



Employment Law Round-Up Seminar

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The New Regime – Employment Act 2008 & The Repeal Of The Statutory Dispute Resolution Procedure

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1. REPEAL OF THE STATUTORY DISPUTE RESOLUTION PROCEDURES

1.1 Introduction

When the statutory dispute resolution procedures were introduced in 2004, the Government gave a commitment to review the Regulations after two years. In March 2007, the then Department of Trade and Industry (now DBERR) published a review by Michael Gibbons on employment dispute resolution in Great Britain ("the Gibbons Review"). The review highlighted that the statutory dispute resolution procedures had resulted in an unnecessarily high administrative burden for employers and employees. Indeed many businesses told the Review that the Regulations had caused an increase in the number of disputes as the process had the effect of formalising issues at an early stage rather than resolving them.

Following the Review, the Employment Act 2008 ("EA 2008") emerged which, amongst other things, provided for the **repeal** of the statutory dispute resolution procedures, which took effect on 6th April 2009, although there are transitional provisions which it is important you are aware of.

There are no provisions in the Act replacing the statutory procedures with anything new, so we are essentially returning to unfair dismissal law as it was pre-October 2004, save for new provisions concerning adjustment of awards (see below). Importantly, however, the ACAS Code of Practice on Disciplinary and grievance procedures ("the ACAS Code") has been revamped and also took effect on 6th April. There is also new accompanying ACAS guidance. This is a lot longer than the Code (10 pages) covering some 74 pages. The guidance is *"based on ACAS's extensive experience of how discipline and grievances in the workplace should be handled"* and sets out detailed provisions for good practice.

It is important to be aware that the guidance is *not* part of the Code. Whilst unreasonable non-compliance with the Code will result in an uplift of compensation (up to 25%), the guidance is purely *advisory* and there will be no penalty, as such, for non compliance. It is likely, however, that the guidance will be referred to in assisting with interpreting provisions of the Code and will be taken into account by the tribunal in deciding reasonableness.

1.2 Implications

Unlike the statutory procedures, the Code is not legally binding and a failure to comply will not give rise to an automatically unfair dismissal. However, a failure by either party to comply with the provisions of the Code in situations to which it applies, will be taken into account by tribunals as evidence when assessing cases. In addition, the new ACAS Code will have more significance than it did before because of the possibility of an adjustment to an award for failure to comply. At present, in terms of the statutory dispute resolution procedures, an adjustment to a compensatory award of between 10% and 50% is mandatory where there has been a failure to comply with the statutory procedures (save for in exceptional circumstances). Under the new regime, Employment Tribunals will have a *discretion* to increase or decrease an award "by up to 25%" "if it considers it just and equitable in all the circumstances to do so" where there is an unreasonable failure by an employer or employee to comply with any provision of the ACAS Code.

2. REPEAL OF S98A EMPLOYMENT RIGHTS ACT 1996

It is also important to be aware that the EA 2008 has repealed Section 98A of the Employment Rights Act 1996 ("ERA"). That section provided that a dismissal where an employer did not complete the statutory procedures was automatically unfair. No question of reasonableness arose.

It also provided that a tribunal could disregard any failure by the employer to comply with other (e.g. workplace based) procedures in respect of the dismissal, if following such other procedure(s) would have made no difference to the decision to dismiss. This provision brought about the partial reversal of the principles established in ***Polkey v A E Dayton Services Ltd*** which did not allow for the possibility of the "no difference" argument, except where following a procedure would have been "futile". Such a dismissal would still need to be reasonable in all the circumstances. The tribunal would balance probabilities and, therefore, decide (on balance of probabilities) what would have happened if the employer had complied with a fuller procedure.

The repeal of section 98A means that the House of Lords decision in ***Polkey v A E Dayton Services Ltd*** is, once again, the basis for deciding whether a dismissal could be unfair purely on procedural grounds. It is no longer possible for an employer to invoke the no difference argument when defending

a failure to adopt a fair procedure, whether in the ACAS Code or, e.g. in an employer's disciplinary rules. A tribunal would, however, reduce or eliminate the compensation payable to reflect the likelihood (if any) that the dismissal would have gone ahead anyway if the correct procedures had been followed.

3. THE NEW ACAS CODE - GENERAL

3.1 Introduction

The focus of the EA 2008 remains the same as the intention behind the statutory dispute resolution procedures, i.e. *workplace* resolution of disputes, however, whilst this policy aim has not changed, the procedural framework for achieving that aim has: In place of the statutory DDPs and GPs we now have the new ACAS Code.

The Code aims to provide basic practical guidance to employers, employees and their representatives and sets out the basic requirements of a fair procedure and the standard of reasonable behaviour when dealing with disciplinary and grievance issues.

The Code contains the following sections:

- Foreward
- Introduction
- Discipline
- Grievance

3.2 Foreward

It is worth noting at the outset that the Code does **not** apply to dismissals due to redundancy or the non-renewal of fixed term contracts on their expiry. It will still, of course, be necessary to follow a fair procedure as regards dismissals in these circumstances, to avoid a finding of unfair dismissal in relation to those with more than 1 year's service.

The Foreward (which is not part of the Code itself) also states that "*Employers and employees should always seek to resolve disciplinary and grievance issues in the workplace*" and where this is not possible, employers are encouraged to consider using "*an independent third party*" to help resolve the

issue. This person would not need to come from out with the organisation, provided they are not involved in the disciplinary or grievance issue.

The Gibbons Review suggested that awareness of the benefits of alternative dispute resolution, such as mediation and conciliation, is not as high as it should be. It therefore proposed that organisations should be urged to commit to ensuring that all parties genuinely attempt to resolve disputes early. The use of third parties could see a fundamental change in the way HR Departments operate. In practice a judgement call will need to be made in a particular case, as to whether external mediation would be appropriate.

The new Code encourages employers and employees to resolve disciplinary and grievance issues in the workplace informally, explaining *that "a quiet word is often all that is required to resolve an issue"*.

The Code advises employers to keep a written record of any disciplinary or grievance cases dealt with.

The Code also recommends that *"Organisations may wish to consider dealing with issues involving bullying, harassment or whistleblowing under a separate procedure"*. This could prove interesting. Presumably this means that if an employer's grievance procedure states that "grievances" concerning bullying, harassment or whistleblowing will be dealt with under a separate policy, then even if the ACAS Code is not complied with, there should not be any uplift in any award of compensation. In any event, it may be advisable for employers to consider implementing appropriate provisions under their Equal Opportunities Policy.

3.3 Introduction

The Introduction section of the Code has been expanded from the draft to include definitions of disciplinary situations and grievances. As regards discipline, the Code states that:

"Disciplinary situations include misconduct and/or poor performance".

It then provides that if employers have a separate capability procedure, *"they may prefer to address performance issues under this procedure"* but adds that even then, *"the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted"*.

With regard to grievances, they are defined as *"concerns, problems or complaints that employees raise with their employers"*.

The Code is therefore likely to apply in more circumstances than the statutory DDPs and GPs. For example, whilst the Code applies to all "disciplinary situations", it does not specify what is excluded and in particular, warnings are not specifically excluded as they were from the statutory DDPs.

Similarly, the scope of what amounts to a grievance has widened. In terms of the new definition: "*concerns, problems or complaints that employees raise with their employers*", unlike the statutory GP, these are not necessarily limited to work, working conditions or the workplace.

The Introduction also:

- Reiterates that the Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts on their expiry.
- States that procedures should be in writing, be specific and clear and states that employees and where appropriate, their representatives, should be involved in the development of rules and procedures. In addition, it emphasises the importance of training.
- States that ETs will take the size and resources of an employer into account when considering whether the action taken by an employer in a particular case was reasonable or justified. It also acknowledges that "*it may sometimes not be practicable for all employers to take all of the steps set out in*" the Code.

The Introduction to the Code ends with a list of elements to dealing with issues fairly when following a disciplinary or grievance process. Firstly, timing is important.

- *Employers and employees are encouraged to raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.*

NB: This means, for example, that unreasonable delay(s) by an employer during a disciplinary procedure, for example, could render any disciplinary action unfair. If an employee was dismissed and subsequently won a claim for unfair dismissal, any award could therefore be increased by up to 25%. Keeping things moving and avoiding delays is therefore crucial. Similarly, however, any unreasonable delay on an employee's part could lead to a reduction in any award made, by up to 25%, so there is an onus on employees too.

- *Employers and employees should act consistently.*
- *"Employers should carry out necessary investigations to establish the facts of the case".*
- *"Employers should inform employees of the basis of the problem and give them an opportunity*

to put their case in response before any decisions are made".

- *"Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting".*
- Employers should allow an employee to appeal against any formal decision made.

4. THE NEW ACAS CODE – DISCIPLINE & DISMISSAL

The section in the Code on discipline sets out the keys to handling disciplinary issues in the workplace:

4.1 Establish the facts of each case

Necessary investigations of potential disciplinary matters should be carried out without unreasonable delay to establish the facts of the case. The Code points out that if an investigatory meeting is held with the employee, this should not by itself result in any disciplinary action. It also clarifies that whilst the employee does not have a *statutory* right to be accompanied at an investigatory meeting, *"such a right may be allowed under an employer's own procedure"*.

Other points to be aware of at this stage are that:

- a different person should carry out the investigation and disciplinary hearing; and
- any period of paid suspension should be *"as brief as possible"*, kept under review and it should be made clear that suspension is not considered a disciplinary action.

4.2 Inform the employee of the problem

If there is a case to answer, the next part of the process is to notify the employee of this in writing. The written notification to the employee must:

- specify sufficient information about the alleged misconduct/poor performance so the employee can prepare his case;
- spell out its possible consequences (e.g. possibility of a warning dismissal);
- enclose copies of written evidence/documentation which will be relied on (e.g. witness statements);

- provide details of time, date and location of disciplinary hearing; and
- advise the employee of his right to be accompanied at the meeting.
- [inform employee about witnesses you intend to call]; (see below)
- [ask employee to inform you about any witnesses he intends to call]. (see below)

This should be easy to get right but may be easy to get wrong! Don't slip up here and risk an award uplift for non-compliance.

4.3 Hold a meeting with the employee to discuss the problem

This should be held "*without unreasonable delay*" but allowing the employee reasonable time to prepare their case. The Code also provides for an obligation on employers *and employees* (and their companions) to make every effort to attend the meeting.

The Code sets out a few points about how the disciplinary meeting should be conducted (and further detail is provided in the ACAS Guidance document), although there isn't really anything new here.

Where an employee or employer intends to call witnesses, they should give advance notice of this. It's important that this is not forgotten! Whilst there appears to be no obligation to do so in writing, it may well be that the best time to do this, where possible, will be in the letter to the employee inviting him to the disciplinary. In addition, this is an opportunity to ask the employee to inform you if he intends to call any witnesses.

On the subject of witnesses, there is no requirement on the employer to call witnesses, nor any indication that the employee should be allowed an opportunity to cross-examine directly any witnesses that the employer does call. However, the recommendation that the employee should be able to call witnesses if he or she so wishes is clear.

