

# People

WINTER 2003/4

## The FFW Employment Review

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# 1 Executive summary

Welcome to our new look employment law review. In *People* we will cover recent developments and new legislation in employment law, and suggest how to adopt working practices to accommodate them. We welcome your views on what you would like to see in future issues of this review.

There is no freestanding right to be treated equally in this country, although the General Framework Directive for equal treatment in employment and occupation, which will be fully in force by 2006, clearly aspires to such a right. The Directive seeks to outlaw discrimination on the grounds of religion or belief, disability, age and sexual orientation.

Recent legislation implementing the Directive is the Employment Equality (Sexual Orientation) Regulations 2003, which came into force on 1 December 2003. Hard on its heels were the Employment Equality (Religion or Belief) Regulations 2003, which came into force on 2 December.

Amendments to the Disability Discrimination Act 1995 will come into force in October 2004. Finally, the Government is obliged by the Directive to implement legislation on age discrimination by December 2006, although on the DTI website the target date is currently October 2006.

In the following articles, we look at the implications of some of the new laws, and suggest ways in which employers might prepare for them.

We also look at the proposed changes to the Asylum and Immigration Act 1996, and the legislation, which also went live on 1 December, making it illegal to hold a mobile phone whilst driving.

## 2 Religious discrimination and dress codes

Many employers already accommodate employees' requests for variations to dress codes, particularly to take into account religious beliefs.

Most companies today have some kind of dress code, whether it is designed to promote a certain image or for hygiene or safety reasons. There was a time when dress codes were simply accepted but over the last decade several cases attacking such codes have been brought using existing sex and race equality legislation.

The Employment Equality (Religion or Belief) Regulations 2003 have just come into force. These make employers' flexibility an obligation by outlawing discrimination on the grounds of religion or belief. This article looks at how dress codes have been dealt with by courts and the likely impact of the new legislation.

### Unfair dismissal

Where employees argue unfair dismissal for refusing to comply with a dress code, tribunals are likely to review an employer's reasons for imposing the code. They will also look at whether it is contractual, why the employee objects and how the code is enforced.

In one case an electrician successfully claimed that being dismissed for having long hair and refusing to get it cut was unfair. The court held that the employer's own taste was not a sufficient reason for the dismissal. In contrast a woman who was dismissed for refusing to wear an overall because she was deeply superstitious of the colour green was fairly dismissed.

### Sex discrimination

Obviously, there are likely to be differences in the way men and women are expected to dress at work, but a claim of sex discrimination will only be successful where the employee can prove that the result of the dress code is that one sex is treated less favourably than the other and consequently he or she has suffered a detriment. In assessing whether this is so, a tribunal will look at whether the rules of a dress code are more restrictive on one sex than another.

This approach was demonstrated in a recent case



where an employer was found to have sexually discriminated against a man by forcing him to wear a shirt and tie whilst allowing his female colleagues to wear T-shirts.

### Race discrimination

There is a danger that an employer who insists on specific dress rules might discriminate against certain groups who have cultural conventions for clothing and appearance. In one case a black employee successfully claimed race discrimination; she wore her hair in short spiky plaits, and her manager decided this contravened the dress code since he based his idea of an acceptable appearance on what he would expect from a white person.

There is a defence to some claims of race discrimination where an employer can prove that the application of a dress rule is a "proportionate means of achieving a legitimate aim". Reasons of uniform, hygiene and safety may be considered legitimate.

### New regulations

The new regulations provide an additional basis for claims on religious grounds. For instance, observant Muslims are required to cover the body, and will have a legitimate claim against an employer's dress code which does not allow for this. Rastafarians wear their hair in dreadlocks because of religious belief. If a dress

code requires a specific hairstyle or head covering the employer will need to ensure that it is able to justify such a restriction. Where there is conflict with, for example, health and safety, objective justification must be established and should be communicated to employees.

Where employees are forced to wear clothing that has the purpose or effect of violating their dignity or creating a hostile, degrading, humiliating or offensive environment, the employee might also have a claim for harassment under the new regulations.

