

Employment Update

February 2010

News and Developments

New pay rates for Statutory Maternity, Paternity and Adoption Pay

Increases to Statutory Maternity, Paternity and Adoption Pay have been announced but have yet to be laid before Parliament. These are due to take effect for payment weeks from 4 April 2010. For all three, the standard rate (or 'prescribed rate') of pay rises from £123.06 to £124.88 per week.

Statutory Maternity Pay is paid at 90% of earnings for the first six weeks' leave. For up to 33 weeks following this, the rate of pay will be whichever is the lower of 90% of earnings or the statutory rate. Statutory Paternity Pay applies for up to two weeks, and Statutory Adoption Pay for up to 39 weeks, at whichever is the lower of 90% of earnings or the statutory amount.

In our [October Update](#) we reported that the Government was consulting on their plans to introduce up to six months' Additional Paternity Leave for fathers of children born on or after 3 April 2011. The final draft regulations on these proposals have now been laid before Parliament. These will require the agreement of both Houses before they become law, but are due to come into force on 6 April 2010. We will discuss this development further in future updates.

Government proposals on Whistleblowing

The Department for Business, Innovation and Skills (BIS) has published its consultation response on Employment Tribunals' powers to deal with Whistleblowing allegations under the Public Interest Disclosure Act 1998. Under the proposals, the tribunal claim form (ET1) will allow claimants to indicate if they are making an allegation of a protected disclosure. Provided the claimant consents, this

will then allow the tribunal to pass the ET1, or relevant extracts, on to a prescribed regulator. The proposals also include making amendments to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 to allow for otherwise privileged information to be disclosed.

During its consultation, BIS found that 61% of those responding supported its approach. However, the Employment Lawyers' Association have voiced concerns that the proposals could give unfair leverage to claimants, enabling them to use the threat of Whistleblowing allegations and the associated scrutiny from regulatory bodies to force higher settlements out of employers.

BIS intends these proposals to take effect for claims from 6 April 2010.

'Fit notes' to replace sick notes

As mentioned in last month's update in the ["What to look out for in 2010"](#) section, the Government has published the response to its consultation on the draft regulations which will provide for sick notes to be replaced by statements of fitness to work (commonly labelled as 'fit notes'). Key proposals include:

- a statement listing changes that could commonly be made to assist with a return to work, such as adaptations to the workplace, or an alteration to the employee's hours;
- GPs will only be able to certify employees as 'may be fit for work' or 'not fit for work'. The government did not implement a third option of 'fit to work', ensuring that the onus will be on employers to carry out a risk assessment before an employee returns to work;

- altering the wording 'may be fit for some work' to 'you may be fit for work taking account of the following advice...' This is to facilitate discussions between the employer and the employee about any changes that would help him or her to return to the work place; and
- that the maximum duration of a 'fit note' issued in the first six months of a medical condition is to be reduced from six to three months.

The Government intends the proposals to come into force on 6 April 2010.

Default Retirement Age decision due this summer

Employment Relations minister, Lord Young, announced at an Employers' Forum on Age ('EFA') conference this month that the Government would not be making a decision on the Default Retirement Age ('DRA') until this summer. He stated that the Government would be examining "the weight of evidence" received as part of its review of the DRA. Lord Young said that a consultation would be held on the Government's proposals, and that any changes would be due to come into force in 2011.

The Chief Executive of the EFA, Denise Keating, stated that she regards a change to the DRA as "inevitable" as it does not have a bearing on capability and is therefore "fundamentally discriminatory".

Research by the Equality and Human Rights Commission reveals significant public support for changes to the DRA, with 24% of men and 64% of women wanting to work beyond the age of 65.

Case law

"Stigma" damages may be awarded for discrimination claims

In *Chagger v Abbey National plc* [\[2009\] EWCA Civ 1202](#) the Court of Appeal recently ruled that it is possible, in limited circumstances, to claim for stigma damages, where employers are reluctant to hire someone who has brought an Employment Tribunal claim.

Facts

Mr Chagger was made redundant in 2006. He later brought a claim against his employer, Abbey National, alleging that he has been unfairly dismissed and discriminated against on the grounds of his race. Following his dismissal, Mr Chagger suffered difficulties in finding work, even at a more junior level to his former role: he failed to find work despite applying for 111 positions and registering with up to 26 employment agencies. As a result, he claimed that he was suffering from stigma due to his claim against the Abbey National.

