

AUTUMN 2004

People

The FFW Employment Review

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1 Summary

Welcome to the third edition of *People*. We hope you had a good summer and are ready to assimilate the range of new legislation that the autumn has brought!

Statutory dispute resolution

In our Spring/Summer newsletter, our leading article looked at the new statutory dispute resolution procedures, which came into force on 1 October 2004, and will affect all businesses, whatever their size. You are probably well ahead in adapting existing procedures to comply with the new statutory minimum standards, but if you would like some help, FFW would be happy to review your procedures, and as far as implementing them goes, has published a Guide with checklists and best practice hints – see the contacts section on the back page if you would like a copy, or look at our dedicated employment law website www.employmentlaw.com.

National Minimum Wage

From 1 October, the national minimum wage will increase to £4.85 per hour for workers older than 22 and to £4.10 for workers between 18 and 22. There will also be a new rate which applies to 16 and 17 year olds, of £3.00 per hour.

TUPE

We continue to wait for the new draft TUPE Regulations to be published. The word is that they should be out in October 2004, but they have been delayed before and may be again. Nevertheless, the expected implementation date is April 2005.

Disability Discrimination – changes and amendments

On 1 October 2004, the Disability Discrimination Act 1995 (Amendment) Regulations 2003 came into force, substantially developing the law in this area. Under these regulations, the small employer exemption which previously kept businesses with less than 15 employees outside the scope of the Disability Discrimination Act, disappears. In addition, police officers, fire fighters, prison officers, workers on ships, aircraft and hovercraft and partners in business partnerships will now have protection from discrimination on the ground of disability.

The amendments also introduce a definition of direct discrimination (which cannot be justified), expressly outlaw harassment on the grounds of disability, bring

work placements within the scope of the Act, and reverse the burden of proof – from 1 October, if an applicant is able to satisfy a tribunal that the facts of the case tend to show that discrimination took place, then responsibility moves to the respondent to show that there was no discrimination. Proving a negative is always hard, so this change increases the need for employers to have and enforce anti-discrimination policies and to keep good records so that they can provide evidence of the existence and application of good practice.

From 1 October, the final duties under part III of the Disability Discrimination Act 1995 relating to access to goods, facilities and services are in force. Service providers in the private, public or voluntary sector will be under a duty to take reasonable steps to facilitate access to their premises by disabled people.

In force on the same day are the Disability Discrimination Act 1995 (Pensions) Regulations 2003. These introduce a non-discrimination rule into every occupational pension scheme, requiring managers and trustees of schemes to refrain from discriminating against or harassing a disabled person when carrying out their functions in relation to that scheme. This includes entrance to, or treatment as a member of, the scheme. Trustees and managers will also have a duty to make reasonable adjustments in relation to provisions, criteria or practices of the scheme and to ensure that the physical features of the premises they occupy do not place a disabled person at a disadvantage.

If complaint is made to tribunal under these provisions, the employer for whose employees the pension scheme operates will be treated as a party to those proceedings.

This edition of *People*

Our leading article discusses the Information and Consultation Regulations, which will be phased in from 6 April 2005. Although this is some 7 months away, the Regulations deserve consideration, as some employers may benefit from taking pre-emptive action to reach information and consultation agreements with their employees now, rather than being obliged to do so under the terms of the regulations. Over the summer, ACAS published its good practice advice, which is available on its website, www.acas.org.uk.



We also look at the new employment tribunal rules of procedure which are also in force from 1 October; whilst changes in procedure admittedly sounds a bit of a worthy subject, the changes not only have a major impact on us, as representatives, but will also impact on parties to claims.

In relation to this, you may be interested in the following employment tribunal statistics from the Annual Report and Accounts of the Employment Tribunals Service 2003/4. These show an increase in the number of applications received to 115,042, compared to 98,617 the previous year. The maximum award for unfair dismissal during this period was £113,117 (the statutory cap of £55,000 can be exceeded in limited cases such as whistleblowing), with an average award of £7275. The maximum awards for race and sex and disability discrimination were £635,150, £504,433 and £173,139 respectively, with average awards of £26,660, £12,971 and £16,214.

In our case notes, we assess the implications for employers of several important decisions on compensation for unfair dismissal, and the scope of an employers duty to make reasonable adjustments under the disability discrimination legislation.

