and a new interpretation of a number of key aspects of sex discrimination legislation, which are often central to tribunal claims in this area.

"Associative" disability discrimination - reference to ECJ

In *Attridge Law and another v Coleman*, the Employment Appeal Tribunal (EAT) has upheld a tribunal's decision to ask the ECJ whether the prohibition of disability discrimination under the Equal Treatment Framework Directive covers discrimination against a non-disabled person on the grounds of their association with a disabled person.

In this case, an employee, who was the primary carer for her disabled son, claimed that she had suffered disability discrimination at work due to her son's disability (e.g. she claims that she was subject to unfair treatment when she

requested time off to care for her son). The EAT agreed with the tribunal's approach that the Disability Discrimination Act 1995 could be interpreted so as to cover "associative" discrimination without distorting the words of the statute, and upheld its referral to the ECJ.

The outcome of the referral to the ECJ may have a significant impact on the scope of disability discrimination legislation. Carers UK, the Disability Rights Commission and the Equal Opportunities Commission have all hailed the case as having the potential to provide new protection for millions of Britain's carers.

Warning letter constitutes victimisation

The House of Lords has confirmed that letters sent by an employer to its staff warning of adverse consequences if the staff continued to pursue their equal pay claims did amount to victimisation under the Sex Discrimination Act 1975.

In *St Helens Borough Council v Derbyshire and others*, a number of female school catering staff employed by the council brought complaints against it under the Equal Pay Act 1970. Whilst many of the cases were settled, a small number of women proceeded with their claims. Shortly before the tribunal hearing, the council sent two letters. The first was sent to all staff, stating that the council could not bear the financial consequences of losing the equal pay claims and, if it did lose, it would be forced to consider scaling back the provision of school meals and making job losses. The second letter was sent only to

the claimants, and referred to the first letter, urging them to settle. Following receipt of these letters, the claimants brought a second claim, arguing that the letters amounted to victimisation.

Whilst the Court of Appeal had held that the letters were an "honest and reasonable attempt by the council to compromise proceedings", the House of Lords upheld the decision of the original tribunal. The tribunal had recognised that an employer may make reasonable attempts to settle a claim, but in this case, the council's letters did not constitute such an attempt. The object of the letters was to pressurise the women into settling, they were treated less favourably than staff that were not pursuing equal pay claims and the letters amounted to a detriment. The council's letters therefore amounted to victimisation.

Whistleblowing – reasonable belief

The Court of Appeal has recently handed down a decision which will affect many future whistleblowing cases.

Under the whistleblowing provisions in Part IVA of the Employment Rights Act 1996, a 'qualifying disclosure' is one which, in the reasonable belief of a worker, tends to show that a 'relevant failure' (such as a criminal offence or the failure to comply with any legal obligation for example) has occurred, is occurring, or is likely to occur.

In the earlier case of *Kraus v Penna*, the EAT confirmed that if a legal obligation does not exist, as a matter of law, a worker will not be protected by the legislation by claiming he reasonably believed it did.

However, the Court of Appeal in *Babula v Waltham Forest College* has now overturned this point, stating that it is not a correct statement of the law and should not be followed. As long as a worker's belief (which is inevitably subjective) is considered by a tribunal to be objectively reasonable, the fact that the belief turns out to be wrong does not render the belief unreasonable and deprive that worker of statutory protection. The fact that a whistleblower may be wrong is therefore irrelevant, provided his belief is reasonable and the disclosure is made in good faith.



This is a sensible decision and is in line with the policy and purpose of whistleblowing legislation in the UK. The interpretation provided in *Kraus v Penna* was a significant obstacle for whistleblowers to overcome and the Court of Appeal's approach will undoubtedly strengthen their position in the future, in such circumstances.

No obligation to extend sick pay for disabled employees

The Court of Appeal has confirmed that an employer is not obliged to continue paying sick pay to a disabled employee once sick pay entitlement has been exhausted. Any failure to do so was held to be neither a breach of the duty to make reasonable adjustments nor unlawful disability-related discrimination.