Mr Chagger succeeded in his claim at the Employment Tribunal, and was awarded compensation due to the fact that he would be unable to find future work in the financial services sector. However, the Tribunal did not specifically find that he had been stigmatised.

On referral to the Employment Appeal Tribunal, the EAT considered the claim for stigma damages, and held that the stigma was too remote a result of the discrimination claim. Therefore, they found that the Employment Tribunal should only have awarded compensation for loss of earnings.

Decision

The case was referred to the Court of Appeal, whose finding on the issue of stigma loss was that it was recoverable and that the former employer (in this case, the Abbey National) would be held liable, rather than the stigmatising employer. They did not consider that this was too remote, as a third party employer's reluctance to employ a perceived "troublemaker" could be viewed as a loss flowing from the "original unlawful act". However, it would be unlikely to be considered as a separate head of loss in the majority of cases, as it would be taken into account when dealing with mitigation and the likely duration of unemployment.

Comment

This case is significant because of the potential for stigma arising from an employee who makes a claim at an Employment Tribunal. It is foreseeable that potential employers might be deterred from making a job offer if they are aware that the employee has brought a claim in the past. However, the very limited circumstances in which a claim for stigma loss can be brought under a separate head of loss, ensures that the potential for claims is limited. Employers ought still to be mindful of the fact that the Employment Tribunal may still consider whether stigma has taken place, and award damages for this as a result. This is a risk even if this is considered in the context of mitigation, as it may add to the claimant's difficulties in finding future work, and therefore mitigating his or her losses.

Court of Appeal reaches decision in key Equal Pay case

In the case of *Gibson and others v Sheffield County Council* [\[2010\] EWCA Civ 63](#) the Court of Appeal decided that a difference in pay between one mainly male group of employees and a group of predominantly female employees who did work rated as equivalent, did suggest that there may have been discrimination. As a result, the council had to objectively justify it.

Facts

A largely female group of workers (carers), had their work

rated as equivalent to a predominantly male group of employees (street cleaners and gardeners). However the carers were paid considerably less than the street cleaners/gardeners. This is because the pay of the latter group included productivity bonuses, which the carers did not receive. The female carers brought a claim against the council in the Employment Tribunal under the Equal Pay Act 1970 ('The Act').

The Act implies an equal pay term into every contract of employment where men and women do "like work", "work rated as equivalent" or "work of equal value". An employer has a defence if they can show that the difference in rates of pay results from a genuine material factor which is not the difference in sex. Where there is a suggestion of sex discrimination (for example, where a lower rate of pay has disproportionate effect on women) an employer must be able to demonstrate that it is objectively justifiable.

The Employment Tribunal dismissed the claim, and held that the employer had succeeded in establishing that the difference in pay was due to a genuine material factor not based on a difference in sex; in this case that the bonuses were linked to productivity and that this pay structure was not appropriate for care work.

The female carers appealed the decision, arguing that the Employment Tribunal had failed to question the stated grounds for the different treatment (that the bonus was not appropriate for the carers' pay structure), and concluded that it was tainted by a difference in sex. As a result, the council should have been required to objectively justify it.

However, the Employment Appeal Tribunal rejected the appeal, concluding that the fact that the bonus was genuinely related to productivity indicated that there was no discriminatory taint to the difference in treatment. Therefore the council was not required to objectively justify the discrepancy in pay structures.

The Court of Appeal upheld the appeal, as the productivity bonus did have a discriminatory effect. The court did accept that the bonuses were not appropriate for the carers' pay. However it was still tainted by a difference in sex, and that therefore the council ought to objectively justify it. The case was remitted to the Employment Tribunal to allow the council to show that the difference in pay was objectively justified.

Comment

Where there is a difference in pay, or other contractual terms, that have a disproportionate effect on women it is open to employers to argue that this has nothing to do with a difference in sex. However, this case shows that they must demonstrate clear evidence that this is

unrelated to sex. This will often be the case where there is a longstanding difference in pay between groups of employees, and one of those disadvantaged groups has become mainly female over time. However, it will normally be difficult for an employer to establish that an obvious disparity between groups of predominantly female and male employees is unrelated to sex, and they will therefore need to objectively justify it.

