



Employment Law Round-Up Seminar

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How Trade Unions Work - A Review Of The Impact A Trade Union Can Have On An Organisation

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1. INTRODUCTION

Unions represent the interests of their members and negotiate with employers on pay and other conditions of work. They can also provide legal advice, financial assistance, sickness benefits, and education and training opportunities for their members.

There are around 180 trade unions in the UK and about one third of those are members of the Trades Union Congress. Unions vary in size, ranging from a membership of close to 2 million, to a few with a membership of less than 100. Indeed 60 per cent of all unions have a membership of less than 2,500.

2. TRADE UNION RECOGNITION

2.1 Introduction

In order for a union to seek to negotiate with an employer, it must first be 'recognised'. The most common form of trade union recognition in the UK is voluntary recognition, whereby the union and employer make a recognition agreement willingly and off their own backs. If the employer refuses to recognise a union, however, it can apply for statutory recognition.

2.2 Key points of procedure

- An employer has ten working days from receipt of a request from a union to agree/ refuse/ start negotiations regarding the recognition.
- Parties have 20 working days to agree on the appropriate bargaining unit and to agree on recognition, though this can be extended by agreement.
- Parties can approach ACAS for help at any time and can reach a voluntary agreement even after the statutory process has been started

- If an employer rejects the request or no agreement is reached, the union can apply to the CAC (Central Arbitration Committee) to have its application accepted.
- The union must first meet several tests, e.g. it must show that 10 per cent of the workers it is proposing to represent ('bargaining unit') belong to the union, with a majority likely to favour recognition.

For the year ending March 2009, 32 applications were heard by the CAC; with 28 being accepted and four not accepted.

CAC will not accept the application if another union is already recognised by the employer in respect of any of the workers belonging to the unions proposed bargaining unit.

3 POSITIVE IMPACTS OF A TRADE UNION ON AN ORGANISATION

3.1 Ability to reach collective bargains

Collective bargaining essentially refers to the process of determining conditions of work and terms of employment through negotiations between employers and employee representatives, who negotiate in the interests of their members. This can occur at various levels of industry, from plant to industry to national level.

A collective agreement is generally an agreement reached between a union and an employer as a result of collective bargaining. It is not normally enforceable in law, but its terms may become incorporated into the individual contracts of employment of the workers covered thereby, and thus assume contractual force indirectly. The sanction for its breach is, ultimately, industrial action not legal action.

Collective bargaining can minimise conflict in the workplace, can give employees a greater influence and can assist in agreements being reached and avoid escalation. It can also lead to increased efficiency and ease for managers, who will not spend excess time reaching agreements at an individual level. In turn, employees have an opportunity to have a greater influence in the final decision the manager will take, thus leading to feelings of motivation and empowerment.

3.2 Avoidance of Industrial Action

Industrial action, if threatened, can potentially be dealt with coherently within procedures established in the trade union agreement, which may save the dispute escalating to a highly problematic level.

3.3 Performance

Debate exists as to whether collective bargaining enhances performance of an organisation/an economy. Several studies have been carried out in this area, most of which have proved inconclusive. However, union presence is generally associated with higher performance work practices such as training, functional flexibility and employee involvement.

3.4 Collective Consultation

The ability to collectively consult is beneficial, not least because it is a statutory requirement in relation to, for example, collective redundancies and TUPE. Collective consultation can also lead to an ability to deliver whole workforce consents, through proper consultation and negotiation with TU representatives.

4. NEGATIVE IMPACTS OF A TRADE UNION ON AN ORGANISATION

4.1 Industrial action and disruptive campaigning

A trade union presence arguably leads to a higher likelihood of industrial action when there is a workplace issue to be addressed. This may be true to the extent that unions facilitate industrial action by having a large body capable of organising itself into taking such action.

It is perhaps useful in this respect to look towards case law as an indication of where the law sits with regard to industrial dispute and workers rights.