Coming up

Data Protection

You may recall the case of *Durant v FSA 2003*, in which the Court of Appeal put the brakes on the use (and some would say, abuse) of rights under the Data Protection Act 1998.

Where an individual wishes to see any personal data being held by an organisation, he or she may address a subject access request to that organisation. Historically, such requests were frequently used in

litigation to obtain pre-action disclosure or information that was not strictly relevant, and caused a recipient organisation significant time and cost to collate. In *Durant*, the definition of personal data and the concept of a filing system were limited to reduce the span of these requests.

Mr Durant has now taken his complaint to the European Commission and we await the outcome. One implication is already known however; the EU has formally notified the UK government of its concern that the Data Protection Act does not comply with the European Data Protection Directive as it implements it too narrowly, a position exacerbated by the ruling in *Durant*. This may result in a reversal of the post-*Durant* position in the UK, with greater powers being given to the Information Commissioner and consequent increases in the burden on organisations dealing with personal data.

Fixed-term contracts – back to school

One of the protections provided by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 is that once an individual has been on fixed-term contracts for 4 years, he or she will automatically become a permanent employee unless further fixed-term contracts can be justified.

Since the regulations only came into force on 1 October 2002, you may think that it's a bit too early to concern yourself about the 4-year rule. However, if you deal with academic contracts, or indeed any rolling fixed-term contracts, the fixed-term contract that will roll us into the 4th year will be signed next year, and therefore should be flagged up for some planning now, particularly in view of the new disciplinary and dismissal procedures. Your workforce may have to be reviewed, unions and individuals consulted and new contracts or justification arguments prepared.



2 Planning ahead - the new information and consultation regulations

The Information and Consultation of Employees Regulations 2004 come into force on 6 April 2005. The Regulations give employees the ongoing right to be informed and consulted by their employer, and a mechanism for reaching agreement with the employer on how – and what - information is to be received and consultation carried out.

In this article we look at the Regulations, together with draft guidance published by the DTI, and suggest ways in which organisations can plan for the consequences of these new employee rights.

Currently, employers are obliged to inform and consult employees on such matters as collective redundancies and business transfers. From April 2005, employees of many organisations will have the right to be informed and consulted on much wider issues including acquisitions and mergers, business reorganisations and changes to terms and conditions of employment.

For many organisations this will represent a fundamental shift in terms of practice and ethos. Employers who take action now will give themselves more options and flexibility than if those who wait until the Regulations are in force.

Which employers will be affected?

The Regulations will apply to larger employers only and will be phased in to apply to:

- undertakings with 150 or more employees from 6 April 2005
- undertakings with 100 or more employees from 6 April 2007
- undertakings with 50 or more employees from 6 April 2008

What is an undertaking?

An “undertaking” is widely defined and will cover companies, partnerships, co-operatives, mutuals, building societies, trade unions, associations, charities and individuals who are employers, as well as possibly NHS Trusts and some Government bodies. The undertaking must have its registered or head office, or principal place of business in Great Britain.

The right

Under the Regulations, employees will have the right to request that their employer negotiates an Information and Consultation agreement (I&C agreement) with them setting out the circumstances in which employees will be informed and consulted.

The negotiation process is triggered when the lower of at least 10% or 2,500 of the employees in the undertaking make a written, dated request for an I&C agreement. If less than the required number of employees make the request, it will remain valid for six months. If during that time a further request is made, this can be aggregated with the first request to achieve the 10% threshold. An organisation must therefore monitor requests closely to know when its duty to negotiate arises.

Reaching agreement

Employers to whom the Regulations apply will find themselves in one of 4 positions:

- those with a pre-existing agreement to inform and consult employees
- those who negotiate an I&C agreement after 6 April 2005 (or whenever their organisation becomes subject to the Regulations)
- those with a default model
- those whose employees make no approach under the Regulations.

Pre-existing agreements

An employer will generally be obliged to enter into negotiations with representatives of the employees (“negotiating representatives”) where a request for an I&C agreement is made. However, there is an exception where an employer already has a valid pre-existing agreement in place. In this case, in some circumstances an employer may first ballot its employees to see if they endorse the request instead of initiating negotiations (see below).

Valid pre-existing agreements

A valid pre-existing agreement must be in writing, cover all the employees of the undertaking (or if there are different agreements in place which cover different parts of the undertaking, they must between them cover all of



the employees in the undertaking), already be approved by the employees and set out how the employer will give information to the employees or their representatives and seek their views on that information.