In *O'Hanlon v Commissioners for HM Revenue and Customs*, Mrs O'Hanlon was disabled under the Disability Discrimination Act 1995 (DDA). Under HMRC's sick pay rules, employees were entitled to receive full pay for up to 6 months' sickness absence in any period of 12 months, and half pay for a further maximum period of 6 months. This was subject to a maximum of 12 months' paid sickness absence in any period of 4 years. Mrs O'Hanlon had taken significantly long periods of absence and had exhausted her sick pay entitlement. She claimed that she was substantially disadvantaged by the sick pay rules, and that HMRC had failed to make any reasonable adjustments to counter that disadvantage, to enable her to continue to

receive full pay during her absence. She argued that the failure to make such a payment amounted to a failure to make reasonable adjustments and disability-related discrimination.

In the Court of Appeal, Mrs O'Hanlon claimed, in relation to her argument on reasonable adjustments, that she ought to have been paid full pay when, after the expiry of 6 months full pay under the employer's sick pay policy, she was absent for disability-related reasons. She also put forward an alternative argument; that periods of absence for a disability-related reason should not be aggregated with periods of absence for non disability-related sickness. Therefore, she argued that in any four year period she should be entitled to 6 months' full pay and 6 months' half pay for disability-related absence and 6 months' full pay and 6 months' half pay for non disability-related absence.

The Court of Appeal rejected both these arguments, endorsing the findings of the EAT. To support her argument that a reduction from full pay after 6 months was discriminatory, Mrs O'Hanlon only relied on the additional pressure placed on her by financial hardship which fed into her depression. The Court agreed with the EAT that employers should not be expected to determine whether to maintain sick pay entitlement at full pay by assessing the financial hardship suffered by an employee or the stress resulting from the lack of money. The non-aggregation argument also failed for the same reasons, as there were no special circumstances which would require the employer in this case not to aggregate. The financial hardship argument had already been rejected.

In relation to disability-related discrimination, the Court of Appeal agreed that although Mrs O'Hanlon had been treated less favourably for a reason related to her disability, the treatment was justified.

Whilst this decision is a complex one, it provides welcome confirmation that disabled employees do not have an automatic right to receive pay after sick pay entitlement has been exhausted, by virtue of an employer's duty to make reasonable adjustments under the DDA. However, it is important to remember that although the case confirms there is no automatic right, this does not mean there is no right at all and the circumstances of each case should always be considered. It is also worth noting that HMRC ran this as a suitable test case partly because they were confident that they had followed all their procedures, treated Mrs O'Hanlon reasonably and not caused or contributed to the absence. The law may be less straightforward where the employer is at fault.

Agency workers – the pendulum swings back

According to DTI research, there are currently 1.4 million temporary workers, including 600,000 agency workers, in the UK. Due to the flexibility and tax advantages offered by this way of working, many organisations are increasingly favouring the agency worker over the traditional employee. However, with this development comes a wealth of case law and legislative developments, all seeking to clarify the rights and status of agency workers.

Despite the significant number of agency workers in the UK, the term “agency worker” does not have a specific legal definition. As a result, whilst agency workers enjoy some legislative protection (e.g. under discrimination legislation, the Working Time Regulations 1998 and the statutory provisions relating to whistleblowing), the general position as to their status has been uncertain for some time.

Completing the triangle

So what is at stake? If a client (or “end user”) contracts with an agency for the supply of an agency worker, there is effectively a tripartite arrangement. The paper relationship in such situations typically provides only two sides to the triangle: there is a contract between the end user and the agency, a separate contract between the agency and the worker (which usually states that the contract is not an employment contract) but no written contract between the worker and the end user.

Problems generally arise for the agency worker and end user when the relationship comes to an end. If the agency worker can establish an implied contract of employment with the end user (and therefore complete the triangle on an implied basis), the end user could be held

liable for a variety of employment claims, including unfair dismissal. The problem is even more acute following the introduction of the statutory dismissal procedures, as the end user is unlikely to have followed a statutory procedure to terminate the supply of a worker. If an agency worker is therefore able to establish an implied employment contract with the end user, s/he is likely to be able to claim that the dismissal is automatically unfair, with any compensation payable by the end user being subject to an uplift of between 10% and 50%.

Case law confusion

To establish an implied contract of employment with the end user, an agency worker needs to address the question of employment status. This involves examining a number of factors, including the following:

- mutuality of obligations – i.e. the obligation on an organisation to provide work and the obligation on an individual to accept that work
- the degree of control or supervision over an individual’s work
- the duration of the engagement

Whilst agency workers have brought a number of claims to establish an employment relationship with the end user, the decisions have not been entirely consistent. Some cases have suggested that an employment relationship could only exist between the agency and worker, and not between the worker and end user. For example, *McMeechan v Secretary of State for Employment* indicated that the agency worker was an employee of the agency when he was on a particular client assignment, as mutuality of obligation existed for the duration of that assignment. In *Bunce v Postworth Ltd (trading as Skyblue)*, the Court of Appeal also concentrated on the relationship between the agency and the worker, confirming that the worker was not employed by the agency as there was insufficient mutuality of obligation and day-to-day control over the worker’s activities.

