

SPRING/SUMMER 2004

People

The FFW Employment Review

Contents

- 1** Summary
- 2** New dispute resolution regulations
- 3** Employment bureaux and temporary labour - a new regulatory framework
- 4** Changes to pensions - an occupational hazard?
- 5** Maternity - still more questions than answers
- 6** Employment rights checklist
- 7** Contacts



1 Summary

Welcome to our spring/summer newsletter. In this edition of *People*, we follow up as promised on issues that were unresolved at the time that our winter newsletter went to press, look at some recent cases, review the legislative changes that have hit the statute book so far this year, and analyse the effect of key changes on your business. As ever, we would be very happy to receive feedback.

If you would like to receive our e-mail alerters, which we send out when there are changes to employment law that we feel you should know about immediately, please see the contacts section at the end of this newsletter.

Follow up to the winter edition of *People*

Illegal workers

In our previous newsletter, we outlined the Government's proposed changes to the documents that an employer should check to comply with the Asylum and Immigration Act 1996, when ensuring that their employees are entitled to work in the UK. Any employer employing illegal workers is liable to be prosecuted.

You will recall that it was proposed that there should be a two-tier system of documents; an employer would only have to check one of the top tier documents, which includes UK or EEA passports, residence permits and registration cards. Alternatively, an employer may check two documents from the lower tier, for example, a certificate of registration as a British citizen and a birth certificate. An employer would always have to see the original of a document, take a photocopy and be satisfied that it relates to the individual in question.

The Immigration (Restrictions on Employment) Order 2004 came into force on 1 May 2004. This makes the above proposals law. Note that it also renders some previously acceptable documents inadequate as proof of entitlement to work, such as short UK birth certificates. A complete list of acceptable documents is available in the Order, which can be found at www.homeoffice.gov.uk/docs3/si2004_755.pdf

Sexual orientation equality

The TUC's challenge to the Government's implementation of the Employment Equality (Sexual Orientation) Regulations 2003, which came into force last December, has now been heard. In our winter newsletter, we noted that the Regulations excluded benefits dependent on marital status. The TUC argued that this will discriminate against gay people who cannot marry, particularly in relation to pension schemes which discriminate in favour of married people. This challenge

has been rejected, the court holding that this exception to the general prohibition against discrimination is lawful.

Legislation review

April saw a variety of new legislation in the employment law field.

The Social Security Up-rating Order 2004 has increased the rates for maternity, paternity and adoption pay to £102.80 per week, or 90% of a person's average weekly earnings if less than £102.80, from 4 April.

In force from 6 April:

- The Conduct of Employment Agencies and Employment Business Regulations 2003. We look at these regulations in more detail below.
- The Statutory Maternity Pay (Compensation of Employers) Amendment Regulations 2004. These affect the definition of small employers who can recover amounts in respect of payments by them of statutory maternity pay. 'Small employer' is defined by reference to the amount of an employer's payments of national insurance contributions. The amendment regulations increase the amount of employer NICs from £40,000 to £45,000.
- The Paternity and Adoption Leave (Amendment) Regulations 2004. An employer will no longer be able to ask the employee for the name and date of birth of the child for whom leave is being taken. The Regulations also provide that all terms and conditions applying in relation to an employee returning to work from adoption leave, not just those relating to remuneration, are to be no less favourable than those which would have applied had the employee not been absent.
- Finally, the ACAS arbitration scheme, already in place in England and Wales, is extended to Scotland.



Recent cases

Is an employee entitled to payment for overtime whilst on annual leave?

In *Bamsey v Albion Engineering and Manufacturing*, Mr Bamsey was contracted to work 39 hours a week although as standard he worked up to 60 hours a week, and was paid for doing overtime. Whilst on annual leave, his employer paid him on the basis of a 39-hour week. Mr Bamsey complained to the tribunal that under the Working Time Regulations 1998, the calculation of his week's pay whilst on holiday should include his overtime working. The Court of Appeal disagreed, saying that a week's pay is to be worked out by reference to 'normal working hours'. Overtime may only be taken into account where the employee is contractually obliged to do it.

Unfairly dismissed employees can claim for non-financial losses.

In cases of unfair dismissal, tribunals have the power to make awards at a level that is just and equitable having regard to the loss suffered by the former employee because of the dismissal. There has been some debate whether this includes a power to make an award for non-pecuniary losses, such as for distress, humiliation, damage to reputation or family life and psychiatric injury sustained as a result of the dismissal, or whether it should be limited to economic loss.