### Human rights

All of these claims could potentially be brought in conjunction with claims under the Human Rights Act 1998 as tribunals must, as far as possible, interpret domestic legislation in a way which complies with that Act. Indeed, merely imposing a dress code on the workforce could be seen as a breach of the right to freedom of expression, although courts are likely to interpret this right more moderately.

But don't panic! The best advice for employers is to take a good objective look at your dress codes. Decide where there is room for leeway and prepare to be flexible when employees request reasonable variations. Ensure that your code treats men and women fairly and that you know where you can legitimately set your boundaries.

## 3

## New sexual orientation regulations

Regulations outlawing discrimination by reason of sexual orientation came into force on 1 December 2003.

Lack of protection for gay men and women has been a longstanding and controversial lacuna in the law of this country. Likewise, courts and tribunals have long been troubled with the issue – although it is now clear that the Sex Discrimination Act 1975 does not provide protection against discrimination for gays: 'sex' relates to 'gender' and not 'sexual orientation'. Therefore if, say, a gay man alleges that he has been treated less favourably than a heterosexual man because of his orientation, this is not unlawful if a gay woman would have been treated equally badly.

### New rights

Now in force, the Employment Equality (Sexual Orientation) Regulations 2003 will resolve some - but not

all – of this controversy.

To an extent, the new regulations follow the format of the sex and race discrimination acts. It is now unlawful to discriminate either directly or indirectly against someone on the basis of their sexual orientation. It is also unlawful to victimise someone who has complained, in good faith, of suffering such discrimination.

### Harassment

One departure from this older model is the addition of harassment as a specific method of unlawful discrimination: whilst sexual and racial harassment are examples of direct discrimination, harassment has not previously been defined by legislation.



So, harassment arises where, on the grounds of sexual orientation, a person is subjected to unwanted conduct which has the purpose or effect of violating his or her dignity or creating a hostile, degrading, humiliating or offensive environment.

### Who can assert these rights?

A person may suffer discrimination on the basis of sexual orientation whether they are gay, heterosexual or bisexual. They may complain of discrimination on the basis of actual or perceived sexuality, and need not, as part of the process, reveal their true orientation.

The duty not to discriminate begins with the recruitment process, and survives the end of the employment relationship, to the extent that subsequent discrimination, victimisation or harassment arises out of, or is closely connected with, that relationship. This obviously includes the classic situation where someone has left, claiming discrimination on the basis of sexual orientation, and then their request for a reference is ignored.

### Exceptions

There is an exception in the regulations where a role may only be carried out by someone of a particular sexual orientation, for example, where employment is for the purposes of an organised religion, and the doctrines of that religion require that the employee has (or rather, does not have) a certain sexuality, or where a certain sexuality would cause conflict with the strongly held beliefs of a significant number of the religion's followers.

There are further exceptions, including where benefits are dependent on marital status. This last exception will preserve large areas of discrimination against gay people as, of course, gay marriages are not recognised in this country.

The TUC is challenging the exceptions concerning marital

status and religion, on the basis that the European law upon which the regulations are based does not allow for such exceptions. We will let you know what becomes of this challenge...

### Questionnaire

If an individual perceives that he or she has suffered discrimination, they may serve a questionnaire on their employer identifying the treatment and asking for information about it. A failure to answer or evasive responses may lead to a tribunal inferring that discrimination has indeed taken place.

A complaint of sexual orientation discrimination should be made to an employment tribunal within three months of any alleged incident.

### Can individuals be asked to declare their sexuality?

Typically, organisations monitor equal opportunities by means of a survey, and compile facts about their workforces, such as ethnic origin and racial group. Some employers are attempting to monitor their employees' sexuality in the same way. It is unlikely that, by doing so, they will protect themselves against claims under the new legislation. First, answers to such a survey are likely to be unreliable, as many people would prefer not to declare their orientation, and either will not answer the question, or not tell the truth. Secondly, if a person knows that the employer is aware of his or her sexuality, it will be easy to conclude that any perceived unfavourable treatment is as a result of that knowledge. Finally and importantly, for public authorities there is likely to be a human rights dimension, in that such a question may be seen as a breach of the right to a private life, under article 8 of the European Convention on Human Rights.