In *Frank v Reuters Ltd*, however, the Court of Appeal indicated that the tribunal should consider whether an implied contract of employment may exist between the end user and the worker, taking into account all the facts, including the duration of the assignment and not just the contractual documents. Whilst the Court of Appeal accepted that someone cannot become an employee simply by reason of the length of time worked, it

did emphasise that this was highly relevant and that dealings between end users and temporary workers over a period of years could generate an implied contractual relationship. In *Brook Street Bureau v Dacas*, one of the most prominent decisions in this area, the Court of Appeal stated that the agency had been under no obligation to provide the agency worker with work, she had not been under any obligation to accept the work offered, and the agency did not have sufficient day-to-day control over the agency worker. Had the end user been a party to the proceedings, the Court of Appeal indicated that it, rather than the agency, would have been held to be the employer on the basis of an implied contract of employment. In the later case of *Cable and Wireless Plc v Muscat*, the Court of Appeal confirmed that tribunals were bound by the guidance in *Dacas*, which outlined the possibility that an implied contract of employment might exist between the agency worker and end user.

Whilst *Dacas* and *Muscat* both caused considerable concern for employers using agency staff, recent cases have seen the pendulum swing back in favour of only implying a contract between a worker and an end user in extreme cases. In *James v Greenwich Council*, an agency worker had worked for the council for five years and had been treated in all respects like a permanent employee. However, the EAT did not consider the worker to be employed by the council and confirmed that there was no implied contract of employment. The EAT noted the following:

- It was not helpful to focus on whether there are mutual obligations between the worker and end user. The issue is whether the performance of the contract is consistent with the agency arrangements, or whether it is only consistent with an implied contract between the worker and end user.
- Genuine agency relationship may change, so that the agency arrangements no longer adequately reflect how the work is being performed, and that the reality of the relationship is only consistent with implying a contract of employment.
- The fact that arrangements have continued for a long time does not in itself justify a contract of employment being implied.

This case was recently followed in *Craigie v London Borough of Haringey*, where an agency worker brought a claim for unfair dismissal and breach of contract against the council. The EAT upheld the tribunal's decision, finding that there was no need to imply a contract of employment between him and the end user. Both *James* and *Craigie* make the point that not all agency relationships intend to defeat the rights of workers. They also point out that end users are paying for a service and wrapped up in the fee they pay is not only the remuneration of the worker but also the profit of the agency.

Two further decisions have also followed the trend set by *James v Greenwich Council* and *Craigie v London Borough of Haringey*. In *Heatherwood and Wexham Park Hospitals NHS Trust v Kulubowila and ors*, the EAT confirmed that it was not enough to form the

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view that because the worker looked like an employee, acted like an employee and was treated like an employee, the business reality was that he was an employee and that the tribunal must therefore imply a contract of employment. As the affairs of the parties were consistent with the express triangular agreements (i.e. the contract for services between the worker and the agency and the contract between the agency and the end user), it was not necessary to infer a contract of employment between the Trust and the worker. Similarly, in *Astbury v Gist Ltd*, the EAT again confirmed that a contract of service did not exist between the worker and the end user. Both cases note that if Parliament had intended agency workers to enjoy ordinary unfair dismissal protection against end users, it would have extended that protection to them. It has not yet done so and therefore a change in legislation would be required.

It is worth noting, however, that the Court of Appeal in *Dacas* had left open the possibility that an agency worker could be an employee of both the agency and the end user. The EAT examined this possibility recently, in *Cairns v Visteon Ltd*. The agency worker in this case was employed by an agency under a contract of employment but chose to bring her claim of unfair dismissal against the end user, on the basis that the claim would have greater prospect of success. However, as the agency worker already had an express contract with the agency, the EAT could not establish either a good policy reason or any business necessity for implying another, parallel, contract between her and the end user. Whilst the

decision does not rule out the possibility of parallel contracts between a worker and both an agency and end user, it acknowledges that this could be problematic and would depart from the key principle that a servant cannot have two masters in respect of the same job.