4.4 Allow the employee to be accompanied at the meeting

As regards an employee's right to be accompanied, this has not changed and employees have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- a formal warning being issued;
- the taking of some other disciplinary action; or
- the confirmation of a warning or some other disciplinary action (appeal hearings).

The chosen companion may be a fellow worker, a trade union representative or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker.

To exercise the statutory right to be accompanied, workers must make a *reasonable* request. What is reasonable will depend on the circumstances of each individual case. In this regard, a useful addition to the Code is the provision that:

"it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing, nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location if someone suitable and willing was available on site".

This may well be helpful to employers in defeating employees' often repeated assertions that they have the right to be accompanied by whomsoever they choose.

4.5 Decide on appropriate action

The Code then moves on to the stage of deciding on an appropriate sanction and the employee must be informed of the decision in writing. The Code then goes on to provide guidance on the types of action which should be taken in cases of misconduct. Interestingly, there is no mention of an **oral** warning stage (although there is reference in the Foreword to resolving issues informally). The Code provides for a written warning; final written warning; and dismissal.

The Code provides some detail as regards what should be set out in a warning and it may be useful to include this in your disciplinary procedure. Details include:

- the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required;
- the timescale for improvement;
- how long the warning will remain current;
- the consequences of further misconduct, or failure to improve performance within the set period following a final warning. For instance, that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.

Where the decision is to dismiss an employee, the Code confirms that this decision should only be taken by a manager who has the authority to do so. It goes on to say that the employee should be informed as soon as possible for the reasons for the dismissal, the date on which the employment

contract will end, the appropriate period of notice and the employee's right of appeal.

The Code does acknowledge that some acts are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence (gross misconduct). However, the Code reiterates that a fair disciplinary process should always be followed before dismissing for gross misconduct. There is no equivalent in the Code of the much criticised modified dismissal procedure under the statutory dispute resolution regime.

Before moving on to the appeal stage, I would draw your attention to a new paragraph which has been added to cover the situation where an employee refuses to attend a disciplinary meeting: It states that:

"Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available".

The Code does not, however, elaborate on what is meant by *"persistently"* and this is likely to be an area for debate! Nor does the Code deal with situations in which the employee has a good reason for not attending, e.g. long-term sickness.

4.6 Provide employees with an opportunity to appeal

"Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision".

The key things mentioned in the Code with regard to appeals are that:

- They should be heard without unreasonable delay
- They should be held *"ideally at an agreed time and place"*
- Employees should let employers know the grounds for their appeal in writing
- The appeal should be heard *"impartially"* and *"wherever possible, by a manager who has not previously been involved in the case"*
- Employees have a statutory right to be accompanied at appeal hearings; and
- An employee should be informed of the appeal decision in writing, as soon as possible.

With regard to the issue of specifying a time limit within which an employee should appeal, an issue which was somewhat vexed in terms of the statutory procedures, the ACAS Guidance indicates (para 100) that an appeal procedure **should** specify a time limit within which an appeal should be lodged and states that *"(5 working days is commonly felt appropriate although this may be extended in particular*

circumstances)". The Code itself, however, remains silent on this issue.

4.7 Special cases

The last heading in the Code concerning discipline, is "Special cases" and this sets out provisions in relation to disciplining a trade union representative and where an employee is charged with, or convicted of a criminal offence, respectively.

As regards disciplining a trade union representative, the Code provides that the normal disciplinary procedure should be followed. However, depending on the circumstances, it will be advisable to discuss the matter at an early stage with an official employed by the union, after obtaining the employee's agreement.

As regards employees charged with or convicted of a criminal offence, the Code indicates that this should not normally in itself be a reason for disciplinary action. Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers.

5. THE NEW ACAS CODE – GRIEVANCES

The Code then moves on to grievances and this section sets out keys to handling grievances in the workplace, under the following headings:

- let the employer know the nature of the grievance;
- hold a meeting with the employee to discuss the grievance;
- allow the employee to be accompanied at the meeting;
- decide on appropriate action;
- allow the employee to take the grievance further if not resolved;
- overlapping grievance and disciplinary cases; and
- collective grievances.

5.1 Let the employer know the nature of the grievance

Parties are encouraged to resolve grievances informally, however, where this is not possible, an employee should raise the matter formally with a manager who is not the subject of the grievance.

Importantly, the original draft Code did not previously require a grievance to be raised in writing; it simply said this would be "best" done in writing. This somewhat vague language would have potentially made it even more difficult to identify when a formal grievance has been made. Where it is not possible for a grievance to be resolved informally, the final version of the Code requires a grievance to be raised formally in writing and it should set out the nature of the grievance. This would seem to enable employers to ask whether it is a formal grievance, and to rely on the employee's answer. Currently, a written complaint can be a statutory grievance even if the employee says it is informal (***Procek v Oakford Farms***). It should also mean that employers can safely attempt informal resolution of oral complaints.

In addition, it should be raised without undue delay. In this regard, one theme that emerges in the grievance section is that each stage of the grievance should take place "*without unreasonable delay*" – the phrase occurs 6 times in the section of the Code dealing with grievances. However, the Code does not elucidate what magnitude of delay would count as unreasonable.

5.2 Hold a meeting with the employee to discuss the grievance

After a grievance is received, an employer should arrange for a meeting to be held without unreasonable delay and employers, employees and their companions should make every effort to attend the meeting. The Code states that employees should be allowed to explain their grievance and how they think it should be resolved. In addition consideration should be given to adjourning the meeting for any investigation that may be necessary.

5.3 Allow the employee to be accompanied at the meeting

The Code notes that a worker has a statutory right to be accompanied at a grievance meeting which deals with a complaint about a duty owed by the employer to the worker. Again, to exercise the right, a worker must first make a *reasonable* request.

5.4 Decide on appropriate action

Following the meeting, the employer should decide on what action, if any, to take. The decision should be communicated to the employee in writing without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. In addition, the employee should be informed that they can appeal if they are not content with the action taken.

5.5 Allow the employee to take the grievance further if not resolved

Where an employee feels their grievance has not been satisfactorily resolved, they should appeal. The employee should inform their employer of the grounds for their appeal **without unreasonable delay and in writing**. NB: the draft Code previously stated simply that an employee "*should be allowed to take the matter further on appeal*". It is now made clear, however, that there is an obligation on an employee to appeal if they are not happy with the decision made. The appeal should be heard:

- without unreasonable delay;
- impartially, and;
- wherever possible, by a manager who has not previously been involved in the case.

The time and place should be notified to the employee in advance. There is a statutory right to be accompanied and the decision should be communicated in writing without unreasonable delay.

5.6 Overlapping grievance and disciplinary cases

As regards overlapping grievance and disciplinary issues, the Gibbons Review recognised that often disciplinary and grievance issues are raised at the same time and that employers can feel compelled to hold excessive numbers of meetings and write excessive numbers of formal letters to be sure of fulfilling the procedural requirements. In this regard, a new section has been added to the Code which states that

"Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance".

However, it goes on to provide that: *"Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently".*

There are, therefore, no set rules in these circumstances and a view will need to be taken on a case by case basis, as to the best way to move forward in the particular circumstances.

5.7 Collective grievances

An additional new provision states that the Code does not apply to grievances raised on behalf of two or more employees by a TU or other workplace representative, which, the Code states, should be handled by the organisation's collective grievance process. This prevents the risk of a 25% adjustment

where such grievances are not handled individually, however, it does mean employers should perhaps ensure they have such a policy in place.

One last point I would draw your attention to, with regard to grievances, is that there is no replacement for the current statutory *modified* procedure, which allows employees and employers to agree to conduct grievance disputes in writing, following termination of employment. This suggests, in particular, that there will no longer be an obligation to deal with an employee's grievance if, e.g. they are no longer employed. However, it may be worthwhile seeking to resolve such a grievance if it may prevent an ET claim being lodged.

6. EMPLOYEE OBLIGATIONS

As mentioned earlier, one of the criticisms of the first draft of the new Code was that whilst an ET would be able to reduce an employee's compensation by up to 25% for an unreasonable failure to comply with the Code, there were not really any obligations on *employees* provided for in the Code. The amended version of the Code has rectified this by providing for obligations on employees which I have referred to. However, by way of summary, these include:

- Employees (and employers) should always seek to resolve disciplinary and grievance issues in the workplace.
- Employees (and employers) should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employees (and employers) should act consistently.
- Employees (and employers and companion) should make every effort to attend a disciplinary/grievance meeting.
- Where an employee (and employer) intends to call witnesses, they should give advance notice of this.
- An employee should appeal if unhappy with any disciplinary action/resolution of their grievance and provide grounds in writing.
- An employee must raise a grievance in writing, setting out the nature of the grievance and without undue delay.

When you are reviewing your policies and procedures, it will be worth making reference to these obligations.

7. TRANSITIONAL PROVISIONS

7.1 Introduction

The statutory procedures were repealed on 6th April 2009. However and perhaps sadly, they will not disappear overnight. There are transitional provisions which, in effect, mean that they will continue to apply where the "trigger event" occurs before cut-off dates set out in a statutory instrument (The Employment Act 2008 (Commencement No 1, Transitional Provisions and Savings) Order 2008).

Where they **do** continue to apply, it will be important to remember that the associated 3-month extension for bringing a tribunal claim, the compensation adjustments (10-50%) and the automatic unfair dismissal provisions will also continue to apply.

The fact that different consequences flow from a failure to comply with either the old or new regime mean it is very important to understand which one applies when. Note also that it is not possible for parties to a dispute to agree to a particular case being dealt with under one regime or the other; which regime applies is governed solely by the transitional provisions set out in the statutory instrument which we will look at now.

7.2 Statutory DDPs – transitional provisions

The statutory DDPs will continue to apply after 6th April 2009 where:

- on or before 5th April 2009, the standard or modified DDP applied; and
- on or before that date, the employer has either:
 - dismissed the employee;
 - taken relevant disciplinary action against the employee; or
 - complied with Step 1 or 2 of the standard procedure, or Step 1 of the modified procedure.

7.3 Statutory GPs – transitional provisions

The statutory GPs will continue to apply after 6th April 2009 in two sets of circumstances. These are:

- (i) where the action that forms the basis of the employee's complaint occurs wholly before 6th April 2009;

- (ii) where the action forming the basis of the grievance begins on or before the 5th April 2009 and continues beyond that date, but only if the employee presents a complaint to a tribunal based on that grievance on or before 4th July 2009 if it relates to a jurisdiction with a 3 month time limit (most types of claim), or 4th October 2009 if it relates to a jurisdiction with a 6 month time limit (namely equal pay or redundancy pay claims and claims for dismissals in connection with industrial action).

The statutory procedures will, therefore, remain with us throughout most of 2009, and the courts and tribunals will still be dealing with them well into 2010 and likely beyond. We can expect to see tortuous arguments about just when the events that are the basis of a particular grievance took place and arguments from employees that their employer first "contemplated" dismissing them much earlier than the employer claims.