In a test case during the University workers strikes, *Spackman v London Metropolitan University* [2007], the claimant lecturer was one of many employees who claimed breach of contract in respect of a deduction from wages made by the defendant University. She, along with others in her trade union, had taken part in industrial action, including a one-week strike and other very disruptive activities such

as the boycotting of certain specified activities including exam assessment and invigilation over a period of two months. In her employment contract with the University, it was expressly stated that the University would not accept partial performance and S's entitlement to remuneration would cease if she did not perform her full duties. Additionally, the university had written to all staff prior to the industrial action informing them that if they took part in the action they would suffer deductions from wages as the university would not accept partial performance. During the action S attended work as usual but refrained from doing such things as the submission of assessments and students marks. Consequently, the University deducted 30% of the wages of all staff involved in the action. The Claimant in this case raised an action, arguing that no deduction should have been made, as the university had accepted partial performance of her contract. Alternatively, there was a term in her contract that her pay should be proportionate to the amount of work which she did, and therefore a 30% blanket deduction was unfair and she should be paid on a quantum meruit base.

The Court dismissed the claim. The University had made it quite plain that they wanted staff to work normally and that if they did not do so they would incur a deduction. As to the argument that the Claimant should have been paid in accordance with the work she carried out, the court held that her employment contract indicated the contrary. Essentially, the court took the view that, unless there was some express agreement otherwise, employees who participated in collective industrial action took the risk that even if they did some or most of their ordinary duties, their employer could pay them nothing at all. This, said the court, would be even more so in instances where the employer has expressly said that full pay will not be awarded to participants.

Another more recent example of industrial unrest concerned that at the Lindsey Oil Refinery. The protest was initially sparked by the loss of 51 jobs with one subcontractor while another was recruiting. However, the dispute escalated further when the workers taking part were sacked. This led to a further 3,000 workers across the UK staging "wild cat strikes" in support.

5. ALTERNATIVES TO TRADE UNIONS

It has become increasingly necessary for the law to recognise the status of workers' representatives other than trade union officials, particularly since most workers are not members a trade union and trade unions are recognised as bargaining agent in fewer than half the workplaces.

Thus, where the law imposes upon an employer a duty to deal with representatives of his workforce, it cannot assume that those representatives will be trade union officials. Accordingly it is necessary to make provision for non-union representatives and an increasing number of companies are introducing various forms of employee consultation in their establishments, in order to work together through co-

operation and agreement. It is also important to be aware of the Information and Consultation of Employees Regulations 2004 (ICE regulations), which now apply to organisations with more than 50 employees.

The case of *Stewart v Moray Council* was the first reported case from the Central Arbitration Committee (CAC) on the ICE Regulations and provided guidance on the definition of a pre-existing agreement for the purposes of the ICE regulations.

The concept of a pre-existing agreement is important because if there is one in place, and it has enough employee support, an employer can fend off a request to set up an information and consultation mechanism under the regulations. For such an agreement to be valid, it must:

- be in writing;
- cover all of the employees of the undertaking;
- set out how the employer is to give information to the employees or their representatives and seek their views on such information;
- and have been approved by the employees.

If 10% of employees in an undertaking request negotiations for an information and consultation (I&C) agreement, an employer must normally consent to that request. However, if the employer already has a valid pre-existing agreement in place and the request for negotiations has been made by less than 40% of the workforce, the employer may hold a ballot of the workforce as a whole to seek endorsement of the request. If, on a ballot, at least 40% of the employees employed in the undertaking and the majority of those who vote in the ballot vote in favour of endorsing the request, the employer must negotiate a new I&C agreement.

However, if this voting threshold is not reached, the pre-existing agreement remains valid and no further employee request for negotiations may take place for three years from the date of the original request. Hence the importance of the pre-existing agreement and making sure the qualifying conditions are satisfied to ensure it is valid.

In the *Stewart* case, the council received a request to negotiate an agreement from between 10% and 40% of its employees. The council took the view that various collective agreements in place together amounted to a pre-existing agreement, and duly decided to hold a ballot. Stewart complained to the CAC that this was not the case. The CAC then considered the four conditions for a valid pre-existing agreement, but decided that the agreement failed in one important respect – its insufficiently detailed

description of the way the council should inform and consult employees. The agreement stated that it was 'a forum for discussion and/or consultation on a range of matters not subject to national bargaining'. That failing meant the council was not entitled to hold a ballot, and had no option but to "initiate negotiations" for a new "information and consultation" agreement and was ordered to do so. On appeal the EAT confirmed that that was a correct ruling.