In *Dunnachie v Kingston Upon Hull City Council*, the Court of Appeal held (by a majority) that tribunals do have the power to compensate for non-financial loss, particularly where an employee has suffered real injury to their self-respect caused by the manner in which the dismissal was handled. This will have particular impact in constructive dismissal cases, where the employee is complaining specifically about his or her treatment prior to resigning, and is likely to lead to enhanced awards (possibly by up to £25,000 in extreme cases, although total compensation is still subject to the statutory cap of £55,000).

What should employers do to minimize the impact of this case? You should have a strong and clear grievance procedure in place, grievance and disciplinary matters should be handled swiftly and in accordance with policies, employees should always be dealt with respectfully and there should be a culture of zero tolerance for bullying, with the requisite training for managers.

This case is being appealed to the House of Lords, and should be heard on 19 May. We will let you know the outcome.

Agency workers – liability of the end user

In *Dacas v Brook Street Bureau (UK) Ltd*, Ms Dacas had been working for Wandsworth Council as a cleaner for four years. She had been supplied by the agency, Brook Street Bureau, with whom she had a contract that specifically said she was not an employee of either the agency or Wandsworth. When her contract was terminated, she claimed unfair dismissal against both the agency and the council.

The Court of Appeal decided that Ms Dacas was not an employee of the agency, but had an implied contract of employment with the council, given that the council had control over her work, could tell her what to do, was obliged to pay for the work that she did, even though payment was made by the agency, and had taken the initiative to terminate her contract.

This case is very relevant to employers, as the Court of Appeal held that in such situations, someone is the employer, and typically, it will be the end user. The most striking aspect of this decision is that the Court of Appeal said that the mere fact someone works for the same end user for one year (which is the amount of time it takes to qualify for protection from unfair dismissal) is enough to imply a contract of employment.

What should organisations which use agency-supplied workers do in the light of this case? First, there is no harm in continuing to include a written term in the contract that there is no contract of employment with the end user. Second, where possible, use employment businesses which have a contract of employment with the workers they supply, and third, where agency workers have worked in your organisation for a year or more, be very careful when dealing with termination of their contracts, both in terms of reasons for termination and the procedure for doing so.

This might not be the final word in this matter as an appeal to the House of Lords is possible, although no such action has been taken so far.



2 New dispute resolution regulations

The Employment Act 2002 (Dispute Resolution) Regulations, published on 12 March 2004, set out the circumstances in which the new statutory procedures introduced by the Employment Act 2002 will apply. The Regulations are due to come into force on 1 October 2004 and aim to promote dispute resolution in the workplace so that fewer cases end up before a tribunal.

To that end, they impose minimum disciplinary and grievance procedures on all employers, existing employees and new employees from the outset of their employment. However, please note that in relation to unfair dismissal claims, the normal 1 year minimum service requirement still applies and a failure to follow the procedures does not give rise to a separate free-standing right to claim against the employer.

Those familiar with good practice and unfair dismissal case law will recognise the basic framework of the new procedures. However, the procedures will be mandatory rather than merely advisable, and in addition to existing good practice and unfair dismissal principles rather than an alternative.

Currently, when managing disciplinary and grievance hearings, broadly speaking, an employer needs to consider three areas. First, the right not to be unfairly dismissed as set out in s.94 of the Employment Rights Act 1996. Secondly, the right to be accompanied to a disciplinary or grievance hearing as set out in s.10 of the Employment Relations Act 1999. Thirdly, good practice as set out in the ACAS Code of Practice and in company disciplinary procedures which may be incorporated into the contract of employment or set out in a non-contractual policy. The incoming statutory dispute resolution Regulations provide a fourth area for consideration.

Statutory disciplinary and dismissal procedures

The disciplinary procedures will not apply where an employer gives oral or written warnings, but will if the threatened sanction goes further, for example, suspension without pay, demotion or dismissal. There are two forms of this procedure, 'standard' and 'modified'.

The standard procedure has three steps:

- (1) the employer writes to the employee explaining the nature of the allegations and inviting him or her to a disciplinary meeting;
- (2) a meeting is arranged and the employee must take all reasonable steps to attend the meeting.

The employer should then inform the employee of its decision and of the right to appeal if he or she is not satisfied with the decision;

- (3) the appeal meeting (if necessary) is held. After the appeal meeting, the employer should inform the employee of its final decision.