8. CONCLUSION

The new Code does little to clarify the difficult points of procedure with which large employers may struggle. However, neither does it place any surprising or burdensome requirements on employers. A procedure which complies with the statutory dispute resolution procedures will almost certainly comply with the new ACAS code, however, employers should ensure that they review their procedures to check compliance and there may be some scope for simplification too. In addition, with the abolition of the statutory procedures, employers may need to undergo a change of mind-set in dealing with disciplinary and grievance procedures; employers should not merely focus on ensuring they have complied with the minimum procedures but should seek to identify the origins of disputes and ways of resolving them before they reach tribunal. Employers may therefore wish to reassess how they currently handle disciplinary and grievance issues and identify any areas of their approach which could be changed/improved.

It will be interesting to keep an eye on how case law develops which will hopefully expand on some of the quite general principles set out in the Code and deal with some of the more difficult procedural points not addressed in the code.

9. OTHER KEY PROVISIONS OF THE EMPLOYMENT ACT 2008

By way of completeness, I will briefly run through some of the other key provisions of the Employment Act 2008, as it does more than repeal the statutory dispute resolution procedures.

9.1 Power of ETs to determine matters without a hearing in particular circumstances

Under s7(3) of the Employment Tribunals Act 1996, the Secretary of State has the power to issue regulations permitting tribunals to determine matters without a hearing in certain prescribed circumstances. Although this wide power was inserted into ETA 1996 in 2002, it has never been used. Therefore, previously, all cases in the employment tribunal were decided at a hearing before a tribunal panel or an employment judge sitting alone. However s4 of the EA 2008 has amended this section by providing that any such regulations may allow a case to be determined *without* a hearing, provided that:

- both sides consent to this in writing; or
- if the respondent has either not presented a response to the proceedings or does not contest the case.

For the purposes of this Act, a respondent is taken as not submitting a response where it has submitted one but it has not been accepted by the tribunal. This section makes it clear, however, that the consent of the parties is not required in circumstances where the tribunal is issuing default judgements without a hearing.

These provisions came into force on the 6th April 2009.

9.2 Changes to ACAS powers to conciliate and to conciliation periods

The Tribunal Rules, when they came into force on 1 October 2004, introduced fixed conciliation periods. These restricted the period during which Acas had a duty to assist parties to tribunal proceedings to reach a conciliated settlement, and applied to the majority of tribunal claims, with the notable exception of discrimination, equal pay and whistleblowing claims.

The Government's reason for limiting the time available for Acas conciliation was to encourage parties to settle in good time rather than immediately before a tribunal hearing, thereby promoting dispute resolution. This was not being achieved, however, and so, like the statutory dispute resolution procedures, the fixed conciliation periods have also been repealed.

In addition, Acas's **duty** to conciliate in certain circumstances *before* proceedings have been instituted has been replaced with a **discretionary power** to conciliate in a pre-tribunal dispute. This is to enable ACAS to prioritise cases where demand for conciliation exceeds resources available for conciliation and

to relieve ACAS of the obligation to offer conciliation in pre-tribunal disputes where there is no prospect of success.

9.3 Changes to remedies for workers claiming unlawful deductions from wages and employees claiming a redundancy payment

Previously, an ET could only declare and order to be paid, the amount of the **actual** unlawful deduction or unlawful payment to employer, or redundancy payment. The remedies available in the ET did not extend to compensation for financial losses arising out of the non-payment/unauthorised deduction etc, for example, additional bank charges or interest charges.

This has changed so that an ET may now: *"... order the employer to pay... such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to [the unlawful deduction/payment to the employer/non-payment of the redundancy payment]."*

This section came into force on the 6th of April 2009. However, the provision will not take effect in circumstances where a complaint has been presented under s7 *prior to* 6th April.

9.4 Changes to the enforcement regime for the national minimum wage

The EA 2008 makes a number of amendments to the enforcement regime for the national minimum wage. In particular, I would draw your attention to the following:

- The Act has introduced a new method of calculating arrears in respect of a worker who has not been paid the national minimum wage. Previously under the National Minimum Wage Act 1998, a worker was entitled to receive as "additional remuneration" the difference between the amount actually paid to him or her for the **pay reference period in question** and the amount the worker would have received had he been paid at the NMW rate. However under the new provisions a worker who has been paid less than the NMW for a period of time will now be entitled to be compensated for this on the basis of the rate of the NMW applying at the date in which his/her case is to be determined.
- The Act has replaced enforcement and penalty notices with a single "Notice of Underpayment" which includes a civil penalty against employers who have not complied with NMW requirements. The amount of the penalty to be paid is 50% of the total arrears owed in respect of periods

following the coming into force of the new regime. Such a penalty must be at least £100 and not more than £5000. However it is important to note that if an employer pays the whole of the arrears plus half of the financial penalty within 14 days of the notice being issued the rest of the financial penalty will be waived. An employer who wishes to challenge a notice of underpayment now has the right to appeal to the employment tribunal within 28 days of the issuing of the notice.

- The Act has introduced an increase to the civil enforcement powers available to officers enforcing the NMW. These include, for example, a wider right in relation to the copying of materials as part of the investigation (which came into force on 13th January 2009) and the right to bring an unlawful deduction from wages claim on the employee's behalf etc.
- The Act has increased the criminal investigation powers available to officers enforcing the NMW e.g. the right to apply for production orders, search warrants and the right to arrest a person suspected of committing an offence and finally;
- Offences under the NMW Act 1998 now triable in the Court of Session or the Sheriff Court.

9.5 Changes concerning offences and powers of inspectors, relating to employment agencies

By virtue of s15 of the EA 2008, offences under the Employment Agencies Act 1973 are now "triable either way" i.e. they can be tried in both the Court of Session or the Sheriff Court. The maximum penalty therefore becomes a fine (with no upper limit) in the Court of Session or a fine not exceeding the statutory minimum in the Sheriff Court (currently £10,000).

In addition, Section 16 makes some amendments to the powers of employment agency inspectors under the Employment Agencies Act 1973. As a result, an inspector's power to inspect and copy financial records and documents is widened. An inspector will therefore be entitled to remove a document from the premises and return it once a copy has been made. In addition to this, inspectors will be provided with greater powers to require individuals (including, in certain circumstances, banks) to produce records and documents that may be required for their inspection.

Again, these provisions came into force on 6th April 2009.

9.6 Change to the law concerning the exclusion or expulsion of trade union members

Previously, section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides a right for individuals not to be excluded or expelled from membership of a trade union, unless the exclusion or expulsion is for a reason specified in that section. The section made it unlawful for a trade union to expel or exclude a person on the grounds of "*protected conduct*", defined as membership or former membership of a political party. Together with other provisions, the net effect was that under section 174, a union could exclude an individual from membership on grounds of his activities as a member of a political party, but that membership of a political party per se, was not a lawful ground for exclusion.

Section 19 of the EA 2008 has amended Section 174 so that trade unions can prevent individuals joining on the basis of membership of political party. This change is to ensure compliance with the ECHR ruling in the case of **Aslef v UK** in February 2007. In that case, the trade union had a policy to prohibit members of the BNP from belonging to its union. Mr Lee, a member of ASLEF, was expelled when it was discovered that he was an activist and had stood as a candidate in local elections for the BNP. This was contrary to ASLEF's stated aims of promoting and developing equality of treatment in its industries. An ET upheld Mr Lee's complaint under section 174. The union then complained to the ECHR which ruled that, in being prevented from expelling a member on grounds of political party membership, the union's Convention right of association had been infringed. The court held that the union had not acted unlawfully in expelling Mr Lee. Article 11 (freedom of association) of the European Convention of Human Rights does not impose an obligation on trade unions to admit anyone who wishes to join. Mr Lee had not suffered any significant detriment and the union's right to choose its members therefore outweighed his right to be a member.

As a result of the ECHR's judgment in this case, the Government accepted that section 174 violates Article 11 of the European Convention and a more detailed regime, containing six new subsections, has been inserted into s174.

By virtue of this new regime, conduct that consists of an individual being or having been a member of a political party is not "protected conduct" under s174 if membership of that party is contrary to either a rule or an objective of the trade union. Such membership may therefore form the basis of an lawful expulsion or exclusion from membership.

In terms of expulsions, such an objective cannot be relied upon if, at the time of the conduct, it was not reasonably practicable for the objective to be ascertained by a member of the union (in terms of exclusions, such an objective can not be relied upon if it was not reasonably practicable for it to be ascertained by a person working in the same trade, industry or profession as the individual). A decision

under these circumstances will be unlawful if the decision is not taken in accordance with the union's rules, the decision is taken unfairly, or the individual would lose his or her livelihood or suffer another exceptional hardship as a result of not being, or ceasing to be a member of the union. In order to act fairly in the circumstances s19 states that the union must show that they have given the individual notice of the proposal to exclude or expel him or her, and the reasons for the proposal and the individual must be given a fair opportunity to make representations in respect of the proposal.

As yet a date has not been set for the coming into force of this section.

Immigration & Work-Permits - What Employers Need To Know

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INTRODUCTION

It was in March 2006 that the Government announced plans to adopt an Australian style points based system for migration in the UK. The stated aims of the system are:

- attraction of migrants who will contribute most to the UK;
- a more efficient, transparent and objective application process;
- improved compliance;
- reduced scope for abuse.

The new points based system applies to people from outside the European Economic Area and Switzerland who are seeking work or study in the UK. It does not cover short-term visitors, family reunification, etc.

This new system consolidates over 80 existing work and study immigration routes into a five tier framework. Not all the Tiers have gone live at this stage.

THE TIERS

Tier 1 – Replaces Highly Skilled Migrant Programme - Highly skilled individuals and entrepreneurs: it is anticipated that migrants under Tier 1 will contribute to growth and productivity in the UK. This Tier came into force on 30 June 2008.

Tier 2 – Replaces Work Permits Scheme - skilled workers with a job offer: it is hoped that tier 2 migrants will fill gaps in the UK work force. This Tier came into force on 27 November 2008.

Tier 3 – Low skilled workers: it is anticipated that tier 3 migrants will fill specific temporary labour

shortages - for example construction workers for a particular project. Tier 3 is currently suspended but it is anticipated that it will be used to employ migrant workers to assist with building projects ahead of the 2012 London Olympics.

Tier 4 – Students: places a requirement on higher education institutions to sponsor overseas student. Tier 4 went live on 31 March 2009.

Tier 5 – Youth mobility and temporary workers: it is anticipated that Tier 5 will enable migrants to work temporarily in the UK such as entertainers, backpackers etc. This tier came into force on 27 November 2008.

TIER 1 – GENERAL

Tier 1 is divided into four sub-categories. General highly skilled migrants, entrepreneurs, investors and post study workers. Applicants under this scheme do not need to have a specific job offer nor are they tied to a particular employer.

As applicants do not need a sponsor under Tier 1 generally employers are not involved in the Tier 1 applicant process. However, it is relevant where current employees' work permits have expired and the employer is keen to continue the employee's employment but was not a registered sponsor and seeks to support the individual through the Tier 1 application process. It is therefore useful to know the requisite requirements for a Tier 1 visa application.

Let's look at one of these sub-categories in more detail. hopefully this will help you understand the concept behind the points based system.

Tier 1 (highly skilled migrants)

In order to qualify to enter the UK, extend a stay in the UK (where permitted) or switch between tiers (again where permitted), applicants under the Tier 1 (highly skilled migrant) category must pass a points-based assessment.