Employers with a pre-existing agreement should therefore ensure that it satisfies all the requisite elements to be valid and if not, take steps to ensure it is properly drafted if the employer wishes to rely on it to defend a request to negotiate an I&C agreement.

Industrial Action – What's Lawful & What's Not & The Consequences For Those Who Take Part

By Karen McGill

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1. INTRODUCTION

The embittered industrial relations climate of the 1970s, when strikes were a part of everyday life, seems like a lifetime ago. This area of employment law has received little attention over the years and the relevant legislation has changed little since its introduction. However, given the economic climate which has prevailed of late, this subject has taken on a renewed significance and we have seen a marked increase in both reports of industrial action and unrest and requests for advice in this area.

2. WHAT IS INDUSTRIAL ACTION?

Industrial action is a generic term covering the various types of action that can be taken to put pressure on another party. There is no statutory definition in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).

In order to determine lawfulness of action, it will always be necessary to consider the terms of an employee's contract of employment and the form of industrial action taken, in order to determine whether the conduct in question is a breach of that contract.

Industrial action most commonly refers to strikes but can also cover less drastic action, such as, go-slows, work-to-rule and overtime bans.

3. RIGHT TO STRIKE?

The strict answer is "no" and being the unilateral withdrawal of labour by the employee, striking will normally amount to a breach of an employee's contract of employment. In addition, industrial action can also amount to a civil wrong on the part of the trade union that organised it. For example, where a trade union encourages its members to engage in industrial action, they will commit the civil wrong of "inducing a person to breach a contract".

Whilst the legislation does not provide for a free-standing right to take such action, it does make provision for circumstances where employees and trade unions can avoid the civil and/or contractual liability for its consequences, often referred to as "statutory immunity".

4. STATUTORY IMMUNITY

4.1 Conditions

For action to attract immunity, it must be:

- In contemplation or furtherance of a trade dispute with the employer in question;
- Supported by a secret ballot of all those entitled to vote;
- Compliant with all the procedural requirements with regard to the ballot;
- Taken within 4 weeks of the ballot;
- Taken not less than 7 days after a valid notice of industrial action was served on the employer.

The key requirements therefore concern:

- (i) the concept of action in furtherance of a trade dispute;
- (ii) the ballot;
- (iii) notice.

4.2 Trade disputes

A trade dispute is defined (TULR(C)A, section 244), as: "*a dispute between workers and their employer*" which relates to:

- Terms and conditions of employment, or the physical conditions in which any workers are required to work;
- Engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- Allocation of work or the duties of employment between workers or groups of workers;

- Matters of discipline;
- A worker's membership or non-membership of a trade union;
- Facilities for officials of trade unions; and
- Machinery for negotiation or consultation, and other procedures, relating to any of the above matters.

Note also that in order to be protected, the action must not be of a type not qualifying for protection, in terms of the legislation, that is:

- Action aimed at enforcing trade union membership;
- Action taken because an employer has dismissed one or more employees for taking unofficial industrial action;
- Action aimed at obliging a person to impose a requirement of union recognition in contracting for the supply of goods and services;
- Secondary picketing, that is, action is taken or threatened against an employer who is not involved in a trade dispute. This means, for example, that a union cannot set up a picket outside an employer's *client* premises.

4.3 The Ballot requirements

In order for industrial action to be lawful, it must be supported by a ballot of relevant members of the trade union, being those it is reasonable at the time of the ballot to believe will be called to industrial action and no others.

The union is required to notify the employer of those who will be entitled to vote, of its intention to ballot, not later than **7 days** before the opening day of the ballot and must also take such steps as are reasonably necessary to ensure that the employer receives a sample voting paper(s) at least **three days** before the opening of the ballot.