Practical steps

Following the extent of the case law in this area, it is important that employers clarify the status of agency workers and reduce the risk that agency workers will be held to be working for them under an implied contract of employment (entitling them to a wider range of legal rights, including the right not to be unfairly dismissed).

Employers should therefore aim to reduce the day-to-day control of agency workers, where possible. Certain procedures, such as appraisals, grievance and disciplinary procedures, should exclude agency workers, and complete integration into the workforce should be avoided. Periodic breaks could also be introduced into assignments and control should be exercised over the length of assignments. Where appropriate, a pool of agency workers could also be considered, to enable a number of workers to be used at different times, and to avoid one worker being engaged for an unbroken period of time.

Future proposals

Whilst the future may hold more clarity for agency workers following *James* and *Craigie*, they still lack the broad legislative protection enjoyed by employees.

Some steps have been taken to address this issue. For example, proposals for a Temporary Workers Directive have been under consideration for a number of years. The main principle of this Directive is anti-discrimination; ensuring that agency workers enjoy basic working and employment conditions which are no less favourable than if they had been recruited directly by the end user. These proposals, however, have not progressed very far.

In December 2006, a Private Member's Bill, the Temporary and Agency Workers (Prevention of Less Favourable Treatment) Bill, was introduced into the House of Commons, containing similar anti-discrimination principles to those in the proposed Directive. Also underway is the Government's consultation on measures to protect vulnerable agency workers. The aim of these measures is to address the "malpractices" which affect vulnerable agency workers, giving them the right to withdraw from certain services provided by an agency without suffering detriment.

It is difficult to say with any certainty to what extent agency workers will receive the enhanced protection outlined in the above proposals. However, as the number of agency workers continues to rise, there is no doubt that both the rights and status of agency workers need to be reviewed. Without legislation to clarify their position, agency workers may be left without adequate protection, forced to rely on case law which, until recently, has struggled to provide any clear guidance.

Criminal records confusion

Criminal records checks have been hitting the headlines recently. Not only have people been wrongly labelled as criminals, serious offenders have also managed to escape criminal records vetting. Although the Criminal Records Bureau was set up to assist with criminal records checks, it has suffered negative publicity from the outset, following lengthy delays and backlogs. Amidst all the confusion, and not surprisingly, many employers remain unsure as to the scope of criminal records checks and the disclosure process.

Spent convictions

Whilst finding out about past criminal records is often key to an employer's recruitment process, there is an important distinction between spent and unspent criminal convictions which affects access to any such records.

Under the Rehabilitation of Offenders Act 1974 (ROA), subject to certain exceptions, people who are convicted of a criminal offence and who have not re-offended during a specified period are deemed to be "rehabilitated" and their convictions "spent". Most spent convictions do not need to be disclosed to a current or prospective employer and, unless an exception applies, current or prospective employees should not be subject to any liability or otherwise prejudiced for failing to disclose a spent conviction. Similarly, failing to disclose a spent conviction will not be a lawful ground for dismissing an employee.

However, the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (the Order) overrides any employment rights an individual may otherwise have in respect of spent convictions. Where an individual is interviewed for a position covered by the Order, he or she may be questioned about both spent and unspent convictions, provided the

questions are to assess suitability for the position.

Any failure to answer such questions or give truthful information about the existence of spent convictions will be a valid reason to withhold employment or to dismiss. The Order lists a number of types of work and professions, for example, doctors, teachers and police officers. Certain financial services positions also fall within the scope of the Order. Where a position falls within the Order, the disclosure service will be available from the Criminal Records Bureau (CRB).

The CRB

The CRB is an executive agency of the Home Office, created to provide access to criminal records and other information. It enables employers and potential employers in the public, private and voluntary sectors to identify candidates who may be unsuitable for certain work and obtain details of spent and unspent criminal convictions. The CRB became operational on 1 April 2002.

Level of disclosure

The CRB issues three levels of disclosure documents: basic, standard and enhanced. Selecting the appropriate one depends on the position applied for and on the type of work involved.

Basic disclosure

Basic disclosure is not yet available from the CRB in England and Wales and no date for its implementation has been announced. It is, however, available in Scotland, where searches may be carried out through Disclosure Scotland.

Basic disclosure reveals any convictions that a person has, excluding those convictions which are spent under the ROA. Any employer may ask a potential employee to apply for basic disclosure, and, once available, it will be issued solely to individuals.