Legislation

The Agency Workers Regulations 2010 are published

The Agency Workers Regulations 2010, which were laid before Parliament on 21 January 2010, have now been published. The Regulations are due to come into force on 1 October 2011, and are intended to implement the Temporary Agency Workers Directive.

After a 12 week qualifying period, temporary workers will be entitled to work under the same terms and conditions as permanent staff in similar roles. This would include terms such as pay (including holiday pay), annual leave and overtime. Certain financial benefits such as share options, profit sharing, pensions and sick pay are excluded. However from 2012, agency workers will benefit from workplace pension schemes, following the implementation of the Pensions Act 2008.

The Directive does allow an exemption for public or publicly endorsed vocational or retraining programmes, but the UK approach is to consider individual cases, rather than enshrine it in the Regulations.

The Regulations will cover agency workers who are placed with employers by temporary work agencies, and are under the supervision and direction of those employers. Agency workers are those who have an employment contract with a temporary work agency, or any other contract to carry out work and services personally for it. Workers who are supplied by intermediaries or umbrella companies will also be covered, unless they are genuinely self employed, working through their own limited or personal service company, or those who work on a managed service contract.

Temporary work agencies are defined as persons who supply "individuals who work temporarily and under the direction of hirers" ('agency workers') or who "pay for" or receive or forward payment for the services of these agency workers. They can be public or private entities, and do not have to operate for profit.

Vetting and barring staff who work with vulnerable people

The Safeguarding Vulnerable Groups Act 2006 ('the Act') was introduced as a result of the Bichard Inquiry arising from the Soham murders in 2002, when the schoolgirls Jessica Chapman and Holly Wells were murdered by Ian Huntley (a school caretaker).

The Inquiry questioned the way employers recruit people to work with vulnerable groups, and particularly the way background checks are carried out. Recommendation 19 of the Inquiry Report highlighted the need for a single agency to vet all individuals who want to work or volunteer with children or vulnerable adults and to bar unsuitable people from doing so.

This has led to the establishment of the Independent Safeguarding Authority (ISA). The ISA has already been beset with criticism, including in respect of the new Vetting and Barring Scheme (the VBS) that is intended to implement the recommendations contained in the Inquiry Report.

The introduction of the VBS has been subject to delays, and indeed it is still not clear how the VBS will be implemented across the board. However, what is clear is that the VBS will have wide-spread implications for those providing services to children and young people or vulnerable adults. The VBS will apply to public, private and voluntary sector providers.

Work falling into the categories of "controlled" or "regulated" activities will be covered by the requirements.

Regulated activities are those which are either prescribed by the Act, or those carried out at prescribed establishments (which include schools, children's homes and care homes) which allow the worker to have contact with children or vulnerable adults. Prescribed activities include teaching, supervision, providing treatment and advising. In order to fall within this category, they must take place frequently (once a week or more) or intensively (at least four days per month) or overnight.

Controlled activities are those which fall outside the definition of regulated activities but allow the individual to have contact with children or vulnerable adults, or access to their records.

Sectors which are likely to be affected by the new requirements include:

- education (e.g. schools and further education colleges, nursery schools, foster homes and young offenders' institutions);
- health and social care (e.g. hospitals and trusts, social services, home-based care agencies and workers,

care homes and GP surgeries); and

- sports and leisure (e.g. leisure centres, youth clubs and hotels).

The Act's provisions are currently being implemented in phases, with the key forthcoming changes being:

- July 2010: voluntary registration for individuals seeking to work in regulated activities;
- November 2010: mandatory registration for those seeking to work, or changing to new roles, in regulated activities;
- 1 January 2014: those seeking work in controlled activities are likely to have to register; and
- 31 July 2015: registration for all new recruits and existing workers.

It is important to note that the new requirements will not replace Criminal Records Bureau checks, as searching the new register will not necessarily reveal whether an individual has a criminal record.

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If you would like further information please contact:



Charles Pallot

T: +44 (0)1392 333906
F: +44 (0)1392 336906
c.pallot@ashfords.co.uk



Rhian Lewis

T: +44 (0)1752 526014
F: +44 (0)1752 526214
r.lewis@ashfords.co.uk



Michelle Fox

T: +44 (0)1823 232305
F: +44 (0)1823 232505
m.fox@ashfords.co.uk



Chloe Ricciardi

T: +44 (0)117 3218058
F: +44 (0)117 3218008
c.ricciardi@ashfords.co.uk