4.4 Conduct of the ballot

Key requirements:

- The vote should be by secret postal ballot;
- Voters must be able to vote without interference from/constraint imposed by, the union or its members, officials or employees;
- Those voting should be able to do so without incurring any direct cost;
- Separate postal ballot at *each* workplace where there are members entitled to vote (save for where it is possible to have a cross-workplace ballot);
- Statutory requirements for the ballot paper are satisfied;
- Where those entitled to vote exceeds 50, the union must appoint an independent "scrutineer" to oversee the conduct of the ballot.

A union must, as soon as reasonably practicable after holding an industrial action ballot, take steps to inform all those entitled to vote and their employers of the number of:

- Votes cast in the ballot;
- Individuals answering "yes";
- Individuals answering "no";
- Spoiled voting papers.

Upon the request of any union member who was entitled to vote in the ballot or any employer, the union must provide a copy of the scrutineer's report as soon as reasonably practicable and at no cost (or on payment of a reasonable fee specified by the union).

4.5 Notice of industrial action

The union is obliged to give employers 7 days notice of intended industrial action and before this can be done the union must have taken the required steps to notify the employers of the ballot results.

Ballots are only effective up to four weeks from the date of the ballot although this can be extended to eight weeks if agreement is reached between the union and the employer.

The form and requirements of the notice are quite prescriptive (see section 234(A) TULR(C)A). In summary, the notice must provide:

- Lists of the categories of employees to be involved in the action;
- A list of the workplaces at which the affected employees work;
- The number of affected employees at each workplace;
- Total number of employees involved;
- Statement of whether the action is to be continuous or discontinuous;
- The date(s) on which action will take place.

5. CONSEQUENCES OF INDUSTRIAL ACTION FOR EMPLOYEES

5.1 Dismissal

Whether or not the dismissal of an employee involved in industrial action is fair, will largely depend on the status of that action.

(i) Unofficial industrial action

If an employee is dismissed while taking part in unofficial industrial action, (i.e. not authorised by the trade union), he will **not** be able to claim unfair dismissal, unless it can be shown that the real reason for dismissal was one of the automatically unfair reasons provided for in the Employment Rights Act 1996 ("ERA"). Examples would include jury service, health and safety and time off for dependants.

Example:

Sandhu & Ors v Gate Gourmet (July 2009)

Gate Gourmet, which supplied British Airways with in-flight food, dismissed over 600 staff in August 2005 following a dispute arising out of widespread discontent about the engagement of a large number of seasonal staff. The dispute was resolved some weeks later and, although a number of employees were re-engaged, many others remained dismissed. The EAT held that an employment tribunal had been entitled to rule that the 6 claimants were either dismissed while taking part in unofficial industrial action, in this case, a stoppage at work, so that it had no jurisdiction to hear the claims (pursuant to S.237(1) of TULR(C)A), or that the dismissals were otherwise fair.

Industrial action is unofficial *unless*:

- The employee is a trade union member and that union has authorised/endorsed the action;
- The employee is not a trade union member but some of those taking part in the industrial action are members of a union which has authorised/endorsed the action; or
- None of those taking part in the strike are trade union members.

Note: the actual *reason* for the dismissal is irrelevant (save for the statutory automatically unfair reasons mentioned above). So, an employee may be dismissed *because* he is taking industrial action or for some other reason entirely, he simply has no right to claim unfair dismissal if he was participating in unofficial industrial action at the time of his dismissal.

(ii) Official industrial action

The legislation makes a distinction between "protected" and "unprotected" official action.

(a) "Protected" official action

This is action taken which is authorised or endorsed by the union, where the statutory requirements concerning balloting of members and service of notice have been complied with (i.e. where there is statutory immunity (see above)).

An employee will be **automatically unfairly dismissed** if the reason or principal reason for dismissal was that he took protected industrial action and either the date of dismissal:

- is within the first 12 weeks of the industrial action (the "protected period") (NB: this period is extended by any days on which the employee was subjected to a lock-out by his employer); or
- falls after the protected period and the employee has ceased taking industrial action before the end of the protected period; or
- falls after the protected period and the employee has continued to participate beyond that period, but the employer has not taken reasonable steps to resolve the dispute to which the action relates.