Checklist

- A written invitation to the disciplinary hearing should contain:
 - the nature of allegation (mandatory); and
 - a reminder of the right to be accompanied (good practice).
- The disciplinary hearing should take place before any action is taken, except in the case where the disciplinary action consists of a suspension (mandatory).
- The disciplinary hearing should not take place unless the employer has informed the employee of the nature of the allegations (mandatory).
- The disciplinary hearing should be set with sufficient time for the employee to prepare, usually at least 48 hours after receipt of the invitation letter (good practice).
- The employee has a right to be accompanied to the disciplinary hearing by a trade union representative or colleague and the hearing date may have to be delayed to accommodate the employee's choice of representative (mandatory).
- The employer should hold the meeting in as private a location as possible and ensure there are no interruptions (good practice).
- At the meeting, the employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be allowed to ask questions, present evidence, call witnesses and question any witnesses called by the employer (good practice).



- Before making any decision on disciplinary action, the employer should take account of the employee's disciplinary and general record (good practice).
- The employer should inform the employee of its decision and of the right to appeal where relevant (mandatory).
- If an employee does wish to appeal, he or she must inform the employer (mandatory).
- The appeal meeting need not take place before the dismissal or disciplinary action takes effect.
- The employer must inform the employee of the outcome to the appeal (mandatory).

If an employer believes that an employee may be guilty of gross misconduct and liable to be dismissed summarily, it is still important to establish the facts of the case before taking any action. It is always high risk to dismiss without first giving an employee an opportunity to put forward a case at a disciplinary meeting. When an employer does dismiss instantly, without commencing disciplinary procedures, it is still legally required to give to the employee written reasons for dismissal and to hold an appeal meeting, if the employee wishes.

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

- (1) the employer sends the employee a letter setting out grounds of misconduct;
- (2) the appeal meeting (if necessary) is held, after which the employer must inform the employee of its final decision.

Checklist

- (1) The letter should detail:
 - the nature of the employee's alleged misconduct which led to the dismissal (mandatory);
 - the basis for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct (mandatory);
 - a reminder of the right to be accompanied (good practice); and
 - the right to appeal (mandatory).
- (2) If an employee does wish to appeal, he or she should inform the employer who must then invite him or her to attend a meeting after which the employer must inform the employee of its decision (mandatory).

Maintaining records

It is good practice and in the interest of both employers and employees to keep written records of the disciplinary process as it progresses, including:

- the complaint against the employee;
- the employee's defence;
- findings made and actions taken;
- the reason for actions taken;
- whether an appeal is lodged;
- the outcome of the appeal; and
- subsequent developments.

There are various circumstances where the statutory disciplinary procedures do not apply, for example where all employees are dismissed and then re-engaged, certain instances of redundancy, industrial disputes, or where the employee is found to be an illegal worker.

Statutory grievance procedures

The grievance procedures follow the same two forms as the disciplinary procedures. The standard procedure applies in respect of any grievance about which the employee could make a complaint to a tribunal, for example, discrimination, unauthorised deduction of wages or unfair dismissal. The standard procedure has three steps:

- (1) the employee gives to the employer written notice of the grievance. If the grievance is not in writing, in most cases, the employee loses the right to have the case heard by a tribunal;
- (2) the employee is invited to attend a meeting by the employer to discuss the grievance. The employer should then inform the employee of its decision and the right to appeal;
- (3) the employee informs the employer if he or she wishes to appeal the decision. After the appeal meeting, the employer should inform the employee of its final decision.

Checklist

- The grievance hearing should not take place unless the employee has first set out the grievance in writing for the employer (mandatory).
- The grievance hearing should not take place unless the employer has had a reasonable opportunity to consider its response to that information (mandatory).



- The employee should be informed of the right to be accompanied to the meeting (good practice).
- The employer should ensure that the hearing is not interrupted and the grievance is treated confidentially (good practice).
- If at any point the employer is unsure how to deal with the grievance, it may be sensible to adjourn the meeting to get advice (good practice).
- The employer should respond in writing to the employee within reasonable time, five days is normally long enough (good practice).
- If the employee does wish to appeal, he or she must inform the employer (mandatory).
- The appeal should be heard by a more senior or at least a different manager (good practice).
- The employer must inform the employee of the outcome to the appeal (mandatory).
- either party has reasonable grounds to believe that going through either procedure would result in a significant threat to themselves, others or property;
- either party has been subject to harassment and has reasonable grounds to believe that going through either procedure would perpetuate that harassment; or
- a procedure cannot be started or concluded within a reasonable period.