## 4

## Pensioning off age discrimination

It is somewhat surprising that in this world of ever-increasing equality, age discrimination remains legal in the UK.

Despite the growing number of employment cases on equality, we have yet to see a successful case on age discrimination. There was, therefore, huge press interest in the recent *Rutherford* case when it seemed that a new precedent in age discrimination might be set.

The case was brought by two men both aged over 65 who were made redundant. The crux of their case was that a provision in English law prohibiting unfair dismissal and redundancy claims by anyone over 65 is indirectly discriminatory against men (since more men than women are working at that age), and so contrary to the principle



of equality set down in European law. Had this been found to be the case it would effectively have changed domestic legislation.

### The decision

Ultimately, the Employment Appeal Tribunal decided that English law did not indirectly discriminate against men in this respect and therefore the two men had no claim. However, in summing up, it was remarked that in a few years time the outcome of such a case is likely to be altogether different.

### Future developments

So what does the future hold? The Government is obliged to implement legislation on age discrimination by December 2006. Public consultation on this subject closed in October 2003 and it seems likely that the legislation will abolish the upper qualifying age for unfair dismissal and redundancy claims.

The legislation is set to have a fundamental effect on all businesses. It will impact upon redundancy payments, recruitment, selection, promotion, retirement and benefits. There is even a suggestion that the statutory default retirement age should be set at 70, after which age

employees could be forced to resign without employers having to justify their decision. If this were to be introduced employers could still continue to employ people over the age of 70 or set their own retirement age above 70. Indeed, if one examines the proposed legislation in the light of the current pensions crisis it seems likely that people are going to have to work for longer in order to finance their eventual retirement.

### The effect on employers

Employers will have to consider very carefully the way in which they recruit staff and whether any age requirements imposed are genuine. Indeed, such is the predicted impact on employment policy, that the Government is aiming to give employers two years from the date of the draft legislation to implementation to enable them to review all policies and procedures and ensure that they are compliant with the legislation. Finally, employers should be aware that, as with other anti-discrimination legislation, there will be no limit to the compensation available to successful tribunal applicants.

If you would like to see the Government's commentary on proposed legislation or to have your say on future consultation then visit the DTI site at: <http://www.dti.gov.uk/er/equality/age.htm>

## 5 Preparing for the future

Employers should consider what steps are needed to prepare for the new legislation, at the earliest opportunity.

These might include:

- reviewing your equal opportunities policy to ensure religion, belief and sexual orientation are covered, and that the principle of non-discrimination after the end of the employment relationship is included;
- reviewing your dress code and the way it is applied;
- ensuring that your non-harassment policy conforms with the new statutory definition;
- arranging training for your managers on the implications of the new legislation;
- ensuring that any consequent changes to your disciplinary and grievance procedures are effected; and
- preparing in the longer term to comply with the changes to disability and age discrimination legislation.



# 6 Illegal workers - employers' liability

Employing an illegal worker may be a criminal offence and an employer can be fined up to £5,000 per illegal worker.

Under the Asylum and Immigration Act 1996, employers must ensure that their employees are entitled to work in the UK.

The employer has a defence if, before the start of employment, it has checked and copied one of a list of documents that confirm the prospective employee's right to work. The defence stands even if it later turns out that the employee was not entitled to work. Listed documents include a P45 or similar official document which contains the employee's National Insurance number and a passport which describes the holder as a British citizen, or as having a right of abode in, or entitlement to re-admission to, the UK.

Successful prosecutions have been very limited in number. For example, in 2001, there were 65 prosecutions but only one conviction. There were only 34 convictions in the period between 1997 and 2001.