This means that an employer can never fairly dismiss an employee for taking protected industrial action

unless the action has lasted more than 12 weeks and the employer has tried to resolve the dispute.

(b) "Unprotected" official action.

This is where action is authorised or endorsed by the union but it did not comply with the rules on ballots and notices. In these circumstances, an employee cannot bring an unfair dismissal claim unless the employer has been dismissing selectively. In summary, the position is:

- if all participating employees are dismissed, those employees may not bring unfair dismissal claims.
- BUT if a dismissed employee can show that one or more employees who took part in the same industrial action were not dismissed, or were offered re-engagement within 3 months of dismissal, he will not be prevented from bringing a claim.

Note also that as with unofficial action, where the real reason for dismissal is a prohibited ground in terms of the ERA, a dismissal during industrial action will be automatically unfair.

5.2 Deductions from pay

An employer does not have to pay an employee for any day on which he takes strike action.

In terms of the amount to be deducted, this has been clarified by the recent case of *Cooper v Isle of Wight College* [2008] IRLR 124 HC. That case concerned one of three teachers who took part in a one day strike. The High Court ruled that a day's pay should be calculated on the 1/260 formula on the basis that this would be the basis on which any unlawful deduction from wages claim by an employee would be based. The College's approach based on 1/228 of C's salary (C would have actually worked 228 days) was therefore rejected.

5.3 Criminal offences?

Industrial action does not generally involve criminal liability either on the part of the organiser or on the part of the participator. There are a few special cases. For example, pickets often risk committing a number of public order offences, especially if they behave in an abusive or disorderly manner.

In addition, TULR(C)A (Section 240) makes it an offence for any person deliberately to break a contract of service or of hiring *"knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be (a) to endanger human life or cause serious bodily injury, or (b) to expose valuable property, whether real or personal, to destruction or serious injury"*.

Section 241 also sets out a provision concerned with intimidation or annoyance by violence or otherwise.

6. CONCLUSION

Where there is an industrial dispute in an organisation, the threat or use of industrial action can be the ultimate weapon for one party where no progress is being made with the other party involved. It should, however, be borne in mind that industrial action means lost production, loss of pay for workers, loss of profits for the business and can affect the national economy. It will therefore almost always be in the interests of the parties (and the wider economy) to use industrial action only as the last resort and in such case, it should be settled as quickly as possible.

Being A Witness At An Employment Tribunal – Our Top Tips

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1. INTRODUCTION

Being involved in an employment tribunal claim, particularly if you are a witness, can be a daunting experience, particularly if you are unfamiliar with the venue, the format and how the proceedings are conducted. With this in mind, we thought we would give you a quick overview of what happens in the employment tribunal, the order of events and look at some top tips to think about if you are going to be a witness in an employment tribunal.

2. ORDER OF EVENTS

For those who are, perhaps, not familiar with attending and/or being a witness at tribunal, here is a bit of background on what happens and the order of events:

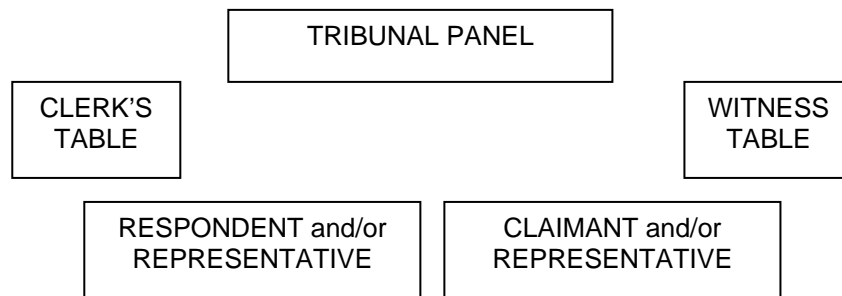
2.1 Oath/affirmation

When you come into the tribunal room, you will be directed to the witness table. You will be asked by the Employment Judge to stand at the witness table and take the oath or affirm. A witness will have to give evidence on oath or affirmation. It is very important to tell the truth when giving evidence. If you do not tell the truth after swearing an oath or affirming you could face proceedings for perjury. You do not require to remain standing to give your evidence and will be seated throughout the questioning.