Content of pre-existing agreements

Employers and employees are free to agree whatever arrangements they wish as to the method, frequency, timing and subject matter of information and consultation. Importantly for employers with diverse business units or offices, arrangements may vary for different parts of the business.

The draft DTI guidance suggests what a pre-existing agreement should cover. This includes:

- Coverage – does one agreement cover all employees or are there separate arrangements for different parts of the business?
- Methods of information and consultation – for instance, how will employee representatives be elected and how many? How long will they serve and how will they be replaced?
- Frequency and timing – when and how often will information and consultation take place?
- Subject matter – parameters of subjects to be covered; how subjects will be chosen.
- Process – how will the opinions of staff be fed back to the employer? How will the company respond, and who represents management?
- Confidential information – how will confidential or price-sensitive information be dealt with? What will be the obligations on those in receipt of such information and what will be the sanctions for breach?
- Duration of agreement and circumstances in which it can be reviewed, revised or terminated – this is important as there is a 3-year moratorium on unilateral changes being introduced once agreement has been reached (subject to where the pre-existing agreement is successfully challenged, as explained below).
- Resolving disputes.

Endorsement ballot

Even though a pre-existing agreement is in place with employee approval, it will be open to challenge where enough employees request an I&C agreement:

- where 40% or more of employees request an I&C agreement this will override the pre-existing agreement and an employer will have to enter

negotiations within 3 months of the request

- where less than 10% of employees request an I&C agreement, the employer will not have to take any further action and the pre-existing agreement will remain in place (with a 3-year moratorium on unilateral attempts to overturn it)
- where between 10% and 40% of employees request an I&C agreement, the employer will have to ballot all employees to establish how many endorse the request.

Outcome of the ballot

- where at least 40% of the workforce and a majority of those who vote endorse the request, the company will be obliged to negotiate a new I&C agreement.
- if less than 40% of employees or less than 50% who vote endorse the request, the pre-existing agreement will remain in place (with a 3-year moratorium on unilateral attempts to overturn it).

From this, one advantage of having a pre-existing agreement in place is clear: a much higher percentage of employees will be required to support a request to negotiate a new agreement.

Negotiating an I&C agreement under the Regulations

Where

- there is no pre-existing agreement and the lower of at least 10% or 2,500 of the employees in the undertaking request an I&C agreement
- 40% or more employees request an I&C agreement, to replace a pre-existing agreement
- a request, made by between 10% and 40% of the employees, has been endorsed in a ballot
- an employer notifies its employees that it intends to implement an I&C agreement
- an employer will have to start negotiating an I&C agreement within 3 months of the request or notification.

Negotiating representatives

During this 3-month period, the employer must arrange the election of negotiating representatives. Whilst the Regulations are flexible about how the negotiating representatives are elected, and who they are, all employees must be able to take part in the election, and must be represented during the subsequent negotiations.



Once negotiating representatives have been elected, an I&C agreement must be negotiated within six months (though this period can be extended by agreement).

Requirements of a negotiated agreement

The Regulations give considerable flexibility to the employer and the negotiating representatives to agree information and consultation arrangements best suited to their particular circumstances. The DTI's draft guidance offers similar suggestions for the content of a negotiated agreement to that of pre-existing agreements (see above).

The main drawback of a negotiated I&C agreement is that there will be restrictions on employers withholding confidential information. You will recall that in a pre-existing agreement, an employer is free to negotiate whatever it likes regarding disclosure of confidential information.

Approval of the negotiated agreement

The agreement must be written, dated and signed by or on behalf of the employer and approved by employees. Employee approval may be shown either by signature by all negotiating representatives, or by a majority of the negotiating representatives with written approval from at least 50% of all employees or (where applicable) 50% of employees who voted in a ballot.

Default model

The Regulations also set out default information and consultation provisions which will apply where, following a request, an employer either fails to start negotiations for an I&C agreement or the parties fail to reach agreement within the time limit. The default model is to be avoided if at all possible as it is a lot less flexible than a negotiated agreement. Where the default model applies:

- an employer will have to provide wide categories of information and will have to consult on much of it. For instance, information on the recent and probable development of the undertaking's activities and economic situation must be provided, and information on the probable development of employment and any threats to it within the undertaking must be provided for consultation. Pre-existing and negotiated agreements enable an employer to dictate to a greater extent how much information should be made available and the parameters of consultation
- there are strict guidelines for the election of employee representatives
- there is not the same scope for different arrangements in different parts of the business as a

pre-existing agreement or negotiated I&C agreement would allow.