Points are earned against three sets of objective criteria:

1. attributes (that is, age, qualifications, previous earnings, and experience in the united kingdom);
2. competence in English language; and
3. available maintenance funds.

The points provided for in these tables relate to initial applications under tier 1. Please note that the points awarded to applicants under each sub-category may vary where an individual is applying for an extension of stay or switching between categories. Further details can be obtained from the UK Borders Agency website.

In order to qualify for a Tier 1 visa an applicant must score:

- 75 points for attributes;
- 10 points for English language; and
- 10 points for available maintenance funds.

If an applicant fails to score the required minimum number of points (75 points for attributes and 10 points for English language and 10 points for available maintenance funds), an application will be refused.

ATTRIBUTES

Qualifications: an applicant can score the following points for a qualification (under one heading only):

Qualification	Points available
PHD	50 points
Master's degree (or equivalent vocational or professional qualification)	35 points
Bachelor's degree (or equivalent vocational or professional qualification) (extension applications only)	30 points

Previous (gross) earnings: an applicant can claim points for previous earnings during the 15 months immediately before the date of applying.

Earnings	Points available
£40,000 +	45 points
£35,000 - £39,999	40 points
£32,000 - £34,999	35 points
£29,000 - £31,999	30 points
£26,000 - £28,999	25 points
£23,000 - £25,999	20 points
£20,000 - £22,999	15 points
£18,000 - £19,999 (extension applications only)	10 points
£16,000 - £17,999 (extension applications only)	5 points

UK experience:

An applicant can claim a maximum of 5 points if he or she has either:

- successfully scored points from previous earnings in the UK; or
- undertaken a period of full-time study in the UK, of at least one full academic year, and been awarded a qualification at master's degree level or above. The qualification should have been awarded no more than 5 years before making the application.

Age:

Applicants can claim points if they are under 32 years of age at the date of their application.

age (initial application)	points available
under 28 years of age	20 points
28 or 29 years of age	10 points
30 or 31 years of age	5 points

As stated the points provided for in these tables relate to initial applications under Tier 1. Points awarded to applicants under each sub-category may vary where an individual is applying for an applicant who is switching or extending his stay. Further details can be obtained from the UK Borders Agency website.

English language

The level of English required will be a basic standard. There are various tests that an applicant can take to satisfy this requirement. The English language requirement will automatically be satisfied (and 10 points awarded) for individuals who are nationals from a specific list of English speaking countries or where they hold a bachelors or masters degree or a PHD awarded from an institution in an English speaking country.

Maintenance

In order to qualify for 10 points in the maintenance category, an applicant has to demonstrate a bank balance of at least £2,800 for a continuous period of 3 months (if outside the UK) or £800 if he or she is currently in the UK.

There is also a separate requirement to demonstrate £1,600 of funds per dependant (again over a 3 month period) if the applicant is outside the UK or has been in the UK for less than 12 months or £533 for each dependent (over a 3 month period) if the highly skilled migrant has been in the UK for 12 months or more.

Tier 1 (highly skilled migrant) - conclusions

As you can see only those considered most able to contribute to the UK economy and can demonstrate sufficient skills, qualifications and earning capacity can successfully apply under the Tier 1 (highly skilled migrant) category.

As applicants do not need a sponsor under Tier 1 generally employers are not involved in the Tier 1 applicant process. However, as I have said I have been approached by a number of clients who are not registered sponsors but are keen to continue an employee's employment and have sought support for the individual through the Tier 1 application process.

Moreover as you can see if a migrant with a Tier 1 (highly skilled migrant) visa applies for a job with the company generally you can rest assured that you have a highly qualified applicant for the post, with good language skills and funds to support their continued stay in the UK.

Let's look at the other categories in tier 1 briefly now.

Tier 1 - entrepreneur

As with Tier 1 (general), applicants in the entrepreneur category need to demonstrate that they have funds in a bank account (again £2,800 if outside the UK or £800 if in the UK) and a good grasp of the English language. However, attributes are focused on capital/funding available for entrepreneurial investment in a UK business venture under this sub-category.

Tier 1- investors

The investor category is designed for high net worth individuals who wish to make a substantial financial investment in the UK. Investors are awarded points based on their ability to invest £1 million in the UK. Investors are exempt from the English language requirement (until such time as they apply for indefinite leave to remain). Clearly this sub-category is less relevant to UK employers.

Tier 1 - post-study workers

The post study category of tier 1 is designed to enable the UK to retain high-achieving international graduates who have completed a degree or professional qualifications in the UK. Graduates from outside the European Economic Area or Switzerland are free to look for work without having a sponsor for the length of their leave. Applicants under this category are granted a visa for 1 or 2 years and generally this period is not extendable.

However, this category is intended to provide a bridge to highly skilled or skilled work. If an individual is granted permission to stay as a post-study worker, they should switch into Tier 1 (highly skilled migrant) or Tier 2 of the points based system as soon as they are able to do so.

In order to qualify for a Tier 1 (post work study) visa an individual must have enough funds in personal savings to support themselves. In this case £800 for a continuous 3 month period. This is no mean feat for a student!

TIER 2 – SKILLED INDIVIDUALS, INTRA-COMPANY TRANSFERS, SPORTS PERSONS AND MINISTERS OF RELIGION

On 27 November 2008 tier 2 of the new points based system went live. It was introduced to replace the work permit regime. In practice however work permits may still be issued into spring 2009 where applications were received prior to 27 November 2008. It is likely that a large number of applications were submitted prior to this deadline as there was less stringent requirements on migrants under the previous regime. It is therefore still possible that migrants from outside the EEA will be entitled to work for some time under the old system.

A Tier 2 visa can only be issued to a migrant holding a valid job offer and Certificate of Sponsorship from a licensed sponsor. A tier 2 migrant is expected to remain with the original sponsor. In certain circumstances there may be scope to move around the labour market to other shortage occupations with home office approval, however, a fresh visa application is required. In the event that the new application is rejected the individual will have no further right to remain in the UK.

Tier 2 – skilled migrants

The Tier 2 (skilled migrant) route covers situations where employers are unable to source a suitably skilled and qualified worker from the UK labour market.

Similar to Tier 1, an applicant must demonstrate that he is skilled, has money to support himself and can speak English to the requisite standard in order to qualify for the issue of a Certificate of Sponsorship. The current minimum points are: 50 points for attributes, 10 points for English language and 10 for maintenance funds.

Let's look at these in more detail. It is important that employers are familiar with these categories as under Tier 2 it will be the employer that issues the Certificate of Sponsorship and confirms to the UK Borders Agency that the applicant has met the requisite requirements. Under the old regime the Home Office would consider the documentation and approve the application.

Please note that the points detailed below relate to initial applications and the allocation of points may vary where an individual is switching categories or applying for an extension of stay.

Attributes

Sponsorship	Points
Job in shortage occupation	50
Offer of job that passes resident labour market test	30
Switching from a post study category	30
Intra-company transfer	30

Job in shortage occupation

The Government has appointed the Migration Advisory Committee to recommend designated shortage occupations. The list is reviewed regularly. Candidates meeting the shortage occupation criteria will automatically be awarded 50 points for attributes and therefore applicants only require to meet the English language and maintenance requirements thereafter.

Resident labour market test

As you can see, where the vacant post is not a listed designated shortage occupation, it may still be possible to employ an individual from outside the EEA or Switzerland where the resident labour market test has been satisfied. An applicant can score up to 30 points if it meets the resident labour market test.

What is the resident labour market test?

The principle underlying the resident labour market test is that an employer has attempted but is unable to find a resident worker (that is, a person not requiring immigration permission) to do the job.

Skill level

The minimum skill level for the resident labour market test is SVQ or NVQ 3. Again reference to the code of practice for the particular sector and job should be made to determine the skills level of the post in each particular case.

An employer must have advertised the job according to the code of practice specific to the particular sector and job. There are a vast number of codes of practice and it is not possible to cover them all here. I would recommend that you consult the Borders Agency website for further details in each particular case. I can assist if you have any doubts about the code of practice the particular job falls under.

Nevertheless there are some common elements which all advertisements must contain regardless of the sector.

In order to meet the resident labour market test the advert must include:

- job title;
- the main duties and responsibilities of the job in the job description;
- the location of the job;
- an indication of the salary package or range, and the terms on offer;
- skills, qualifications and experience needed;
- the closing date for applications, unless it is part of the company's rolling recruitment programme.

Appropriate rates of pay

All jobs must be advertised at the appropriate rate of pay for that job in the United Kingdom to make sure that there has been a genuine attempt to fill the vacancy with a resident worker. Migrants, when taken on, must be paid at least the rate advertised.

If the salary for the job is £40,000 or under, an employer must advertise it for a minimum of two weeks and if the vacancy is over £40,000, an employer must advertise it for a minimum of one week.

Methods of advertising jobs

On this slide is a list of methods an employer may use to advertise a job. The specific methods an employer can use in each case are set out in the relevant codes of practice. An employer may require to use one or a number of methods:

- national newspaper or professional journal;
- annual recruitment programme or 'milkround';
- recruitment agencies;
- internet; and
- head-hunters.

Attributes continued

In the event that the resident labour market test is satisfied employees can gain further points for qualifications and prospective earnings.

Qualifications: an applicant can score the following points for a qualification (under one heading only):

Academic qualifications (or equivalent vocational or professional qualifications)	Points
None, or below a sub degree level qualification	0
Appropriate sub degree level qualification ¹	5
Bachelors or Masters	10
PHD	15

Prospective earnings: an applicant can claim points for prospective earnings.

Prospective earnings	Points
under £17,000	0
£17,000 - £19,999	5
£20,000 - £21,999	10
£22,000 - £23,999	15
£24,000 or above	20

¹ (1 or A level [or Higher?])

Candidates meeting the resident labour market test will be awarded 30 points for attributes and as we have seen additional points for qualifications and prospective earnings. In addition applicants will require to meet the English language and maintenance requirements.

Certificate of Sponsorship

Where the criteria are met, a licensed sponsor must issue a Certificate of Sponsorship before the individual can apply for a tier 2 visa. The certificate is a number not an actual certificate.

A Certificate of Sponsorship must be issued within six months of placing the advert. This is to ensure that the results of the employers advertising reflect the current availability of the skills it requires. The only exception is where an employer recruits a migrant using a university milk round. In such circumstances a Certificate of Sponsorship must be assigned within 12 months of the milk round.

When a licensed sponsor issues a Certificate of Sponsorship on the sponsorship management system under Tier 2, it must confirm:

- it has met the resident labour market test as set out in the relevant code of practice and cannot fill the post with a settled worker; or
- the test does not apply to the job (for example, if the job is on the list of shortage occupations, is an intra-company transfer or if the migrant is switching from the post-study worker category, the international graduates scheme, the fresh talent working in scotland scheme or the science and engineering graduates scheme).

Migrants in these categories must have been employed in the United Kingdom for a continuous period of at least six months with the same employer, working in the same job, immediately before they switch. They will need a letter from their employer to send with their application confirming that the migrant has been working for the company for at least six months before they apply.

In order to issue certificates of sponsorship under Tier 2 an employer is first required to register as a licensed sponsor.