One of the main difficulties in obtaining a successful prosecution is that many documents produced to employers are forgeries. Employers therefore employ an illegal worker and hold a copy of the forged document as a defence. Of course, the defence would not apply if the employer knew that the document was forged, but proving that is extremely difficult.

The simple solution is a national identity card, although few politicians share David Blunkett's public enthusiasm for such a scheme. There is also great opposition to ID cards, not least from civil rights organisations, and the Government is unlikely to be able to introduce them in the near future.

## Future developments

In the meantime, the Government's proposed solution is a two-tier list of documents that employers must check. The top tier includes passports, residence permits and registration cards, which are more difficult to forge. An employer need only check and copy one document off the top tier to protect itself against prosecution. An employer can, as an alternative, check and copy two documents off the second tier, such as a birth certificate and a certificate of registration as a British Citizen, to obtain the same protection.

It is also proposed that employers are placed under more responsibility to check photos and dates of birth given in documents produced to them. If a prospective employee produces two documents from the second tier where the names are different, for example, because of marriage, the employer must check a third document that explains the difference.

The Government's consultation on the proposed legal changes ended in October 2003 with new legislation expected before the end of the year.

## Race or religious discrimination

Employers should not make assumptions about a person's right to work or immigration status on the basis of their colour, race, nationality or ethnic or national origins as to do so would be discriminatory and fall foul of the Race Relations Act and possibly, from December 2003, regulations preventing discrimination on the grounds of religion. To assist employers, there is a Race Relations Code of Practice which recommends that employers should have clear written procedures for recruitment and selection based on equal and fair treatment of all applicants and should make those known to all relevant staff. The Code recommends that in providing information to prospective applicants employers should include a reminder that the successful applicant will be asked to produce one of the specified documents. If employers treat all applicants the same, discrimination should not be an issue.

In time, the whole issue of illegal working may fall away completely. Europe has been importing expertise to increase the workforce from the developing world for years. As the Continent's shrinking workforce struggles to support an aging population, more foreign workers, skilled and unskilled, may well be welcomed with open arms.



# 7

## Hold the line, I've just been fined

On 1 December 2003, holding a mobile phone whilst driving became unlawful.

The Road Vehicles (Construction and Use) (Amendment) (no 4) Regulations 2003 make it a road traffic offence to hold a mobile phone or other hand-held device for transmitting or receiving data whilst driving. This includes making calls or texting, sending or receiving faxes or images and accessing the internet. The legislation applies to all motor vehicles and motor bikes. Push bikes are not covered, but we are not anticipating wide use of them on the M25 as a result!

### Penalties

Initially, the penalty is a £30 fixed penalty, or up to £1000 on conviction in court (£2500 for drivers of goods vehicles, buses or coaches). The Government anticipates increasing the fine to £60 with three penalty points, although there is no timetable for doing so.

These regulations do not outlaw the use of hands-free equipment, although the police may use existing powers where use of such equipment leads to failure to have proper control of a vehicle.

Even if your hands ARE free whilst you use a hand-held device, for example, if you cradle it between your shoulder and ear, this still amounts to holding, and is an offence.

### Employers on the hook

By Regulation 110 (2), the legislation applies to 'any person who causes or permits any other person' to use a hand-held mobile phone whilst driving. The Department of Transport anticipates that employers will be liable under this provision if they supply such a telephone to employees or call the employee whilst on the road. Employers may also be liable if they require employees to use the mobile phone whilst driving, or fail to prohibit using hand-held phones whilst on company business.

It is not immediately obvious how the police would obtain evidence against the employer. Presumably, either the employee will maintain that he or she was using the phone at the behest of, or because of time pressures imposed by, the employer. It will also be evidence against the employer if the hand-held equipment is

company property, although this on its own is unlikely to be enough for the employer to be fined or convicted.

### Exceptions

There are exceptional circumstances in which use of a hand-held mobile phone is acceptable. These include acting in response to a genuine emergency and calling the emergency services where it is unsafe or impracticable for the driver to stop driving to make the call.