Effect on tribunal awards

The Regulations do not give employees or employers free-standing statutory rights to sue each other for respective failures to comply with the statutory procedures. Rather, adjustments can be made by tribunals to compensation awards in other employment claims, for example, unfair dismissal and discrimination.

If an employer fails to follow the new statutory procedures, a dismissal will be **automatically** unfair (although the normal requirement of 1 year's service for unfair dismissal claims still applies). In such case, the tribunal would increase the employee's compensation by between 10 and 50 per cent. Where an employee fails to follow the procedures, any award may equally be reduced.

ACAS is currently revising its code of practice on disciplinary and grievance procedures, to take account of the new regime. The draft code is available on the ACAS website at www.acas.org.uk. The code contains guidance and notes on good practice which tribunals will take into account when reviewing how a case has been handled by an employer.

Breach of contract

During the consultation stage, it was proposed that the statutory procedures should become terms of every employee's contract of employment, so that an employer who failed to follow the new regime would be in breach of contract. This proposal has not been adopted in the Regulations, although the Government will review this issue after two years, having assessed the extent to which the procedures are being used. An employer will of course be in breach of contract if it has incorporated its own disciplinary and grievance procedures into contracts of employment then does not adhere to them.

Base line

The statutory procedures only provide a base line for employers. If an employee is dismissed without the correct statutory procedure being followed, the dismissal is automatically unfair. However, even if the employer has followed the statutory procedures, it must still handle

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

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

Maintaining records

Again, it is good practice to keep written records detailing:

- the nature of the grievance raised;
- the employer's response;
- action taken;
- reasons for action taken; and
- whether there was an appeal, and if so, the outcome.

All records from either the disciplinary and grievance procedures should be treated as confidential and kept in accordance with the Data Protection Act 1998.

Exceptions

There are cases in which the Regulations anticipate that forcing the parties to go through the statutory procedures will be inappropriate. These are where:



a matter reasonably – judged, for example, against an employer's own company handbook and the ACAS guidelines – in order to show that the dismissal was fair.

Planning ahead

Companies should have their disciplinary and grievance policies reviewed to ensure they comply with and make

reference to the new law. It is important that managers are given training so that they understand and can implement the new procedures. Employees should also be made aware of the changes so that the new Regulations are used constructively and if problems arise, the parties discuss them and settle any disputes without the involvement of a tribunal.

3 Employment bureaux and temporary labour - a new regulatory framework

On 6 April 2004, the Conduct of Employment Agencies and Employment Business Regulations 2003 (the Regulations) came into force. The new Regulations impose a wide range of obligations upon employment agencies and employment businesses ('employment bureaux').

The stated aim of Government is to provide temporary workers with greater protection and more flexibility to move from temporary to permanent work. The Regulations are also intended to safeguard hirers (both individuals and companies) against being provided with unsuitable temps. Failure to comply with the Regulations is not only a criminal offence, carrying a maximum fine of £5000, it is also possible for anyone suffering loss as a result to sue for compensation.

Definitions

An **employment agency** introduces workers to a hirer who may then contract directly with a worker (so the contract is between the worker and the hirer);

An **employment business** contracts with workers and then supplies their services to a hirer (so the employment business has two contracts, a supply contract with the hirer, and a separate contract with the worker)

Important changes

There is a wide range of new restrictions and rules too extensive even to summarise here. However, if you deal with employment bureaux, the following areas are particularly important:

- New restrictions on charging transfer fees
- VAT Restrictions
- Documentation requirements
- Information obligations

Transfer Fees

Transfer fees are any payments charged by an **employment business** when a worker it has supplied takes up employment directly with the hirer, or is subsequently supplied to the hirer by another employment business. Historically, such charges have often been penal, and have deterred hirers from permanently engaging workers who have been supplied to them on a temporary basis.

Under the Regulations, an employment business' ability to charge transfer fees will be restricted. These restrictions apply with immediate effect to any new engagement of a temporary worker, and will apply to existing engagements after 6 July 2004.

The Regulations deal with three potential scenarios:

(1) Where an employment business has introduced a temporary worker (who has not actually started working for the hirer), with whom the hirer then decides it wishes to contract directly or retain through another employment business

Here, the employment business must offer the hirer a contract which provides for the supply of the worker for a set period as an alternative to being charged a transfer fee. If no such period has been agreed, then no transfer fee will be enforceable.