Tier 2 – intra-company transfers

Intra-company transfers are reserved for employees of multi-national companies who are being transferred to the UK to a skilled post by a related UK entity. As was the case under the work permit arrangements, the sponsor must demonstrate common ownership between itself and the overseas employer of the candidate. The individual applicant must demonstrate evidence of employment with the overseas employer for at least six months prior to the applications being submitted.

In such circumstances the skill level of the job must be at least SVQ or NVQ 3, the same as the Tier 2 (skilled migrant) category. However the maintenance and English language requirements are waived (unless the migrant intends to remain in the UK for over 3 years).

Tier 2 – sports person

The sportsperson category is for elite sports people and coaches who are internationally established at the highest level, and will make a significant contribution to the development of their sport in the UK. This specialist subcategory is beyond the scope of this talk but further details are available from the UKBA website. Needless to say you may find that a number of footballers will need to spend the summer brushing up on their English language skills.

Tier 2 – minister of religion

Again the Tier 2 (minister of religion) category is beyond the scope of this talk and further details are available from the UKBA website if required.

Tier 3 – low skilled workers

The Government has suspended tier 3 indefinitely. Its rationale was that the supply of low skilled workers from European Union accession countries was sufficient to meet labour market demands. In the current climate it is unlikely that the suspension will be lifted in the near future.

Tier 4 - students

From 31 March 2009, education providers in the UK wishing to accept non European Economic Area

students are also required to issue certificates of sponsorship under the points based system. Again the specific criteria to be met in order to sponsor a student can be found on the UKBA website.

Tier 5 – youth mobility and temporary workers

The youth mobility scheme effectively replaces the commonwealth working holidaymaker scheme, and is intended to enable young people aged between 18 and 30 to travel to the UK and work for 'non-economic' or 'cultural' reasons. The intention is that work is of a temporary nature in order to 'fund the experience' (terms used by the UK Borders Agency). I imagine that this allows backpackers to work in bars etc. Under this category, sponsors are the national governments of the participating countries rather than individual employers.

Entitlement to remain

Successful applicants entering the UK in, or switching into, the Tier 1 or tier 2, will be granted three years' leave to remain. Subsequent grants of leave will be for two years, so that the total period of leave is five years, after which an application for permanent residence may be made.

Successful applicants for the Tier 1 post-study work sub-category receive a single, non-renewable grant of leave for two years. As stated it is envisaged that they may be able to switch into the other Tier 1 or Tier 2 categories at the end of this period.

Successful applicants under the Tier 5 temporary worker sub-categories will be granted 1 to 2 years' leave depending on which sub-category applies. Successful applicants under the Tier 5 youth mobility scheme sub-categories will be granted up to two years' leave.

THE ROLE OF SPONSORS UNDER THE POINT BASED SYSTEM

As you now know, only applications in Tier 1 of the points based system are sponsor free. Applicants under Tiers 2 to 5 will need to produce a Certificate of Sponsorship from a licensed sponsor when making their application for a visa.

In order to become a licensed sponsor and sponsor migrants, an employer must:

- register as a sponsor;

- satisfy the particular requirements for the particular Tier or Tiers in which they wish to sponsor migrants; and
- accept various responsibilities in relation to the employees' immigration status'.

The licensing application

In order to become a licensed sponsor, an employer must make an online application for registration. Applications can only be made electronically. The aim of this process is to ensure that the prospective sponsor:

- is a bone fide entity established in the UK;
- will not constitute a threat to immigration control (based on its historic record in managing immigration matters); and
- is able to fulfil its sponsorship duties under the points based system.

The online form sets out various questions which include questions relating to the company structure and finances, the number of required certificates of sponsorship and the identity of the "key personnel". Please note that an employer will have to estimate the number of Certificates of Sponsorship required in advance of the application being made. The sponsor must also Nominate staff members for specific roles:

- Authorising Officer;
- Level 1 user;
- Level 2 user; and
- Key contact.

For small sponsors (those with under 50 employees), the same person may fulfil all 4 roles but for most organisations it will be appropriate to split them.

Authorising Officer

This is an important role because the individual will ultimately be responsible for the company's compliance as sponsor and he or she will be responsible for the activities of all users of the online Sponsor Management System. He/she must be permanently based in the UK and a senior member of

the organisation. In view of this, it is important that the relevant individual is familiar with Tier 2 and understands the responsibilities that he/she has agreed to take on.

Level 1 and Level 2 users have access to the Sponsor Management System and will be responsible for day to day maintenance such as reporting migrant activity, changes in circumstances, an increase in the number of certificates of sponsorship issued etc.

Key Contact

This will be the first point of contact between the UK Borders Agency and the sponsor. These roles cannot generally be delegated to a third party. However, the key contact can be a legal representative.

Licences

Sponsors with various locations and offices and separate legal entities should consider applying for separate licences for each part of their business. This will ensure that in the event that one part of the business is downgraded or removed from the sponsor register it will not affect another if it is registered under a separate licence.

Supporting documentation

Once the online sponsor registration form has been submitted, it is necessary to submit the appropriate fee together with certified true copies of the supporting documents within 10 working days.

The documents to be provided will depend on the type of organisation applying for a licence and these are set out at Appendix A of the Licensing Guidance.

However, the documents would normally include the company's latest annual audited accounts plus 3 other documents such as evidence of registration with HM Revenue & Customs for PAYE. The fee will vary upon the size of the company and may be £300 for small organisations or £1,000 for larger organisations.

Originally it was intended that all applicant sponsors would receive a visit from a dedicated UK Borders Agency Officer who would carry out a 'compliance check'. However it soon became clear that this would be impractical and Border Agency officers do not attend in every case. Nevertheless, a

substantial number of visits have been made to date in order to verify that:

- the information given in the sponsor licensing application is accurate and complete;
- The sponsor is able to offer employment;
- The sponsor is genuine and trading;
- There is no reason to believe that the sponsor represents a threat to immigration control; and
- The sponsor is able and committed to compliance with its sponsorship duties.

When attending a compliance check, the visiting officer will ask to inspect HR files and will interview staff nominated for inclusion in the Sponsor Management System. They may also ask to interview migrant employees.

It is important to ensure that HR records are up to date before making an application as failure to do so could result in the application being rejected. I recommend to all employers that they carry out an audit of their personnel files before they apply to register as a sponsor.

The UK Borders Agency aims to process applications within 6 weeks of receipt of the supporting documents.

Successful Applicants

The Home Office will rate successful applicants 'A' or 'B' according to their track record in sponsoring migrants and adhering to UK immigration laws. New sponsors will be risk assessed on a case by case basis before being allocated with an initial rating.

Successful applicants will usually be Grade A. B-rated sponsors are subject to a more rigorous inspection regime by the UK Border Agency and will also have to complete an action plan (usually over a period of three months, depending on the circumstances) agreed with the Agency. At the end of that time the Agency will decide whether the sponsor should be upgraded, kept at a B-rating, have a new action plan drawn up, or have its licence withdrawn altogether.

Failing sponsors

Failing sponsors, or those in relation to whom there is evidence of large-scale non-compliance or fraud,

may be downgraded or removed from the list of approved sponsors and may be subject to civil penalties. The factors that the Agency will take into account when deciding what action to take include the seriousness of the conduct concerned and the harm it has done, and whether the breach is part of a consistent or sustained record of non-compliance or poor compliance, or a one-off incident. The Agency will also consider whether any action was taken by the sponsor to mitigate the consequences of its conduct (such as alerting it promptly in the event of a migrant going missing).

If a sponsor's licence is withdrawn, the migrant's leave will be cut to 60 days or curtailed immediately, depending on whether the migrant concerned was complicit in any dishonest actions that led to the sponsor losing its licence.

A register of sponsors, including details of licensed sponsors' names, locations, ratings and the tiers and sub-categories for which they are licensed, is available on the UK Border Agency website.

Right of appeal

There is no right of appeal against the refusal of a licence application. However, unsuccessful applicants can reapply at any time. They will, of course, need to ensure that the reasons for their earlier refusal no longer apply, or risk being refused again.

PROVISION OF LICENCE

Licensed sponsors have generic and specific duties

Generic duties include:

- Record keeping duties

This involves the retention of hard and/or electronic copies of each sponsored migrant's passport or ID status documents which includes ID cards. Sponsors must keep up to date contact and address details for each sponsored migrant. Also included in the record keeping duties is the requirement to retain evidence that tier-specific guidance has been adhered to prior to the issue of a Certificate of Sponsorship. So for example I would recommend that an employer keeps a record of the shortage occupation list which allowed it to issue the Certificate of Sponsorship.

- **Reporting duties**

Sponsors are required to report a number of specified events via the Sponsor Management System website. These include:

- A migrant failing to turn up for work having been issued with a Certificate of Sponsorship and Entrance Certificate (gone AWOL not absent on sick leave);
- Termination of employment (whether by way of resignation or dismissal);
- Significant changes in the migrant's circumstances (such as divorce or criminal conviction);
- An active suspicion that the migrant is breaching the conditions of his leave in some respect;
- Significant changes in the sponsor's own circumstances (such as ceasing trading or being taken over by another company or organisation, whether that other company has sponsorship status or not);
- Any suspicion that the sponsored migrant may be engaging in terrorism or other criminal activity;
- Any change to the migrant's immigration status whereby he remains employed but is no longer sponsored. One example may be where a migrant applies for immigration status as a result of marriage to a British Citizen which allows him to move outside the points based system.

- **Complying with the law**

This means adherence to the rules and procedures governing the issue of Certificate of Sponsorship and ensuring that migrants have proper accreditations to do their jobs.

- **Cooperation with the UK Borders Agency**

This means cooperating with any enquiry by the UK Borders Agency. For example an employer should allow Borders Agency officials access to its premises and supply information on request.

Specific duties are contained with the code of practice applicable to the particular sector and job under Tiers 2 to 5. Employers must ensure that reference is made to these Codes before issuing a Certificate of Sponsorship.

Surrender of Licence

If a sponsorship licence holder no longer wishes to sponsor migrants and no sponsored migrants are

working for it, it may surrender its licence by writing to the UK Border Agency. The sponsor will then be removed from the register of sponsors. It may reapply for a licence at any time in the future.

Migrant workers and Tupe

The UK Borders Agency has updated its guidance to make clear who must notify the UKBA, via the Sponsorship Management System, when a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) results in the transfer of migrant workers sponsored under the new points based system.

The new guidance provides that if a licensed sponsor takes over an organisation that is not licensed, the sponsor must inform the UKBA within 28 calendar days. If a licensed sponsor is taken over by a company that is not a licensed sponsor, then the existing sponsor must tell UKBA about the takeover, and the new organisation must apply for a sponsor licence, within 28 calendar days. If the new organisation (the transferee) fails to apply for a licence, the permission for all sponsored migrants who have transferred to stay in the UK is likely to be reduced to 60 calendar days to allow them time to find a new sponsor, as they will no longer be working for a licensed sponsor.

If both companies are licensed sponsors, then both companies must tell UKBA about the takeover within 28 calendar days. The organisation that was taken over must state who now has responsibility for its respective migrants; and the organisation that took over (the transferee) must tell UKBA about the migrants that it has taken responsibility for.