Employers should therefore consider:

- supplying only hands-free mobile telephones to employees;
- making any telephone, e-mail or internet policy compliant with the new law; and
- including use of a hand-held phone whilst driving as an example of misconduct.



## 8

## Employment rights checklist

Here is a brief reminder of some of the statutory employment rights. The financial limits on many awards are due for review in February 2004.

Complaint	Time limits for bringing claim	Normal qualifying employment period	Financial limits on award
<b>Redundancy</b>			
Redundancy payments	6 months from relevant date <sup>1</sup>	2 years <sup>2</sup>	£7,800 maximum
Failure to consult with representatives on collective redundancies	Either before last dismissal or 3 months from date of last dismissal <sup>3</sup>	n/a	90 days' pay
<b>Dismissal</b>			
Unfair dismissal	3 months from date of termination <sup>3</sup>	1 year	
• Basic award			£7,800 maximum
• Compensatory award			£53,500 maximum <sup>4</sup>
• Additional award for failure to comply fully with re-employment order			26-52 weeks' pay (capped at £260 per week)
• Failure to provide written reasons for dismissal within 14 days of request	3 months from date of termination <sup>3</sup>	1 year	2 weeks' pay (capped at £260 per week)
<b>Trade Union Membership</b>			
Action short of dismissal	3 months from date of last action complained of <sup>3</sup>	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 <sup>3</sup>	None	£53,500 maximum
Refusal of time off for trade union activities	3 months from failing to give time off <sup>3</sup>	None	No limit ('just and equitable' amount)
Refusal of time off for trade union duties	3 months from failing to give time off <sup>3</sup>	n/a	No limit ('just and equitable' amount)
Unfair dismissal for trade union activities	3 months from date of termination <sup>3</sup>	None	Minimum award £3,500 maximum award £53,500



Complaint	Time limits for bringing claim	Normal qualifying employment period	Financial limits on award
<b>Maternity</b>			
Unfair dismissal for pregnancy related reason	3 months from date of termination <sup>3</sup>	None	£53,500 <sup>5</sup>
Failure to offer alternative work before suspension of pregnant woman	3 months from date of suspension	sus- None	No limit ('just and equitable' amount)
Failure to pay full pay when on maternity-related suspension	3 months from date of suspension	sus- None	No limit
<b>Parental Leave</b>			
Unreasonable postponement of, or refusal to permit, parental leave	3 months from date of matters complained of <sup>3</sup>	1 year	'just & equitable' amount
Unfair dismissal for taking or seeking to take parental leave	3 months from date of matters complained of <sup>3</sup>	1 year	£53,500
<b>Discrimination: Race and Sex</b>			
Sex, race and/or disability discrimination	3 months from date of matters complained of <sup>6</sup>	None	No limit
<b>Equal Pay</b>			
Breach of equality clause	6 months from date employment ceases <sup>7</sup>	None	No limit on arrears of difference/damages (up to 6 years prior to claim)
<b>Unlawful Deductions from Pay</b>			
	3 months from date of last deduction <sup>3</sup>	None	No limit (subject to amount of the deduction)
<b>Miscellaneous</b>			
Itemised pay statement	3 months from date employment ceased <sup>3</sup>	None	Up to a total of unnotified deductions during 13 weeks prior to application
Written particulars of employment	3 months from date employment ceased <sup>3</sup>	1 month	No financial penalty
Breach of contract claim in the employment tribunal	3 months from date of termination <sup>3</sup>	None	£25,000

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

<sup>2</sup> 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.

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

<sup>4</sup> 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.

<sup>5</sup> No upper limit applies in sex discrimination matters relating to pregnancy.

<sup>6</sup> 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'.

<sup>7</sup> Unless employer deliberately conceals relevant facts or the woman was under a disability.



# 9 Noticeboard

## What seminars?

We are currently organising our 2004 seminar season. Please let us know if there are any subject areas you would particularly like to revise, and we will tailor the programme to suit as many of our clients as possible.

# 10 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 any of our partners.

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FFW also has specialist **tax** and **pension** lawyers.

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