- an employer has less flexibility to protect confidential information (see below).

Confidential information

Employers will be particularly concerned about information which is confidential and price-sensitive. In relation to the default model (as with a negotiated I&C agreement) the Regulations provide employers with a limited exception for withholding such information, if disclosing it would seriously harm or prejudice the undertaking. Where an employer entrusts confidential information to negotiating representatives, making it clear that it is confidential, the negotiating representatives are under a statutory duty to respect that confidentiality.

In contrast, parties to a pre-existing agreement are free to agree whatever confidentiality provisions they wish.

Enforcement

Enforcement for failing to comply with a negotiated agreement or the default model (where applicable) is through the Central Arbitration Committee ("CAC"). If the CAC upholds a complaint, it can make an order requiring the employer to take steps to comply with the relevant arrangement within a defined period. Failure to do so will amount to a contempt of court.

If a complaint is upheld, then a further application can also be made to the Employment Appeal Tribunal, which can impose a penalty of up to £75,000 on the employer. The penalties for employers if they fail to comply with the new Regulations are therefore substantial.

Planning ahead

Before the Regulations come into force employers may either:

- initiate negotiations with employees with a view to reaching a pre-existing agreement before April 2005; or
- do nothing and hope that no request is made, and if a request is made after the Regulations come into force, either negotiate an I&C agreement then or allow the default model to apply.

As outlined above, there are several advantages to putting an agreement in place before the Regulations come into force. First, it gives an employer the opportunity to negotiate something more favourable than the default model (particularly in relation to how confidential information is dealt with). It also increases the threshold vote for having to negotiate a new agreement from 10% to 40% of employees.



However, to do so will involve considerable management time, and there is no guarantee that the agreement would get the approval of the employees. Also, it does not stop employees asking for an I&C agreement under the Regulations, and may even galvanise employees to make a request if agreement cannot be reached. It may be that, unless a workforce is unionised, few employers will receive a request.

Whatever you choose to do, we would recommend that all employers should take certain steps to prepare for

the Regulations:

- Clarify employee numbers to see whether and when the Regulations will apply
- Review any pre-existing agreements to see that they comply with the new law
- Ensure that management is aware of its new information and consultation obligations, and would recognise and know what to do with a request when the Regulations come into force.

3 New procedures, new rules - changes at the Employment Tribunal

On the same date that the new statutory dispute resolution procedures came into force, new rules governing the workings of employment tribunals also took effect. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 are a key part of the government's reform of the framework for resolving workplace disputes, aimed at reducing litigation and streamlining claims to tribunal.

The government's primary aims are to reduce the number of employment tribunal claims, and minimise the costs of any claims which proceed to a hearing. In this context, the new rules are calculated to weed out misconceived claims and to help settle others as early as possible. The "Overriding Objective" of employment tribunals as set out in the new Regulations (borrowed from the Civil Procedure Rules, which govern the procedures of the civil courts) outlines how a case may be dealt with justly, significantly including an obligation on tribunals to have regard to "saving expense".

Fixed conciliation periods

Depending upon the type of claim brought by a claimant (the term "applicant" is abandoned by the new rules), a fixed conciliation period will now be set for each case. This runs from the moment the employment tribunal sends a copy of the claim to the respondent, and ACAS will be tasked to assist the parties to reach a settlement during this period. Although parties may prepare their cases as normal during the conciliation period, any hearing will only be set for a date after the end of this period.

For simple claims the conciliation period runs for seven weeks; in most others, 13 weeks.

New costs regime

A major change is that a tribunal now has power to award unrepresented parties £25 per hour for preparing for the proceedings. Costs may now also be awarded against a party or its representatives who do not comply with a direction or order of the employment tribunal.

Pre-acceptance assessments and default judgments

From 6 April 2005 prescribed forms must be used. The tribunal office will assess each claim (and the response to it by any respondent) to ensure that it includes all required information, is on the prescribed form and states (where required to comply with the new statutory dispute resolution procedures) that the claimant has made a written grievance to his or her employer at least 28 days before making the claim to tribunal.