(2) Where a temporary worker has started working for the hirer, which then decides it wishes to contract directly or retain the worker through another employment business



Here, not only must the employment business offer a contract for a set period (as above), but also, it will not be able to charge a transfer fee unless the transfer date is either

- within 14 weeks of the beginning of the first engagement, or
- within eight weeks of the end of the engagement (whichever is later).

(3) Where the hirer introduces a temporary worker to a third party

In this case an employment business is not obliged to offer a contract for a set period as an alternative to a transfer fee. However, as above, the employment business will not be able to charge a transfer fee unless the transfer occurs within 14 weeks of the beginning of the first engagement, or 8 weeks of the last day worked for the hirer through the employment business.

Changes to the handling of VAT

Under the new Regulations it is generally no longer possible for an **employment agency** to pay any money to a worker on behalf of a hirer who has contracted directly with the worker. Historically, the incentive for pursuing such an arrangement was that the agency would only charge the hirer VAT on the introduction fee, and not on the service provided by the workers. The Government has moved to prevent this type of arrangement in order to avoid confusion as to the employment status of such workers, and because generally it never intended organisations to avoid paying VAT in this way. Note that certain sectors are exempted from this rule.

Currently, when an **employment business** supplies workers to a hirer, it can make use of the 'staff hire concession': instead of paying the workers' salaries itself and then passing this charge, together with VAT, onto the hirer, the hirer can pay the workers' salaries direct, incurring no VAT liability. Customs & Excise will review this concession in the 18 months following 6 July 2004, at the end of which the concession may be withdrawn. They have promised not to make any changes during that period.

Documentation

The Regulations require employment bureaux dealing with a hirer to agree certain terms and conditions to govern the relationship between them and for these to be recorded in a single document. Importantly, this should include the procedure to be followed if a temporary worker is supplied who proves unsatisfactory. This ties in with the new requirements on employment bureaux to obtain and communicate information about temporary workers which might indicate that they are unsuitable for any particular role.

Obligation to acquire information

Employment bureaux are now under an obligation to establish the identity and qualifications of any worker who is going to be introduced to a hirer, and to confirm their willingness to work. Where the role requires certain professional qualifications or involves dealing with vulnerable people such as children, employment bureaux are required to obtain at least two written references and copies of relevant qualifications. These must be disclosed to the hirer. Employment bureaux are under a general obligation to take all reasonably practicable steps to confirm that the worker is suitable for the position concerned.

In any case where an employment bureau introduces a worker to a hirer, it must ensure that it provides to the hirer all the information it has obtained about the identity of the worker including experience, training and qualifications.

Hirers should be aware that they will (or should) be required to provide details of the role which they are seeking to fill, including details of any risks to health and safety, the steps taken to prevent and control such risks, and details of experience, training and qualifications considered necessary for the role.

Where an **employment business** obtains information that gives it reasonable grounds to believe that a worker is unsuitable for the position for which they have been supplied, it is under an obligation to inform the hirer and to terminate the worker's engagement with the hirer immediately. Where such information indicates unsuitability but does not amount to "reasonable grounds" the business must give that information to the hirer and make further reasonable enquiries to determine the worker's suitability.

Employment agencies which introduce people for permanent employment are under a similar obligation to provide such information for the first three months of the initial placement.

Summary

There are important new restrictions on employment bureaux which should help protect work seekers, temporary workers and those that engage them. Those dealing with employment bureaux can expect to be asked to agree to new and more detailed terms governing their relationship. Given the potentially serious sanctions an agency or business faces for failure to comply with the new Regulations, hirers and workers are likely to find that the balance of power has now shifted at least a little in their favour.



4

Changes to pensions - an occupational hazard?

The law on pensions and similar employee benefits is going through change: employers need to be aware of changes which have already happened, and others which are on the way.

TUPE: recent cases

Recently there have been two major European cases on the application of the Transfer of Undertakings (Protection of Employment) Regulations 1981, as amended, (TUPE) to various benefits payable under pension schemes. Whilst the two cases, *Beckmann* and *Martin*, concern public sector pension schemes, the decisions may also apply to a number of benefits under private sector schemes. As such, all employers are advised to follow developments in this area.