Again, please note that where there has been a TUPE transfer, transferees have 28 days to check the documentation relating to transferred employees to ensure that no illegal workers have transferred and bear in mind the civil penalties of a fine up to £10,000 per illegal worker employed as set out in the Immigration, Asylum and Nationality Act 2006.

Whilst I do not consider that failure to apply for sponsorship could constitute direct race discrimination it may well constitute indirect race discrimination. Accordingly an employer could be presented with claims from employees with current leave to remain under the work permit system when their permit expires but also prospective employees where they are the best candidate but not selected for the post as you do not hold a sponsorship licence.

ENFORCEMENT – THE CRIMINAL AND CIVIL PENALTIES

The Old Law

The Government made the unlawful employment of an overseas worker a criminal offence from 27 January 1997. Under Section 8(1) of the Asylum and Immigration Act 1996, it was, and still is, a criminal offence to have employed a person aged 16 or over who was subject to immigration control and who had no permission to work in the UK, or who worked for an employer in breach of their conditions of stay in the UK, between 27 January 1997 and 28 February 2008.

A statutory defence could be established under Section 8(2) of the 1996 Act, if the employer had, before the employment commenced, carried out specific checks on the original documents of potential employees and retained copies of these documents. The statutory defence could be established even if the documents turned out to be fraudulent, provided they appeared to be genuine to the employer on reasonable inspection. Only where the employer actually knew that the documents were false would the employer be prosecuted. As you can imagine this is extremely difficult to establish and prosecutions are rare. I understand there were only 11 last year.

There had been persistent difficulties with the enforcement of this legislation and prosecutions remained at a low level despite considerable evidence of a growing problem. A major weakness was the legislation's inability to distinguish between careless, negligent and wilful criminal employers. All were equally guilty under this regime. The lack of a continuing obligation to ensure correct immigration status was also identified as a weakness.

The New Law

On 29 February 2008, the Government introduced new and tougher sanctions on employers for employing individuals without the appropriate immigration permission to work in the UK. Unlike the old law, the new law aims to distinguish between the careless and the ill intentioned and imposes a new continuing obligation on the employer.

Sections 15 to 25 of the Immigration, Asylum and Nationality Act 2006 set out two distinct breaches: civil and criminal. The breaches apply only to employment which commenced on or after 29 February 2008.

Section 15 – The Civil Penalty

Under the new regulations, an employer who employs an adult who is not entitled to take that employment or whose eligibility to be in that employment has lapsed is liable to a fine for negligently employing an illegal immigrant. There is a maximum fine of £10,000 per illegal worker.

A statutory defence can be established by an employer if it has checked, copied and retained copies of specified original documents, prescribed by the Home Office from time to time. Currently these documents reside in two lists.

A document from List A can be produced by those with no restrictions on working in the UK. A document from this list provides an employer with a statutory excuse for the duration of the employment. A document from List B establishes the excuse for a 12 month period. The civil penalty is aimed at the careless rather than the criminal employer. Let's look at these.

LIST A - THOSE WITH NO RESTRICTIONS ON WORKING IN UK

You only need one of these:

- A current passport showing that the holder is a British citizen or citizen of the UK and Colonies having the right to live and work in the UK, or
- A current passport or National Identity Card showing that the holder is a national of a European Economic Area country* or Switzerland, or
- A residence permit, registration certificate or document certifying or indicating permanent residence issued by the Home Office or the Border & Immigration Agency (BIA) to a national of a European Economic Area country or Switzerland, or
- A permanent residence card issued by the Border and Immigration Agency to the family member of a national of a European Economic Area country or Switzerland, or
- A Biometric Immigration Document issued by the BIA to the holder which indicates that the person named in it is allowed to stay indefinitely in the UK, or has no time limit on their stay in the UK, or
- A passport or other travel document endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the UK, has the right of abode or has no time limit on their stay in the UK, or

OR

YOU NEED THIS DOCUMENT

- An official document giving the person's permanent National Insurance Number and their name, eg a P45, P60, National Insurance card or letter from a Government agency or a previous employer.

PLUS ONE OF THE FOLLOWING:

- A full birth, or adoption, certificate issued in the UK which includes the names of at least one of the holder's parents or adoptive parents, or
- A birth, or adoption, certificate issued in the Channel Islands, Isle of Man or Ireland, which includes the name(s) of at least one of the holder's parents or adoptive parents, or
- A certificate of registration or naturalisation stating that the holder is a British citizen, or
- A letter issued by the Home Office to the holder which indicates that the person named in it can stay indefinitely in the UK or has no time limit on their stay, or
- An Immigration Status Document issued by the Home Office or the BIA to the holder with an endorsement indicating that the person named on it can stay indefinitely in the UK or has no time limit on their stay in the UK.

* Please note that further proof of authorisation to work may be required for applicants from Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. If you are in any doubt about whether an individual is entitled to work in the UK

LIST B - THOSE WITH RESTRICTIONS ON WORKING IN THE UK

YOU NEED ONE OF THESE:

- A passport or travel document endorsed to show that the holder is allowed to stay in the UK and is allowed to do the type of work in question, provided that it does not require the issue of a work permit, or
- A Biometric Immigration Document issued by the BIA to the holder which indicates that the person named in it can stay in the UK and is allowed to do the work in question, or

- A work permit or other approval to take employment issued by the Home Office or the BIA when produced in combination with either a passport or another travel document endorsed to show the holder is allowed to stay in the UK and is allowed to do the work in question, or a letter issued by the Home Office or the BIA to the holder which indicates that the person can stay in the UK and is allowed to do the kind of work we offer, or
- A certificate of application issued by the Home Office or the BIA to or for a family member of a national of a European Economic Area country or Switzerland stating that the holder is permitted to take employment which is less than 6 months old when produced in combination with the evidence of verification by the BIA Employment Checking Service, or
- A residence card or document issued by the Home Office or the BIA to a family member of a national of a European Economic Area country or Switzerland, or
- An Application Registration Card issued by the Home Office or the BIA stating that the holder is permitted to take employment, when produced in combination with evidence of verification by the BIA Employer Checking Service, or
- An Immigration Status Document issued to the holder, or a letter to the holder or the employer or prospective employer, by the Home Office or the BIA, which indicates that the person named in it can stay in the UK, and is allowed to do the type of work in question, when produced in combination with an official document giving the person's permanent National Insurance number and their name issued by a Government agency or a previous employer (eg P45, P60, NI card), or

THE FOLLOWING DOCUMENTS ARE NOT ACCEPTABLE

- A temporary National Insurance card beginning with TN or any number which ends with the letters from E to Z inclusive.
- A driving licence issued by the DVLA (even if it is a photo-style licence)
- A bill issued by a financial institution or utility company.
- A short (abbreviated) birth certificate issued in the UK which does not show details of one of the holder's parents or adoptive parents.
- A card or certificate issued by the HM Revenue and Customs under the Construction Industry Scheme.
- A passport describing the holder as a British Dependent Territories Citizen which states that the holder has a connection with Gibraltar.
- A letter issued by the Home Office or Border & Immigration Agency stating that the holder is a British citizen.

- A Home Office Standard Acknowledgement Letter or Border & Immigration Agency Letter (IS96W) which states that an asylum seeker can work in the UK. If you are presented with one of these documents, you should advise the applicant to call the Home Office or Border & Immigration Agency for information about how they can apply for an Application Registration Card.

Detecting Forgeries

Although the Government recognises that it cannot expect employers to be experts in detecting forged documents, it does require them to take all reasonable steps to verify the authenticity of documents. Specifically, if a document contains a photograph, the employer must satisfy himself that the photograph is a true likeness. Similarly if a document contains a date of birth, the employer must check that the employee's apparent age seems reasonable. Particular attention should be paid to the expiry dates of visas.

ID cards were rolled out for foreign nationals living in the UK in November 2008. The Government's aim is that 99% of foreign nationals will have ID card by 2014. In the meantime it is important that employers take reasonable steps to verify the authenticity of document to avoid prosecution under the legislation.

Employers unsure as to the validity of any document should contact the employer checking service, which is run jointly by the UK Borders Agency and the Identity and Passport Service, for help. The Council of The European Union also maintains a website – Public Register of Authentic Identity and Travel Documents Online (Prado) containing samples of passport and identity documents from all European Union countries. In addition, the comprehensive guidance has images of all List A and List B documents.

Risk of Discrimination

In order to avoid the risk of racial discrimination when performing these checks, the UK Borders Agency has published a Code of Practice on 'The Avoidance of Unlawful Discrimination in Employment Practice While Seeking to Prevent Illegal Working'. The suggestions in the Code include that:

- Checks should initially be carried out on all employees (prior to the start of their employment) regardless of whether you think the job applicant is a migrant or not; UK nationality should not be assumed. The repeat checks need only be carried out on employees who do not have a permanent right to live and work in the UK;

- Job applicants should not be treated less favourably if they produce documents from List B rather than List A;
- Rejecting all job applicants who do not have British nationality, or refusing to consider non-European job applicants could amount to direct discrimination – see Osbourne Clark decision.

The Code does not impose any legal obligations on employers but any failure to comply with it can be referred to in legal proceedings and courts and tribunals must take account of any part of the Code that might be relevant in matters of racial discrimination in employment practices.

Whilst I do not consider that failure to apply for sponsorship could constitute direct race discrimination it may well constitute indirect race discrimination. Accordingly an employer could be presented with claims from employees with current leave to remain under the work permit system when their permit expires but also prospective employees where they are the best candidate but not selected for the post as you do not hold a sponsorship licence.

Although indirect discrimination can be objectively justified in certain circumstances as this area of law is untested I recommend that the prudent approach would be for an employer to apply to become a sponsor.

Nevertheless, you should note that by the end of October only about 1,000 sponsors had been licensed to the new system out of potentially 18,000 to 20,000 employers that employ migrants in the UK. However, these figures may also reflect the fact that guidance was published only a couple of weeks before the system went live.

Amendment to Contracts/ Handbooks

I strongly recommend that employers ensure that their employment contracts and or handbooks allow them to conduct these repeat checks and include a continuing obligation on employees to notify their employers of any facts that may affect their immigration status in the UK. For example, if the employee's right to work in the UK is dependent on his/her spouse's immigration then it is crucial that the company is notified if the couple get divorced.

Section 21 – The Criminal Penalty

Knowingly employing a migrant who does not have immigration permission to work in the UK

constitutes a criminal offence and can result in an unlimited fine and/ or up to 2 years' imprisonment. The criminal penalty is aimed at those intentionally employing illegal immigrants and therefore the carrying out of checks of List A or B documents does not provide a statutory excuse against this criminal liability.

Company directors convicted of knowingly employing an illegal migrant may be disqualified from forming or managing a company in future.

CONCLUSIONS

Under the new arrangements, a link with the Sponsorship Register and greatly enhanced resourcing means that employers can expect a much more proactive approach from the Government. 'Account managers' and other immigration staff will visit employer's premises, and will have authority to inspect documentation to ensure that there are no illegal workers present. Immigration staff will be empowered to issue penalty notices where civil breaches are found. This is a significant development reflecting an enhanced, proactive approach and a much higher level of risk exposure for employers who fail to comply with the new law.