Standard and enhanced disclosure

Standard and enhanced disclosure are appropriate for posts that involve working with children or regular contact with vulnerable adults. Standard and enhanced disclosure provide details of all spent and unspent convictions, as well as cautions, reprimands and

“If a check reveals that an individual has a criminal record, employers should avoid the temptation to simply dismiss or refuse to hire that individual”

warnings, recorded centrally on the Police National Computer. They will also indicate if there are no such matters on record. If an individual is applying for a position working with children or vulnerable adults, such disclosure should reveal whether the individual is barred from working with children or vulnerable adults because they are included on lists held by the Department of Health and the Department for Education and Skills.

The key difference between standard and enhanced disclosure is that enhanced disclosure is intended principally for positions which involve a greater (often unsupervised) degree of contact with children and vulnerable adults. The check is therefore carried out in greater depth, and may include a search of local police force records and possibly non-conviction information which a chief police officer thinks may be relevant to the matter in question.

Obtaining disclosure

An application form for standard or enhanced disclosure must be signed by the individual applicant and countersigned by a registered body.

Registered bodies

Any organisation that is likely to ask exempted questions under the terms of the ROA – that is, information about spent convictions (i.e. standard and enhanced disclosure) – may apply to become a registered body with the CRB.

Broadly speaking, registered bodies may be any incorporated or unincorporated body and, in most cases, the employer. In order to become registered, applicants must satisfy the CRB that they are likely to ask questions about spent convictions or that they are likely to countersign any application for standard or enhanced disclosure.

Umbrella registered bodies

Some organisations who require standard or enhanced disclosure may not wish, for reasons such as cost, to become registered with the CRB. Such organisations can approach other registered organisations, known as umbrella registered bodies, to act as an intermediary between the CRB and the recruiting organisation and countersign applications on the organisation's behalf. An organisation can register as an umbrella registered body even if it is not likely to ask exempted questions itself but wishes to countersign



applications on behalf of others that are entitled to do so.

Applicants for registration, in both registered and umbrella registered bodies, must nominate a lead countersignatory who countersigns the initial application for registration. Lead countersignatories must themselves undergo an enhanced level check.

Application process

Where the employer is the registered body, the following process should apply:

- The employer provides a blank disclosure application form to the applicant for completion
- The applicant completes

and signs the application form, giving consent for their details to be checked, and provides certain identification documents

- The employer checks and validates the identification documents and completes the relevant section of the form
- A designated individual at the employer countersigns the form and sends it to the CRB
- The CRB reviews the application, searches the Police National Computer and issues copies of the disclosure to both the individual and the employer

Whilst the CRB has been heavily criticised for the delays in issuing disclosures, it now aims to issue 90% of standard disclosures within 10 days of receiving a completed application and 90% of enhanced disclosures within 4 weeks of receiving a completed application.

A one-off fee (currently £300) is payable by a registered body at the time of registration, and a one-off fee (currently £5) is payable in respect of each additional person who will countersign standard and enhanced disclosure applications. A further fee is payable for each disclosure; currently £31 for each standard disclosure and £36 for each enhanced disclosure.

Code of Practice

The CRB recognises that disclosure information will be extremely sensitive and personal. Anybody who receives standard and enhanced disclosure information (including registered and umbrella bodies and recruiters) must

therefore abide by the obligations set out in the CRB Code of Practice and Explanatory Guide for Registered Persons and other Recipients of Disclosure Information (the Code).

The Code requires, amongst other things, that registered bodies have a written policy on the recruitment of ex-offenders. The Code also sets out clear guidance on the fair use and appropriate storage of disclosure information. It provides that recipients of disclosure information should ensure that it is not passed to anyone who is not authorised to receive it, as unauthorised disclosure is an offence. Disclosures and disclosure information should only be available to those who require access to it in the course of their duties. The Code seeks to ensure that disclosure information is handled and stored appropriately and is kept for only as long as is necessary - usually a maximum of six months. This period should be exceeded only in very exceptional circumstances.

The Code also requires that the information revealed is considered only for the purpose for which it was obtained. Organisations must satisfy the CRB that they are complying with the Code, and must co-operate with requests from the CRB to undertake assurance checks, as well as reporting any suspected malpractice in relation to the Code or misuse of disclosures. The CRB can refuse to provide disclosure if it suspects that the Code is not being adhered to.