If the tribunal office finds that the claim is lacking in any way, the claim may not be allowed to proceed. In general, if rejected at this stage, a claim will be treated as not having been received, the time limit for presenting a claim will continue to run and any later attempt to bring one may be rejected if out of time.

Of vital importance to employers is the new power of tribunals to issue a default judgment (without a hearing) against a respondent where the claim appears uncontested. Therefore, an employer who fails to respond in time or at all to the notice of a claim form could find that the next document from the tribunal is a judgment ordering compensation to be paid to the claimant. An employer can apply to have such a default judgement overturned, but would have to show very good reasons why no response to the application was made, and could expect to bear all parties' costs.

In conclusion

On reading the new rules, there is a noticeable shift in the language and format to bring them more closely into



line with the Civil Procedure Rules, although they remain largely simpler and more informal. However, in general there is a growing formality and procedural strictness to the way in which tribunals function.

It is helpful to see the new tribunal rules in the context of the government's competing policy objectives. On the one hand the government seeks an informal and accessible tribunal system to handle claims from mainly unrepresented employees, and on the other hand it seeks an effective and judicially fair tribunal, which necessarily requires a level of formality in its procedures.

4 Case round-up

Reasonable adjustments – how far should you go?

Two cases have explained and widened the scope of an employer's duty to make reasonable adjustments under the Disability Discrimination Act 1995 and concluded that the duty to make such adjustments can result in a measure of positive discrimination in favour of disabled people.

Sick pay schemes

In *Nottingham County Council v Meikle*, Ms Meikle suffered from a degenerative eye condition. In spite of repeated requests, her employer failed to make any of the adjustments that she proposed which would have accommodated her developing sight disability. Eventually, Ms Meikle went on long-term sick leave. The length of time she was off sick was exacerbated by her employer's failure to make the requested adjustments. After 100 days, in accordance with her employer's sick pay policy, her pay was reduced to half.

Findings and comment

Nottingham failed in its attempt to argue that a sick pay scheme is excluded from the requirement to make reasonable adjustments. This leaves open the possibility that an employer may fail in its duty to make reasonable adjustments if it reduces the sick pay of a disabled employee even if the reduction is contemplated by and in accordance with a contractual sick pay scheme. Employers will therefore be vulnerable to disability discrimination claims if they pay anything less than full pay when a disabled employee is sick. In such situations, the question would be whether it is a reasonable adjustment to pay full pay to such an employee to overcome the disadvantage of being put on reduced or statutory sick pay. Non-disabled employees

The present focus on reducing the number of claims and dealing more speedily and effectively with those claims that are in fact presented might be seen as shifting the balance somewhat more to the side of formality.

While employers may face somewhat more complicated and perhaps more demanding procedures when dealing with employment tribunal claims, this may be a small price to pay if it indeed results in fewer claims and, as intended, an earlier and less costly resolution of those claims that are made.

cannot claim discrimination so there would be no duty to amend a sick pay policy generally to provide for full pay throughout sickness absence to non-disabled employees.

Ms Meikle also claimed that the reduction in pay was itself less favourable treatment on the grounds of disability which Nottingham accepted but sought to justify its actions on the basis that it was following its sick pay policy. The justification argument failed because Nottingham's original failure to make reasonable adjustments resulted in Ms Meikle's sickness absence in the first place.

Promotion without competition

In *Archibald v Fife Council* Ms Archibald, a road sweeper, became unable to do active work, but was very able to do sedentary work. Within the local authority, office jobs carried a higher grade than manual work, so any such change would amount to a promotion, and could only be applied for by competitive interview. Despite being entirely capable and trained, all Ms Archibald's applications failed, and she was dismissed on the ground of incapacity.

Ms Archibald claimed disability discrimination alleging that her employer had failed to make reasonable adjustments by not transferring her to an existing vacancy. The employment tribunal, EAT and Scottish Court of Session all found for the employer on the basis that the duty to make reasonable adjustments under the Disability Discrimination Act 1995 did not extend to transferring a disabled person to a completely different job, but was limited to making reasonable adjustments to the existing job. If, in spite of making reasonable adjustments a person was still unable to continue in that job, that was an end to the matter.



Findings and comment

The House of Lords disagreed with the lower courts, and held that the duty to make reasonable adjustments could include transferring a disabled employee to an existing vacancy at a higher grade, without undertaking competitive interviews.