TUPE is the UK implementation of the European legislation, the Acquired Rights Directive (ARD) and must be interpreted consistently with it. It provides that when a business or similar operation is transferred from one organisation (the transferor) to another (the transferee), the employment and contractual rights of the transferring employees are protected and the rights and obligations of the transferor are inherited by the transferee.

Rights in occupational pension schemes are, however, an exception to the rule that rights transfer under TUPE. Until recently, the basic position in the UK has been to assume that any right to ongoing membership of an occupational pension scheme is unprotected by TUPE. In the above cases, the European Court of Justice (ECJ) ruled that this exception is strictly limited to those benefits payable for old age, invalidity or survivors' benefits, and 'old age' is limited to when an employee reaches the end of their normal working life. In *Beckmann* it held that redundancy pensions transferred with employees to the transferee and in *Martin* that early retirement benefits transferred. The ECJ logic would also seem to apply to most pensions benefits payable on severance or voluntary early retirement. Other test cases on specific benefits may now be brought.

One of the implications of these cases is that employees who transferred years ago may benefit from the limitation, provided that they remain within the business that was transferred.

Any employer that has taken on staff under a TUPE transfer should check their pension arrangements. There is a strong risk that generous employee benefits have transferred. This has to be confirmed if any such employees are candidates for early retirement, severance or redundancy. The risk is particularly acute

where the transferor was a public sector body with a generous pension scheme.

TUPE: proposed legislation

The Government has announced a wide-ranging set of pensions law reforms, most of which are in the Pensions Bill 2004. These may also impact on occupational pensions as reform of TUPE to include occupational pensions has, after prolonged consultation, finally been included. Personal pensions, such as group personal pensions and most stakeholder schemes, already transfer under TUPE.

If Parliament approves the Pensions Bill, then the transferee of a business where the transaction was within TUPE will have to maintain a limited level of pension provision for the transferring employees where the employees were in an occupational pension scheme before the transfer (note that this is in addition to those rights which do already transfer under the logic applied in *Beckmann* and *Martin*).

If employees are in a final salary, or similar, scheme the transferee will have a choice of what to offer. It can offer a final salary scheme that is good enough to be contracted out of the State Second Pension, or it can offer a money purchase arrangement with an employer contribution rate of 6% of salary available. The money purchase arrangement can be an employer-sponsored scheme or a stakeholder arrangement.

If the transferor provided a money purchase scheme the transferee must match it up to a maximum of 6% employer contributions. Alternatively, it can offer a final salary, or similar, scheme if it is good enough to be contracted out of the State Second Pension. If employees are in different pension schemes or sections then each group must be treated separately.

Failure to comply will mean that the transferee is in breach of the employees' contracts of employment.

These changes to TUPE are projected to take effect in April 2005 although this date is not fixed. Most of the rest of the Pensions Bill reforms affect employers with defined benefit schemes (often called 'final salary schemes') including closed schemes.



Changes to UK tax law

In December 2003, the UK Treasury and Inland Revenue published the long-awaited consultation paper *Simplifying the Taxation of Pensions – the Government's Proposals*.

This, together with an earlier consultation paper, heralds radical reforms. Current UK tax law on the treatment of personal and occupational pension schemes is complex, with eight different and inconsistent regimes governing the same basic concept – retirement income. These will be replaced by one new simplified regime based on an individual lifetime pension saving allowance. Many of the proposed changes are now in the Finance Bill 2004.

In his recent budget, the Chancellor confirmed that the lifetime limit will start at £1.5 million in April 2006. The National Audit Office has calculated that only 10,000 people will be caught by the new total allowance.

Other basic rules in the new regime are: retirement will be allowed at 55 years of age at the earliest (currently it is 50, with special rules for certain occupations); people can build up pension whether or not employed; there will be no limit on the number of schemes anyone can

contribute to at once; and pension tax rules will be checked through an individual's self-assessment returns rather than an employer's pension administration.

In their drive for simplicity, the Treasury and Inland Revenue have minimised provision for special cases. So employees who currently benefit from many of the Inland Revenue's special rules are among those who require specific attention from the employer. In preparing for the new regime, employers need to look at anyone paid over £102,000 a year, employees with agreed retirement ages younger than 55, UK-domiciled employees who are temporarily transferred abroad and employees in a scheme established outside the UK with 'corresponding approval'.

The Inland Revenue plans to publish more details this summer on how special cases will be treated under the new regime. If the employer has specifically designed benefit plans to achieve a desired effect, it may be under a duty to review and, if necessary, revise those plans.