Case Law - Klusova V London Borough OF Hounslow

In this case the Court of Appeal held that an employer's genuine but mistaken belief in the unlawfulness of an employee's continued employment under immigration rules was a potentially fair reason for dismissal. However, the employer's failure to follow the statutory dismissal procedure – believing that it did not apply – rendered the dismissal automatically unfair in any event.

In this case Klusova, a Russian national, was employed by the London Borough of Hounslow on 13 November 2000. She had been living in the UK since 1996 as a student.

In March 2005 the Council began making enquiries with the Home Office as to Klusova's immigration status. Initially the Council was told that she had no right to remain or work. It was then informed that Klusova had been detained by police and she was prevented from continuing in employment.

On 22 March the Council was told that Klusova had a right of appeal and was allowed to work in the interim. At this point she returned to work.

In July 2005 the Council received further communication from the Home Office confirming that she was prohibited from taking up employment. She claimed that she had applied for indefinite leave to remain nevertheless she did not provide any evidence of this application and was summarily dismissed on 10 August 2005.

The following day Klusova's solicitor sent the Council a copy of a letter she had received from the Home Office confirming the application had been made in time and that leave to remain had been extended.

On 28 November 2005 Klusova's solicitor sent the Council a copy of a letter confirming that extended leave to remain and work had been granted. By this time Klusova had presented an employment tribunal claim.

At Tribunal the Council stated that the reason for dismissal was that she could not continue in employment without contravening a statutory restriction (namely Section 8 of the Asylum and Immigration Act 1996. As you know contravention of a statutory right is a potentially fair reason under Section 98(2)(D) of the Employment Rights Act 1996. Alternatively, the Council said that there was some other substantial reason for her dismissal under section 98(1)(B) of the ERA.

However the Council has not followed the statutory dismissal procedure which generally renders a dismissal automatically unfair. The Council attempted to rely on regulation 4(1)(F) of the Employment Act 2002 (Dispute Resolution) Regulations 2004 which provides that the statutory dismissal procedure does not apply to statutory restriction dismissals.

The Court of Appeal upheld Klusova's claim. There was no actual restriction on her right to work and so the council could not rely on the legislation relating to contravention of a statutory right. The Court held

that there was a potentially fair reason for dismissal, the 'some other substantial reason' defence. However it held that owing to the Council's failure to follow the statutory procedure, Klusova had been automatically unfairly dismissed.

As you can see, there is a strong argument for employers following the statutory procedures even where they believe that they do not apply, in case there is any mistake as to the applicable reason for dismissal. [NB: repeal of statutory procedures from 6th April 2009]

COMMENTARY

You may have seen in the press that John Philpott, the Chief Economist at the CIPD, called on the Government to extend restrictions on migrant during the economic recession. The Conservatives say that the new points based system should work alongside an annual cap on the number of migrants entering the UK.

European Case Law Round-Up - Stringer, Holiday Pay & Age Discrimination

By Graham Mitchell

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1. HOLIDAY PAY AND THE LONG-TERM SICK - BACKGROUND

Previously, case law had established that, in effect, workers on long-term sickness absence could still claim statutory annual leave (in terms of the Working Time Regulations ("WTRs")) in a year they had not worked. This contentious situation was, however, altered by the Court of Appeal in *Inland Revenue Commissioners v Ainsworth* in 2005. This case concerned two categories of employees:-

- a worker on long-term sick leave, who, during this period, informed her employer that she wished to take a number of days of paid annual leave.
- workers who, prior to dismissal, had been on long-term sick leave. Since they had not taken their paid annual leave during the leave year - the only period during which paid annual leave can be taken under UK law - they claimed payment in lieu.

They brought tribunal claims seeking to establish that their entitlement to paid holiday under the WTRs endured even when they were not attending work. The employees were successful before the ET and the EAT dismissed the employers' appeals but gave permission to appeal to the Court of Appeal, which allowed the appeals.

On appeal, the Court of Appeal held that workers on long-term sick leave have no legal right to take paid annual leave while absent from work, since this did not serve any health and safety benefit and instead landed the worker with a windfall.

The decision meant that employers could refuse a request from a worker on sick leave to convert a period of sick leave into paid holiday leave (in the absence of contractual right to the contrary). Further, workers on sick leave throughout an entire holiday year had no right to holiday leave or holiday pay in that year and/or a payment in lieu on termination of employment.

However, the claimants appealed to the House of Lords, who remitted the issue to the European Court of Justice ("ECJ") in December 2006 (under the new name of *HMRC v Stringer*).

The questions which were referred to the ECJ concerned the interpretation of Article 7 of Directive 2003/88/EC in relation to certain aspects of the organisation of working time. There were two sets of proceedings: ***Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund*** and ***Stringer and ors v HMRC***.

The questions which were referred to in the ECJ, in essence, concerned:

- whether a worker who is absent on sick leave is entitled to take paid annual leave during that period of sick leave
- whether, and if so to what extent, a worker absent on sick leave for the whole or part of the leave year and/or of a carry-over period is entitled to an allowance in lieu of paid annual leave not taken by the time the employment relationship is terminated.

2. SUMMARY

The key points from the ECJ ruling are that:

- **National legislation and practices may preclude workers from taking paid holiday during a period of sickness absence, but a worker must be allowed to take it at a later date.** NB: The Directive does not preclude national legislation or practices which *allow* a worker on sick leave to take paid annual leave during that sick leave. So, member states are free to decide whether annual leave can or cannot be taken during a period of sickness absence.
- **On termination of employment, a worker is entitled to be paid in lieu of any untaken holiday.** This is because the Directive must be interpreted as precluding national legislation or practices which provide for no payment in lieu of untaken annual leave, on termination of employment, where an employee has been sick for whole or part of the leave year and this was the reason why he could not take the leave. In this regard, the payment in lieu is to be calculated based on "*normal remuneration*" defined as "*that which must be maintained during the rest period corresponding to the paid annual leave*".
- **Annual leave continues to accrue during sickness absence and the right to paid annual leave may not be extinguished at the end of the leave year** (and/or carry over period laid down by national law (e.g. under German law)), even where the worker has been on sick leave for the whole or part of the leave year and that was why he could not take annual leave.
- The ruling only applies to the 4 weeks' statutory minimum holiday entitlement provided for in the Working Time Directive.

3. GREY AREAS

3.1 Decision contrary to WTRs

In light of the ECJ ruling, it seems clear that employees who are unable to take their annual leave entitlement in the leave year owing to sickness absence, must be allowed to carry it forward. However, this is contrary to the WTRs which prohibit the carry forward of statutory holiday entitlement. However, the ECJ has previously ruled in a case in the Netherlands (***Federatie Nederlandse Vakbeweging v Staat der Nederlanden [2006]***) that "...in the event of the aggregation of several periods of leave guaranteed by Community law at the end of a year, **the carrying forward of annual leave or part thereof to the following year may be inevitable.**"

This all suggests that the UK Government will be required to take remedial action in respect of the WTRs, or face a legal challenge. However, rather than disapplying the prohibition on carry forward in the WTRs, the easier way for the House of Lords to interpret the WTRs so as to accord with the Directive, as interpreted by the ECJ, would be to permit workers to take their paid annual leave while off sick. However, as long as a worker is receiving sick pay, it will usually be to his or her advantage to postpone annual leave until the contractual sick pay period runs out, or until he or she is back at work. In these circumstances, it remains unclear whether the employer can instead *oblige* the worker to take annual leave concurrently with sick leave, even though the worker may be unable to derive any meaningful benefit from a holiday or must they be allowed to carry the leave forward?

NB: In light of the case of ***Merino Gomez v Continental Industrias del Caucho (2004)***, however, in which the ECJ ruled that a period of leave guaranteed by community law cannot affect the right to take another period of leave guaranteed by community law, it is arguably unlikely that an employer would be able to *oblige* an employee to take annual leave concurrently with sick leave, although it should be remembered that ***Merino Gomez*** was dealing with a right conferred by community law (maternity leave), whereas sick leave is not from community law.

3.2 What leave does the decision apply to?

It is important to be aware that the House of Lords will only be concerned with the 4 weeks' leave provided for in the Directive and the WTRs as they were during the period relevant to the case.

Whether or not different rules will apply in respect of the 1.6 weeks' additional leave subsequently provided for in Reg 13A of the WTRs will be left for later cases or new legislation to decide.

3.3 Holiday pay as wages?

Earlier case law had established that non-payment of statutory holiday entitlement amounted to a non-payment of **wages**. The relevance of this was that a claimant could make an unlawful deductions from wages claim and claim back from a number of years on the basis that the claim was lodged within 3 months of the last of "a series of deductions or payments".

However, the Court of Appeal in *Ainsworth* (now *Stringer*) ruled that holiday pay due to an employee on the termination of employment is **not** "wages" within the meaning of the Employment Rights Act. This decision meant that claims for unpaid holiday pay can only be made under the WTRs and claims must be made within 3 months of each occasion on which a payment falls due, so could only be made in respect of one relevant holiday year.

The House of Lords will also, therefore, have to determine this issue which was put on hold pending the outcome of the ECJ reference. If the House of Lords overrules the Court of Appeal on this point such that employees will be able to claim for a number of years of untaken annual leave, the question remains whether employees will be able to carry forward annual leave indefinitely and how far back an employee will be able to claim accrued but untaken holiday on termination (or perhaps even on return to work). The ECJ, whilst informing us that there is entitlement to payment in lieu of accrued but untaken holiday on termination, does not shed any light on these issues. Since it does, however, tell us that the right to paid annual leave is not extinguished at the end of the leave year, this may suggest that an employee can go back to perhaps, for example, 1998 when the WTRs came in. We will have to wait for the House of Lords' ruling.

4. WHAT'S NEXT?

The case returned to the House of Lords on 30th April 2009 and we await the judgment which, we understand, should be in 6 to 8 weeks – so by end of June. It is likely that the House of Lords will overrule the Court of Appeal's decision from April 2005, which held that annual leave does not accrue during periods of sick leave. The prospect of sick employees carrying over the whole of their holiday entitlement into subsequent years will not be something employers will want, however, this outcome could be avoided by a return to the position that workers can take annual leave while they are off sick. If the House of Lords rules that *Kigass Aero Components Ltd v Brown* [2002] IRLR 312 EAT was correct, it will be legitimate for employers to prohibit workers from carrying over their holiday into subsequent years because they will not have been prevented by sickness from taking their leave in the relevant leave year. This approach would also sit better with the WTRs as currently drafted (see Reg 13(9)(a)).

Alternatively, the House of Lords could rule that it is not permissible, under UK law, for workers to take annual leave during sick leave and the WTRs are defective in that they do not allow leave to be carried forward. This would require Parliament to amend the WTRs but as stated above, in the meantime, public sector workers could seek to invoke the direct effect of the Directive in order to by pass Reg 13(9)(a).

5. IMPLICATIONS

5.1 Public Sector organisations

Public sector organisations can be directly bound by European legislation without the need for national legislation being put in place to implement it here the relevant legislative provision has "direct effect". Such provision must be: clear and precise; unconditional and capable of producing rights for individuals.