Is a criminal record relevant?

If a check reveals that an individual has a criminal

record, an employer should not simply dismiss or refuse to hire that individual. A number of issues should be considered, including the following:

- Is the offence relevant to the post?
- When was the offence committed?
- Does the offence mean that the organisation's staff, activities or customers are at risk?
- Is the individual likely to re-offend?

Whilst the disclosure process introduced by the CRB is intended to assist employers, it is important to note that it does have limitations. Only basic details of any offence will be provided and a disclosure will not be a substitute for considering the above issues and discussing the offence with the individual concerned. Guidance on the recruitment of ex-offenders is also provided by CRB, Nacro and CIPD, all of which aim to ensure that the disclosure of a criminal record, at any stage of the employment relationship, is always put in context.

Promoting gender equality

The gender equality duty, which came into force in April this year, is one of the biggest changes in sex equality legislation in 30 years. The Equal Opportunities Commission (EOC) has understandably championed the new duty, and considers it to be a “powerful tool that will deliver real change and practical improvements in the lives of women and men”.

As part of the EOC’s countdown to the duty, it has published the “Gender Equality Duty – Code of Practice” (“the Code”), to provide further guidance. Any failure to follow the Code may lead to an adverse inference being drawn by a court or tribunal. The EOC has also recently issued non-statutory guidance to supplement the Code, offering practical advice on meeting the duty. Both the Code and guidance can be found at www.eoc.org.uk.

What is the gender equality duty?

The gender equality duty follows the race and disability equality duties, which came into force in 2001 and 2006 respectively. The gender equality duty applies to most public authorities and was introduced by the Equality Act 2006, which inserted key provisions into the Sex Discrimination Act 1975 (SDA) and the Equal Pay Act 1970 (EPA).

The core purpose of the duty is to make gender equality central to the way public authorities work, in order to improve decision-making, policy development and the provision of services, and to create a more effective use of talent in the workforce. The duty comprises two elements: the “general duty” and “specific duties”. In basic terms, the general duty is the

overall duty to eliminate discrimination and harassment and to promote equality, and the specific duties are a means of meeting the general duty.

General duty

The general duty came into force in Great Britain on 6 April 2007. It applies to most public authorities (including government departments, local authorities and the armed forces). It also applies to private and voluntary bodies carrying out public functions on behalf of a public authority. For the purposes of the general duty, a public authority is a body whose functions are those of a public nature. Importantly, private organisations may be caught by the duty if they perform functions which normally belong in the public sector.

The general duty has three distinct parts:

- Eliminating unlawful discrimination (which covers, for example, discrimination on the grounds of sex, pregnancy, maternity leave, gender reassignment, marital status and civil partnership, and issues relating to equal pay);
- Eliminating harassment (e.g. sexual harassment and harassment on the grounds of sex); and
- Promoting equality of

opportunity between men and women (this is a new principle and acknowledges that it may be appropriate to treat women and men differently, where the aim is to overcome previous disadvantage).

Achieving one part of the general duty may not necessarily lead to achieving all three, and public authorities are therefore required to address each distinct element.

Meeting the general duty

There are a number of steps which will assist a public authority to comply with the duty, including:

- gathering and analysing information
- consulting stakeholders
- carrying out impact assessments
- prioritising and implementing gender equality objectives
- reporting and reviewing
- mainstreaming the duty into core functions

To meet the gender equality duty as an employer, a public authority should ensure that it has due regard to the general duty in its employment practices and within its workforce (e.g. in relation to recruitment processes, promotion of flexible working,

management of leave for parents and carers and assessing gender pay). The Code suggests that this will involve a cyclical process of data collection, data analysis, developing and implementing an action plan and monitoring the outcomes. It also recommends that public authorities involve the workforce in the process and agree a timescale for action.

Specific duties

Only certain public authorities are subject to specific duties. These public authorities are listed in the Schedule to the Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006, and Appendix D of the Code. This list may be updated by the Government.

The specific duties provide a framework to help listed public authorities meet the general duty and report on the action taken by them. At the heart of this framework is the Gender Equality Scheme (the Scheme), which listed public authorities should have published by 30 April 2007. However, whilst the Scheme is a means of meeting the general duty, the existence of a Scheme is not in itself enough to show that a public authority has met the gender equality duty. It will also have to demonstrate what action it has taken and the outcomes it has achieved.