The reasoning behind this decision is that under the Act, where arrangements made by the employer place a disabled person at a substantial disadvantage compared to people who are not disabled, an employer has a duty to make reasonable adjustments to prevent those arrangements having that effect. In this case, the liability of Ms Archibald to be dismissed if she became incapable of sweeping roads was part of those arrangements. As such, Fife Council was under a duty to make reasonable adjustments, which the House of

Lords agreed could include treating Ms Archibald more favourably than other non-disabled employees and transferring her to a suitable, albeit more senior vacant position, without going through competitive interviews first.

This decision recognises that, unlike other discrimination legislation, the aim of the Disability Discrimination Act is not merely to put disabled people on a level playing field with those without disabilities, so that everyone is treated in the same way. Rather, reasonable adjustments must be made to meet the special needs of disabled employees even if this amounts to positive discrimination. Employers will need to be more creative than previously thought in their approach to reasonable adjustments.

5 Unfair dismissal compensation: where do we draw the line?

In *Dunnachie v Kingston upon Hull City Council*, the House of Lords concluded that damages for non-economic loss (such as injury to feelings caused by the manner of dismissal) are not recoverable in unfair dismissal cases and employment tribunals may compensate for financial loss only. This decision is of paramount importance for unfair dismissal cases, both for the parties and their advisers, and for tribunals, who must assess compensation in successful cases.

Background

The relevant legislation requires compensation for unfair dismissal to be “such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer”.

Until recently, this formulation was taken to preclude non-financial loss. Then, in *Johnson v Unisys* [2003] it was suggested that the conventional construction of the word “loss” was too narrow, and where appropriate it might also include “compensation for distress, humiliation, damage to reputation in the community or to family life”.

This provided a green light for including an element of non-pecuniary loss in unfair dismissal claims, as in Mr Dunnachie’s case. We are also aware, incidentally, that many employee representatives have used it as a negotiating chip in settlement negotiations. Nevertheless, there was much debate about whether the suggestion that the concept of loss should be widened was just that, a suggestion, or whether it was binding.

Dunnachie therefore came before the courts in a climate of considerable uncertainty about the scope for awarding compensation in unfair dismissal claims.

Facts

Mr Dunnachie worked as an Environmental Health Officer for Kingston upon Hull City Council from 1986 until 2001. In March 2001 he resigned, and the employment tribunal found that he had been constructively and unfairly dismissed, driven from his job by his manager’s bullying.

The tribunal found that Mr Dunnachie had been unfairly dismissed and assessed his losses as £123,328.28, including £10,000 for injury to feelings. The tribunal reduced the award to £51,700, being the statutory maximum award for unfair dismissal at that time.

The Employment Appeal Tribunal allowed the employer’s appeal, then Mr Dunnachie successfully appealed to the Court of Appeal. The House of Lords’ decision was awaited with trepidation, not least by those with similar cases progressing through (or stayed by, pending the outcome of *Dunnachie*) the lower courts.



The Lords allowed the employer's appeal, holding that the word "loss" is limited to financial loss and that the fact that the amount of an award must be "just and equitable" does not widen the meaning to include any less tangible losses.

Conclusion

This decision clarifies the law in this area, and employers will be happy that it puts an end to claims for injury to feelings and other non-economic loss.

While one might discuss the wider question of whether awards for non-pecuniary loss should be allowed, it seems clear that they were never intended by Parliament to be made. For that reason, the House of Lords' decision provides a clear and common sense restatement of the conventional position.

Other developments

Another important decision on damages for dismissal has also been handed down by the House of Lords in the joined cases of *Eastwood v Magnox Electric plc* and *McCabe v Cornwall County Council* [2004].

Facts

In *Eastwood*, two employees were put through a lengthy disciplinary process which largely dealt with trumped-up charges and ended in dismissal. They subsequently settled their claims for unfair dismissal with their employer, then started proceedings against it in the County Court for negligence and breach of contract, alleging personal injury in the form of psychiatric illness deliberately caused by the implementation of the disciplinary process.

In *McCabe*, a teacher dismissed over allegations of inappropriate behaviour towards pupils was found by a tribunal to have been unfairly dismissed. He subsequently took High Court proceedings against his employer, the local authority, alleging that its failure to investigate the allegations and conduct the disciplinary proceedings against him properly had caused him psychiatric illness, and this amounted to breach of contract and statutory duty, and negligence.