The Working Time Directive is directly effective, which means an employee of a public sector organisation can bring a claim now in relation to accrued holiday using the doctrine of direct effect and would be likely to be successful.

5.2 Private sector employers

Unlike public sector employees, employees in the private sector cannot seek to rely on the doctrine of direct effect and cannot, at this stage, rely directly on the ECJ ruling. An employee may, however, still lodge an ET claim but would be likely to lose as the law in the UK stands as present. Alternatively, (s)he may lodge a "protective" claim and request that it be sisted, pending the House of Lords ruling.

The prudent course of action for private sector employers at this stage is therefore likely to be to await the House of Lords' ruling prior to making nay substantive amendments to policies.

6. AGE DISCRIMINATION – HEYDAY CHALLENGE

Shortly after the Employment Equality (Age) Regulations came into force, Heyday, a spin off of the charity Age Concern, issued a judicial review application in the High Court, challenging the fact that employees can be compelled to retire at 65 and arguing that the setting of such an age limit is age discrimination.

The case was referred to the European Court of Justice ("ECJ"), which handed down its decision in March. The ECJ agreed with the Advocate-General's opinion given last year and has ruled that a mandatory retirement age of 65 is **capable** of being objectively justified as being a proportionate means of achieving a legitimate aim - it is for the UK courts to decide whether that test is met.

According to the ECJ, the Regulations do not create a mandatory scheme of automatic retirement, but instead lay down conditions under which an employer may derogate from the principle prohibiting age discrimination on grounds of age.

Directive 2000/78 lists examples of treatment that may amount to justification, yet the UK Regulations do not. Heyday argued that in adopting the Directive, domestic legislation should also include such a list. The ECJ reiterated the opinion of the Advocate General by saying that although member states are obliged to ensure that a directive is fully effective when they transpose it, they retain a broad discretion in how to implement it.

The case will now return to the High Court to consider whether the UK's mandatory retirement age of 65 *can* be objectively justified, considering, for example, factors such as employment policy and the labour market. The case is due to be heard on 16th and 17th July 2009.

It is important to note that the ECJ has warned that, although member states may enjoy a reasonable amount of discretion when choosing legitimate aims involving social policy, they must establish a high standard of proof regarding the legitimacy of any aim pursued. It follows, therefore, that in this case the Government will need to establish, to a high standard of proof, the legitimacy of the aim relied on as justification for retiring workers at the age of 65.

This ruling is good news for employers, although we will have to wait and see what the High Court ultimately decides.

Note also that there are suggestions that The Equality Bill, published at the end of last month, will be used to attempt to scrap the default retirement age although not provided for in the Bill in its first published form. In this regard, the House of Commons Works and Pensions Committee, chaired by Terry Rooney, has submitted a report to the Government on the Equality Bill, which, whilst welcoming the Government's intention to "simplify and streamline" existing legislation, has raised some 50 reservations and criticisms, including a call for the removal of statutory barriers, including the statutory retirement age (currently 65), making it easier for people beyond retirement age to continue working.

Disability Discrimination – What does the Malcolm case mean?

By John Macmillan

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1. LONDON BOROUGH OF LEWISHAM V MALCOLM [2008]

Whilst this is a housing case, it will have a significant impact on the way employment cases concerning disability discrimination will be determined going forward. In this regard, there have already been at least two EAT decisions confirming its applicability to employment cases and I'll mention these in a moment.

Mr Malcolm suffered from schizophrenia which was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months, which was a breach of the express terms of his tenancy agreement, and provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

In his defence to the possession proceedings, Mr Malcolm argued that the council's attempt to gain possession of the flat constituted unlawful disability discrimination contrary to s.22 of the Disability Discrimination Act 1995. He contended that he suffered from a disability for the purposes of the Act; that the reason why the council was seeking possession was because of his disability; and that unless the council could show justification the court was precluded from making a possession order against him. He claimed that he had only sublet the flat because he had not been taking his medication at the time, and this had led to his irresponsible behaviour. The judge in the county court rejected the complaint of disability discrimination and granted the possession order. The Court of Appeal reversed that decision. The council appealed to the House of Lords.

In considering whether Mr Malcolm had been less favourably treated for a reason relating to his disability, their Lordships had to identify the appropriate comparator and said that this would be a non-disabled tenant of a flat who had committed the same breach. In so doing, they ruled that the Court of Appeal had been wrong in an earlier 1999 employment case, *Clark v Novacold* (in accordance with which the comparator would have been a non-disabled tenant who had *not* committed the breach). Since the comparator and Mr Malcolm would have been treated the same and Mr Malcolm had not shown that his disability had played any part in the council's decision, the majority of the Lords ruled that Mr Malcolm had not been treated less favourably for a reason related to his disability.

Their Lordships also ruled that knowledge (or at least imputed knowledge) of the individual's disability is necessary in order to make a finding of disability discrimination and that "a reason which relates to the disabled person's disability" must be construed narrowly. For example, if an employer dismisses an employee for being off work for a year, then the reason is the absence from work and not one that relates to the underlying disability itself, which means the employer will not be liable under the DDA (although there would still, of course, be a duty to make reasonable adjustments).

This decision is good news for employers in that it is likely to make it much harder for a claimant to succeed in a claim for disability discrimination in the future.

The applicability of the new comparator test to employment cases has been confirmed in the case of ***Child Support Agency v Truman (EAT)***, which concerned the discrimination of an employee who suffered from back pain and who was considered to be disabled within the terms of the DDA 1995. As was expressed by HHJ Peter Clark, at para 22: "*In our judgment the narrower comparator favoured by the majority in Malcolm applies equally in the employment context. The wider comparator used in Novacold should no longer apply (unless and until the legislation is further amended by Parliament).*"

The EAT provided various justifications for coming to this conclusion including:

- (a) the similarity between the test for disability-related discrimination as it applies to housing cases and the test that applies in an employment context. It would be therefore be "surprising" if a different comparator should emerge.
- (b) the opinion of all five Law Lords in Malcolm was that no distinction should be made between the two sections. Even Baroness Hale (who dissented), agreed that the same words could not create a different comparator in the context of employment.
- (c) any policy arguments for having a wider comparator for employment claims and a narrower one in housing cases is a matter for Parliament, not the courts.

This view has also been confirmed in the case of ***Countrywide Estate Agents & Others v Rice (EAT)***, which related to the dismissal of an individual who suffered from a heart condition and was disabled in terms of the DDA 1995. Whilst the EAT dismissed the employer's appeal against the ET's finding of unfair dismissal, on disability discrimination, the EAT allowed its appeal. In determining whether such an individual had been treated less favourably for a reason relating to his disability, the tribunal had compared him to an individual who was not disabled and who had not been absent for lengthy periods of time for whatever reason. However the EAT held that this was not the correct comparator, stating: *"the effect of Malcolm, as is well known, is to limit the range of comparators in disability discrimination cases. Suffice it to say that we are not able to find that... the (tribunal's) judgement either sets out the law accurately in relation to the appropriate comparator or indeed internally."* It was therefore held that *"despite the fact that it was a housing discrimination case, it is clear that it applies to employment matters as well... The remarks of the members of the House of Lords in the Malcolm case are equally applicable to employment law cases."*

2. COLEMAN V ATTRIDGE LAW [2008]

This case concerned Ms Coleman, a legal secretary, who brought claims against her employer under the Disability Discrimination Act 1995 (DDA), arguing that she had suffered discrimination and harassment on the grounds of her son's disability, in respect of whom she was the primary carer. Ms Coleman herself was not disabled.

Due to the complexity of the issues surrounding the case, the tribunal referred the case to the ECJ for a preliminary determination. The ECJ held that the EU's anti-discrimination laws (as contained in the EU Equal Treatment Framework Directive) are intended to prohibit direct discrimination and harassment on the grounds of association with someone who has a disability, even where the person concerned is not disabled themselves. As things stand in the UK at present, the DDA is drafted more narrowly and refers to less favourable treatment *"for a reason related to the disabled person's disability"*.

The issue for the tribunal was to then determine whether the DDA should be read in such a way as to give effect to such Directive.

At a Pre-Hearing Review, the Tribunal has indeed held that the DDA should be interpreted so as to protect individuals who suffer discrimination or harassment on the grounds of their association with a disabled person.

The Tribunal considered the Disability Discrimination Act (Amendment) Regulations 2003, which amended the definition of discrimination and harassment under the DDA with effect from 1 October

2004, and the accompanying explanation of the amendments. It noted that the intention was to give full effect to the Directive. Therefore on the basis of the ECJ decision that the Directive covered associative discrimination, and in the absence of express and unambiguous indications to the contrary, the Employment Tribunal held that the DDA must also share this same purpose.

Employees who have caring responsibilities for people with disabilities as defined by the DDA, now have the same level of protection as public sector workers, who were able to rely upon the ECJ ruling immediately.

The impact of this decision will remain to be seen although the government estimates that 2.6 million employees carry out the role of an unpaid carer along with their job.

The case will now go forward to a full hearing to determine the substantive merits of the claim. In the meantime, it is important that employers check their policies and procedures to ensure that they comply with the implications of this decision.

3. THE EQUALITY BILL

The Equality Bill was published at the end of last month. If and when it becomes law, it will replace the Equal Pay Act 1970 and all the various discrimination statutes and regulations. The Bill is currently some 205 sections and 28 schedules and the government has stated that the Bill has two main purposes:

- (i) to harmonise discrimination law; and
- (ii) to strengthen the law to support progress on equality.

The provisions in the Bill which will affect disability discrimination, if enacted, include:

- The standard definition of indirect discrimination will be adopted. That is when a provision, criterion or practice (PCP) which is applied to all, puts those having a particular protected characteristic at a particular disadvantage, and that PCP is not a proportionate means of achieving a legitimate aim. This definition will, for the first time, also apply to disability discrimination.
- Protection in relation to harassment is widened so that it catches conduct "related to" a protected characteristic (including disability). This means there will be no need for a particular person's characteristic to be the reason for the unwanted conduct to trigger liability. Protection from harassment will be further extended so that an employer can be held liable for harassment by a

third party if harassment occurred on at least 2 previous occasions and the employer failed to take reasonably practicable steps to stop it. At present such liability exists only in relation to sex-based harassment but this will now be extended to all protected characteristics.

- In response to the House of Lords decision in *Malcolm v London Borough of Lewisham* which weakened the ability of a disabled person to claim disability-related discrimination, the Bill introduces provisions designed to strengthen and underpin the protections. To this end, the Bill provides that an employer will discriminate against a disabled person if they treat that person in a particular way, and because of that person's disability the treatment amounts to a detriment, unless the employer can justify that treatment as a proportionate means of achieving a legitimate aim. The employer will, however, have a defence if it can show that he did not know, or could not reasonably be expected to know, that the person had a disability.

The explanatory notes to the Bill state that the aim here is to make it unlawful "*to treat a disabled person in a particular way which, because of his or her disability, amounts to treating him or her badly*". This protection will be in addition to the protections for direct and (for the first time re disability discrimination) indirect discrimination, provided for in the Bill.

The Bill is due to take effect in 2010 although there is to be further consultation this year and is therefore subject to change, following debate.

Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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