Meeting the specific duties

The specific duties essentially require a public authority to:

- prepare and publish a Scheme, showing how it will meet its general and specific duties and setting

out its gender equality objectives;

- in preparing that Scheme:
 - consult stakeholders (i.e. employees, service users and others);
 - take into account relevant information as to how its policies and practices affect gender equality in the workplace;
 - consider the need to address the causes of any gender pay gap;
- ensure that the Scheme sets out the action the authority has taken or intends to take to:
 - gather and use information on the effect of its policies and practices on gender equality in the workplace;
 - consult stakeholders;
 - ensure implementation of its gender equality objectives;
- implement the Scheme within three years of its publication; and
- report against the Scheme annually and review it at least every three years.

The Scheme itself should be published in a readily accessible format. It can be

published as part of another published document e.g. a general equality scheme covering all equality strands. However, whilst public authorities may have schemes to cover the race and disability equality duties, it is important to note that the duties under each strand are slightly different. Public authorities should therefore examine the scope of each strand and ensure that the individual elements are easily identifiable.

Enforcement

The main body responsible for enforcing the gender equality duty is the EOC. However, from October 2007, the Commission for Equality and Human Rights (CEHR) will assume this responsibility. Bringing together the work of the EOC, the Commission for Racial Equality and the Disability Rights Commission in a single body, the CEHR will also have responsibility for the newer "strands" of discrimination (sexual orientation, religion or belief and age) plus human rights.

The CEHR will be able to issue compliance notices to authorities that are failing to comply with the general duty. It can also issue compliance notices in relation to a failure to comply with the specific duties. These notices will

“At the current rate of change, the gender pay gap will not be closed until 2085 and mothers with children under 11 will face penalties in the workplace until 2025”

state that the authority must meet its duties and tell the EOC/CEHR within 28 days what it has done to comply with the duties. The notices are enforceable in the courts.

If a public authority (including a private or voluntary organisation exercising public functions) does not comply with the general duty, its actions, or failure to act, can be challenged through an application to the High Court for judicial review. Application can be made by a person or group of people with an interest in the matter, or by the

EOC/CEHR.

Future of gender equality

The Final Report of the Equalities Review was published last month, providing a glimpse into the future of gender equality. Noting that, at the current rate of change, the gender pay gap will not be closed until 2085 and that mothers with children under 11 will face penalties in the workplace until 2025, the

future may well look bleak.

However, the Report provides a set of recommendations which aims to provide greater equality across all strands of discrimination. When combined with the new gender equality duty and the forthcoming role of the CEHR, it is clear that significant steps are being taken towards achieving true gender equality.

In sickness and in death - employer insurance cover for the older employee

Before the introduction of the new age discrimination legislation (the Employment Equality (Age) Regulations 2006), most employers stopped Private Health Insurance (PHI) and Death Benefit cover arrangements for employees once they reached a particular age. This age usually fell between 60 and 65 years and it was normally tied in with the Normal Retirement Date of any pension scheme sponsored by the employer. This is clearly an age discriminatory practice which, unless it can be objectively justified, is now unlawful.

Providing PHI and Death Benefit cover in respect of older employees is expensive. Insurers believe that older employees are more susceptible to illnesses and will have a reduced life expectancy. Consequently the insurance premiums that employers must pay in respect of PHI and Death Benefit cover for these older employees will be higher. A recent report indicated that the costs of these insurance premiums rise by as much as 50% for small employers if older employees are added. Many employers are considering ways to avoid these extra costs.

The Government has recently rejected industry lobbying to

include a specific legislative exemption that would permit employers to cease to provide PHI and Death Benefit cover to employees above a certain age. The Government considered that if an exemption was permitted then some employers would take advantage of the exemption and treat their older employees differently, even if they could afford to treat all of their employees equally. The Government is, however, keeping the situation under review.

With no specific statutory exemption, each employer is left to consider whether it can objectively justify maintaining an age discriminatory practice of ceasing to provide PHI or

Death Benefit cover to older employees. Objective justification is the proportionate means of achieving a legitimate aim. But determining what is proportionate is a difficult exercise. It is essentially a balancing of the effect of the discriminatory practice and the importance of the aim being pursued, whilst at the same time considering whether the aim can be achieved by less or non-discriminatory means. Government guidance also lists "business needs, reducing staff turnover or providing opportunities to retain good people" all as possible examples of legitimate aims. It is generally considered that cost alone will not constitute objective justification.