The breach of contract alleged in both cases was a breach of the implied term of trust and confidence owed by an employer to its employees. Compensation for statutory unfair dismissal is, of course, capped (currently at £55,000), whereas a claim for breach of contract is not.

The decision

The problem facing the House of Lords was whether to allow a common law claim for unfair dismissal where a statutory remedy was already available. It decided that it could not do so. In its decision, however, it distinguished between an actual dismissal and any cause of action which an employee has acquired prior to dismissal. It concluded that whilst there is only a statutory remedy for a claim of unfair dismissal, an employee may also issue court proceedings to recover any loss caused by an employer's failure to act fairly in the run-up to dismissal (i.e. for breach of the implied term of trust and confidence). Examples of such loss may be financial loss caused by suspension, or where an employee suffers loss as a result of illness caused by unfair treatment preceding dismissal.

Comment

It is going to be interesting, to say the least, to see how, and where, the dividing line between events leading up to a dismissal (typically the disciplinary process) and the actual dismissal will be drawn. How will issues of causation be resolved? How will loss be apportioned? This division will be particularly hard to establish in constructive dismissal cases, where an employee resigns in response to a perceived breach of contract by the employer. It may also lead to the situation where an employer might be better off dismissing rather than suspending an employee – at least it will have excluded the possibility of an unlimited claim for damages in favour of the statutory cap.

The House of Lords acknowledges these problems and anticipates that one result will be duplication of proceedings, with all the waste of time and costs that that will cause. It has called for legislation to clarify this situation. Until then, this is a new area of uncertainty.



6 Pensions News

Corporate Transactions

The Government have announced a number of changes to the ways in which employer companies are responsible for pensions deficits. Pensions deficits arise from time to time in final salary schemes and at the moment most schemes are in deficit.

In the future when an employer company leaves a scheme it will have to pay for any deficit on a very cautious insurer basis. This basis is already used for some scheme winding up deficits and produces much higher debt charges on employers than the old basis.

Further the new Pensions Regulator will have powers (from April 2005) to re-allocate pensions debts to reverse the effects of corporate transactions. These transactions include any company merger or sale of a business and could be applied to any act since June 2003.

PFIs and PPPs

Where staff transfer from the public to the private sector, their pensions are often protected under Government guidance notes. The main guidance note has now been up-dated and re-issued. The new guidance increases the duties on private sector companies bidding for government work. In particular, bidders will need to present detailed pension proposals as part of their initial bid whereas in the past this detailed work has been left until the contract was awarded.

TUPE and Pensions

The Pensions Bill is expected to become law later this year. It includes a new duty on employers to provide pensions following a TUPE transfer. Normal scheme pensions do not, at present, transfer under TUPE.

The Bill does not contain details of what the new employer will be required to provide. We understand from statements made by government ministers that they are looking at imposing a high standard – 6% of pay, paid by the employer. This may even be imposed where the old employer provided less than 6%.

We will watch for more detail on these proposals.

Overseas Secondments

Until now the Inland Revenue have applied strict rules on when an employee on overseas secondment can continue to build up a pension in a UK scheme. They have just announced that with immediate effect, they have withdrawn the rule that the period abroad could not exceed 10 years. The other rules – for instance the requirement that the employee is expected to return to the UK eventually – remain.



7 Contacts

Our employment law partners - Margaret Davis, Richard Kenyon and David Fisher - lead a team of specialist lawyers with many years of experience in the employment field. If you need employment advice or assistance, please contact one of the following partners.

Employment partners

Margaret Davis

margaret.davis@ffw.com

Richard Kenyon

richard.kenyon@ffw.com

David Fisher

david.fisher@ffw.com

Mailing List

We regularly send e-mail alerters informing clients of changes in employment law. If you would like to receive these, please contact Erica Neustadt: erica.neustadt@ffw.com.

Please contact Erica if you would like to order a copy of our Guide to the new statutory dispute resolution procedures.

Pensions department

Belinda Benney

Partner and Head of Pensions
belinda.benney@ffw.com

David Gallagher

Senior Pensions Solicitor
david.gallagher@ffw.com

Karen Gibb-Davis

Senior Pensions Solicitor
karen.gibb-davis@ffw.com

Catherine Hope

Senior Pensions Solicitor
catherine.hope@ffw.com

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