2.2 Where does everyone sit?

The ET is not as formal as a court although there is a structure to the proceedings which is usually followed (see below). Unlike courts, nobody wears a wig or gown.

The tribunal room consists of four tables loosely shaped like a square. The tribunal panel sits at the front of the tribunal room. The representatives for both the Claimant and Respondent sit at a table opposite the tribunal panel, with the Claimant sitting on the right hand side of the table and the respondent on the left. A witness table is situated at 90 degrees to and between the tribunal panel and the representatives of the parties to the hearing. The clerk’s table is situated opposite the witness table.



The case is heard by a tribunal panel, comprised of 3 members who will listen to the evidence. These are an Employment Judge, who is legally qualified, and two lay members, who sit on either side of the Employment Judge. Neither lay member will be legally qualified but one will usually have an HR or management background and the other a trade union or employee background.

2.3 Which side goes first?

Generally in an unfair dismissal case the Respondent will give evidence and call any witnesses first, while in a discrimination case the Claimant will normally be first to give evidence followed by any witnesses. However, there is no absolute rule as to which side starts and this will be discussed with you before the hearing begins.

2.4 Giving evidence

- (i) Examination in Chief

In Scotland, you will first be asked questions by the person presenting the case for the party that has called you as a witness, to draw out your evidence. (This is called “examination in chief”).

- (ii) Cross-examination

Once (s)he has completed their questioning, you will be questioned by the other party/parties or their representative(s). (This is called 'cross-examination').

(iii) Questions

The Employment Judge and members may then ask you some questions in order to clarify any points about which they are unclear.

(iv) Re-examination

Finally, the Employment Judge may invite the person who questioned you first, to have the opportunity to question you further should (s)he wish, in order to clarify matters which came up when being asked questions by the other side or the Panel. (This is called “re-examination”).

Once the tribunal is satisfied that no more questions require to be asked, the witness will be informed of this by the Employment Judge and (s)he may sit in the gallery to listen to the rest of the case or leave the tribunal room.

The same procedure is then usually followed for the other witnesses and then with the witnesses for the other side.

3. TOP TIPS

Here is our top 20 list of tips for attending at a tribunal as a witness:

3.1 Giving evidence can be a nervous time for witnesses once at the Tribunal. This is normal! The key to giving evidence is to be well prepared. Don't under-estimate the importance of preparation. This should normally include:

- There should be discussion with the solicitor conducting the case - strategy; indication of likely questions and papers to which reference will be made.
- We will routinely prepare a written witness statement, even where this is not required for the actual tribunal, as is the case in England. The witness can then comment on it and become comfortable that it actually reflects their version of events, any issues having been ironed out

on that written statement in advance. Witness credibility is crucial and a witness must own his own statement.

- As your representative, your solicitor will often play "devil's advocate" and put questions/scenarios to you in order to predict areas on which you might be cross-examined. It is important that, in this regard, the witness should not be steered as to what to say in response (coaching witnesses is not permitted). Witnesses should, however, be prepared for cross-examination and sometimes it will also be a good idea to address the potentially weak points which are likely to come up in examination in chief, in advance, in order that the witness will be prepared to deal with those and explain them.

3.2 For worried witnesses there is the old adage that you have nothing to try to "remember" if you are not intending to lie! Always tell the truth. To lie under oath is a criminal offence.

3.3 On the day of the tribunal, the witness can have their witness statement in the waiting room and should re read it and look at the productions so they know what to expect and are familiar with the evidence. Note, however, that as a witness you will not normally be able to take papers with you when you go to the witness table to give evidence. There will, however, be a copy of the bundle on the table, which you may be referred to.

3.4 It is important to get to the Tribunal early and dress in an appropriate manner, which makes you appear professional and competent.

IN - a good suit, polished shoes.

OUT – bright, fussy or joke accessories, e.g. jocular ties, which may detract from your evidence; scruffy clothing.

Cover the tattoos!

Don't have a messy lunch. Is it really worth having spaghetti bolognese or a coronation chicken sandwich only to spend the afternoon fretting about marks on your suit when in the witness box?!