However, in its recent rejection of lobbying for an exemption, the Government indicated that, in its view, objective justification may be possible if providing PHI or Death Benefit cover would harm the employer's commercial prospects, for example by reducing the amount of funds available for necessary research and development. This Government view is not binding on courts or tribunals. It would be difficult to identify

extra PHI and Death Benefit cover payments as the direct cause for harming the employer's commercial prospects rather than business expenses, such as staff parties or executive bonuses.

Most employers would be reluctant to take what could be seen as a risky decision to objectively justify ceasing to provide PHI or Death Benefit cover to older employees. Any employer who did take this decision should, at the

very least, also periodically review its decision. It is more likely that employers will scale back the level of the PHI and Death Benefit cover being provided and will not have this financial cost far from their minds when considering whether to retain employees after the default retirement age of 65. If so, this discrimination legislation may result in a counter-productive effect to its original objective.

Online at a price

Every year HM Revenue and Customs ("HMRC") does its best to add excitement to the annual task of filing employee share plan returns.

The deadline for filing returns is similar to previous years (because of Easter, it is 9 July 2007 for all 2006-2007 tax year approved plan returns and 6 July for Forms 40 and 42).

What is new for 2007 is that HMRC is steering companies towards the online filing of returns made to the Employees Shares and Securities Unit ("ESSU"). However, the new arrangements do not apply to the annual return for enterprise management incentives ("EMI") arrangements and going online is not something that can be left to the last minute. It is important companies plan ahead.

ESSU will no longer issue paper returns. Where ESSU is aware of the existence of a relevant plan, a company should get a reminder by post to submit a return but the company will not be sent the return itself. Instead, companies will be encouraged to file their ESSU returns online because this is secure, quick and convenient. There is, however, no tax incentive to

file on-line. Online filing became available from 6 April 2007 when The Employee Share Schemes (Electronic Communication of Returns and Information) Regulations 2007 came into force. In order to file online a company must be registered to use the HMRC Online Service for PAYE. New users should register early, to allow time for the Government Gateway to post out confirmation of a User ID. More information is available at www.hmrc.gov.uk/online/index.htm.

Internet filing enabled software has to be used to file forms online. Only one supplier had been approved at the time these new filing arrangements were announced (see further at www.hmrc.gov.uk/ebu/ess-online.htm). This supplier's software is aimed at larger organisations handling multiple schemes. There is an annual licence fee that depends on the number of schemes and that starts at £10,000 per year. A lower cost version is planned, which will be aimed at companies running a single scheme. Companies must allow time to



obtain and install this software.

The returns a company may have to file with ESSU, depending on the type of share plans it has, are:

- Form 34 (2007) for an SAYE option scheme approved under the Income Tax Earnings and Pensions Act 2003 (“ITEPA 2003”);
- Form 35 (2007) for a CSOP scheme approved under ITEPA 2003;
- Form 39 (2007) for a share incentive plan approved under ITEPA 2003; and
- Form 42 (2007) for employment-related securities and options reportable events under ITEPA 2003 (i.e. so called “unapproved” share and share option arrangements).

Many companies will still want to submit paper returns. These can be downloaded from www.hmrc.gov.uk/shareschemes/ann-app-schemes.htm. Form 42 should also be available on the 2007 version of the Employer CD-ROM (together with detailed interactive guidance on its completion). Alternatively, a company could telephone ESSU on either 020 7147 2843 or 2841 to request copies of the relevant returns.

If a company still has an approved profit sharing scheme, no return is required this year.

A company that has an EMI arrangement can only submit its annual return by post. A Form EMI 40 for the 2006-2007 tax year should be sent out to every company operating EMI by the Small Company Enterprise Centre (“SCEC”) and must be returned to SCEC.

In summary, all annual share plan returns submitted to ESSU can be made online but companies must allow themselves time to get set up for online filing. In practice, many companies will this year still submit paper returns. These must be downloaded or requested from ESSU. There is no change in the EMI annual return arrangements this year. An EMI annual return should be posted automatically to every company with an EMI plan, as in previous years.

Companies must make sure that all relevant returns are made. In particular, “unapproved” reportable events must be reported on Form 42 without any notice or other prompting from HMRC. Although, historically, there has been some leniency it is clear that penalties may (and will) be charged if a return is not received on time or is incomplete or inaccurate.

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