Further advice on these issues and any other pensions law questions can be provided by our specialist pensions teams.

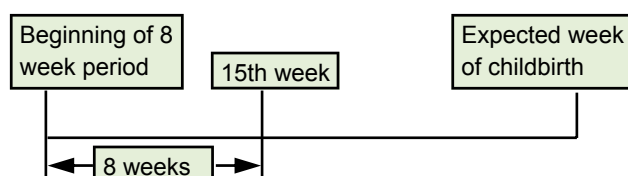
5 Maternity - still more questions than answers

In April 2003, in an attempt to simplify the rules on maternity leave and pay, the Government introduced changes to the maternity legislation.

Nevertheless, maternity remains a complex area of employment law, and recent decisions in the European Court of Justice (ECJ) and the Employment Appeal Tribunal (EAT) throw up more questions than answers. This article looks at the recent decisions of the ECJ and the EAT and considers their impact on current employment practices.

Pay rises

For the first 6 weeks of maternity leave, statutory maternity pay (SMP) is paid at 'higher rate'. This is calculated as 90% of a woman's normal weekly pay during the eight-week period ending with the 'qualifying week' which is the 15th week before the employee's expected week of childbirth.



For the rest of the ordinary maternity leave period, subject to any higher contractually agreed level, it is paid at 'lower rate', which is a flat rate, currently £102.80 per week.

It has long been established that if a woman is awarded a pay rise whilst on maternity leave which is backdated to include the eight-week period, then the woman's normal weekly earnings should be recalculated to reflect the backdated pay rise. What happens, though, where the pay rise is not backdated?

This question was referred to the ECJ by the Court of Appeal, in the recent case of *Alabaster v Woolwich plc*. The ECJ held that even though a pay rise is not backdated, all pay rises awarded between the beginning of the eight-week period and the end of maternity leave must be reflected in the calculation. However, the ECJ declined to give any guidance as to *how* any pay rise awarded before or during maternity leave should be factored into the calculation, leaving this for the Government to decide.



This leaves open such issues as when should an employer pay the recalculated element of SMP to the employee and how should an employer recoup it (as entitled to do) from the Inland Revenue? Also, what is the position of employees who, prior to *Alabaster*, were given pay rises that were not backdated, so not reflected in their SMP? Do they now have a claim, or are they out of time?

It may be that, when the Court of Appeal considers the answers provided by the ECJ, it will also provide guidance on these issues. Alternatively, it may be that we must await clarification through new legislation or further decisions in this area.

Holiday entitlement

The ECJ confirmed in the recent case of *Gomez v Continental Industrias del Caucho* that a woman on maternity leave is entitled to take holiday (under the EC Working Time Directive) at a time other than during her maternity leave. This was so even where, as in this case, the woman's maternity leave coincided with a period of annual leave taken by the whole workforce, pursuant to a collective agreement. This meant that, although the workforce as a whole was obliged to take holiday at a specific time, Ms Gomez could take her leave at a different time.

How does this ruling affect UK law? Does it entitle a woman whose maternity leave spans two holiday years to carry over any untaken holiday from the first into the second year? That would seem to be contrary to the Working Time Regulations 1998 (which implement the Working Time Directive in the UK), which preclude a worker carrying over unused holiday from one year into the following year. Are women on maternity leave an exception to this rule, now?

In the light of this uncertainty, it is hard to suggest how employers should proceed. One possible option is to

encourage employees to take outstanding holiday before going on maternity leave. Again, we await further guidance on how to implement the law.

Failure to inform of job vacancy

The EAT recently reached a curious decision in a constructive dismissal case, *Paul v Visa International*. Ms Paul worked for Visa International as an administrator in its operating regulations department. The department carried out two types of work: credit card design, on which she worked, and dispute resolution. Ms Paul had expressed an interest in moving into dispute resolution before going on maternity leave. During her absence, a new post was created in dispute resolution for an operating regulations analyst. Ms Paul was not told about the post and it was filled by an external candidate. When she found out, she was so upset that she had not been told that she resigned.

The EAT held that an employer who fails to inform a woman on maternity leave of a job vacancy which, had she known about it, she would have applied for, was in fundamental breach of the implied duty of mutual trust and confidence, even though the woman did not have the necessary experience for the job. The employer was also held to have discriminated against her on the grounds of her sex.

It is unclear whether the EAT would have reached the same decision if Ms Paul had not expressed an interest in moving into another role before she went on maternity leave. Visa International may also seek leave to appeal this decision. However, subject to any appeal, the message from this decision is that you should notify any woman who is absent on maternity leave of any job vacancy for which she might wish to apply, even when you believe she would be neither suitable nor qualified. Otherwise, you could be faced with a potential constructive dismissal claim!



6 Employment rights checklist

Here is the employment rights checklist, updated to take account of recent increases.

Complaint	Time limits for bringing claim	Normal qualifying employment period	Financial limits on award
Redundancy			
Redundancy payments	6 months from relevant date ¹	2 years ²	£8,100 maximum
Dismissal			
Unfair dismissal	3 months from date of termination ³	1 year	
• Basic award			£8,100 maximum
• Compensatory award			£55,000 maximum ⁴
• Additional award for failure to comply fully with re-employment order			26-52 weeks' pay (capped at £270 per week)
• Failure to provide written reasons for dismissal within 14 days of request	3 months from date of termination ³	1 year	2 weeks' pay (capped at £270 per week)
Trade Union Membership			
Action short of dismissal	3 months from date of last action complained of ³	None	No limit ('just and equitable' amount)
Refusal of employment on grounds related to trade union membership	3 months from date of conduct complained of ³	None	£55,000 maximum
Refusal of time off for trade union activities	3 months from failing to give time off ³	None	No limit ('just and equitable' amount)
Refusal of time off for trade union duties	3 months from failing to give time off ³	n/a	No limit ('just and equitable' amount)
Unfair dismissal for trade union activities	3 months from date of termination ³	None	Minimum award £3,600 maximum award £55,000



Complaint	Time limits for bringing claim	Normal qualifying employment period	Financial limits on award
Maternity			
Unfair dismissal for pregnancy related reason	3 months from date of termination ³	None	£55,000 ⁵
Failure to offer alternative work before suspension of pregnant woman	3 months from date of suspension	None	No limit ('just and equitable' amount)
Failure to pay full pay when on maternity-related suspension	3 months from date of suspension	None	No limit
Parental Leave			
Unreasonable postponement of, or refusal to permit, parental leave	3 months from date of matters complained of ³	1 year	'just & equitable' amount
Unfair dismissal for taking or seeking to take parental leave	3 months from date of matters complained of ³	1 year	£55,000
Discrimination: Race and Sex			
Sex, race and/or disability discrimination	3 months from date of matters complained of ⁶	None	No limit
Equal Pay			
Breach of equality clause	6 months from date employment ceases ⁷	None	No limit on arrears of difference/damages (up to 6 years prior to claim)
Unlawful Deductions from Pay			
	3 months from date of last deduction ³	None	No limit (subject to amount of the deduction)
Miscellaneous			
Itemised pay statement	3 months from date employment ceased ³	None	Up to a total of unnotified deductions during 13 weeks prior to application
Written particulars of employment	3 months from date employment ceased ³	1 month	No financial penalty
Breach of contract claim in the employment tribunal	3 months from date of termination ³	None	£25,000

¹ Employment tribunals have discretion to extend where it is 'just and equitable' to do so.

² Starting with 18th birthday if employee started work before that date. The relevant date in unfair dismissal cases will normally be either;

- The end of the notice period where notice is given, or
- The date of termination where dismissal is without notice.

³ Employment Tribunals can extend where 'not reasonably practicable' to bring claim in time.

⁴ Applies to dismissal where the effective date of termination falls on or after 25 October 1999. There is no limit if Health and Safety or Public Interest Disclosure is involved.

⁵ No upper limit applies in sex discrimination matters relating to pregnancy.

⁶ Where 'continuous' discrimination occurs over a period, from end of that period. Employment Tribunals have discretion to extend where it is 'just and equitable to do so'.

⁷ Unless employer deliberately conceals relevant facts or the woman was under a disability.



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

Pensions contacts

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

t: 020 7861 4000

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



This publication is not a substitute for detailed advice on specific transactions and should not be taken as providing legal advice on any of the topics discussed.

© Copyright Field Fisher Waterhouse 2004. All rights reserved

Field Fisher Waterhouse 35 Vine Street, London, EC3N 2AA
t: +44 (0)20 7861 4000 f: +44 (0)20 7488 0084 e: info@ffw.com
www.ffw.com www.thealliancelaw.com