3.5 When you are giving evidence, you should always address your answers to the Tribunal and ensure that you keep good eye contact with the three Panel Members. A note of your evidence will be taken by the Tribunal Members and the representatives. It is important that you do not

talk too quickly or quietly; by keeping an eye on the speed of the Chairman's pen, you can gauge how slowly to speak. If you are giving a particularly long answer, you may wish to pause in order to allow the Chairman to make a full note of your evidence.

- 3.6** It is important that you try and come across as being warm, honest and likeable to the Tribunal. You should try and be yourself and obtain the empathy of the Tribunal. This will ensure that they listen to your evidence and accept your explanations, especially if there are errors in your procedure.
- 3.7** For each question: Listen; Pause; then answer. It is very important that you actually *listen* to the question that you are asked and answer *that* question and do not answer the question that you would like to be asked! If you are evasive, the Tribunal is unlikely to consider you to be an open and honest Witness. The Tribunal will assume that you are being evasive because you have something to hide. This may affect the outcome of the Tribunal decision.
- 3.8** Be helpful to the Tribunal if they are asking you questions but not TOO helpful...if you do not remember you do not remember. Do not *guess* what you think might be the right answer. Just because they are the Tribunal panel, it does not automatically mean they have always to be right - they do sometimes go down the wrong track, given that they may not looked at the papers before the first morning of the Tribunal! This is particularly problematic for the first witness when the Tribunal is finding its feet with the case. Keep your volume up and your pace down!
- 3.9** When giving your evidence, it is essential that you are clear about what you want to say, say it and do not be repetitive, ramble or bore the Tribunal by giving long and irrelevant answers or not answering the question that you are asked. If a question can be answered with a simple 'yes' or 'no' answer or a short factual answer, that is the best way to give evidence. If you feel that a short 'yes' or 'no' will give the wrong impression because it should be 'yes, but' then you should provide this additional information. You should relax, guard against talking too much or giving aimless answers.
- 3.10** Remember to be clear about timings. If you dismissed an employee at a disciplinary hearing the bulk of your evidence may be about the lead up and balancing process in your head AT THAT TIME when arriving at your decision. This is opposed to what you think now in retrospect in relation to the decision (given hindsight and given that the Claimant has dragged the company to tribunal).

- 3.11** If a matter is being put to you, do not accept assumptions or summaries by the other side's representative. If their précis is wrong you need to say so, so that you do not find yourself accepting something that you disagree with. If the question is ambiguous, seek clarification.
- 3.12** When you are being cross-examined, try not to allow yourself to be led into confusion. If you do not understand the question, politely say so. If you are not the correct person to comment on the thing being suggested then politely say so.

KEY MESSAGE:

- LISTEN
- PAUSE
- IF A CLEAR AND RELEVANT QUESTION, SUCCINCTLY ANSWER THE QUESTION (and ONLY the question asked).

- 3.13** If you are referred to 3 separate documents and some conclusion is put to you in respect of those, then you may need to ask for time to review all 3 documents and then state whether you agree with that conclusion. Do NOT just agree to save time.
- 3.14** Remain professional, even if others in the Tribunal room are not! Do not let the cross examiner annoy you and resist the urge to come up with a clever retort etc. The other side's solicitor must put his client's case to you and contradictions in your evidence to you and this may sometimes be done in an unpleasant manner. However, Tribunals hate "smart alics". You should remain composed and professional.

Remember that court room scene in the film, "A Few Good Men" when Tom Cruise goaded Jack Nicholson in the witness box, finally hitting a raw nerve making him blurt out the nail in his coffin... "You can't handle the truth!..." in cross-examination, which Tom Cruise was hoping he'd do all along!

- 3.15** Be calm and dispassionate (on the outside at least!!).
- 3.16** There should be no surprises that come out in your evidence. If at any time prior to giving evidence you have a fear of a skeleton coming out of the closet, mention it to your solicitor/HR

and a strategy will be put in place to deal with it. It may be that the issue is not raised when you are examined in chief, but you can consider how you are going to deal with it if it comes up in cross-examination. **YOU MUST NOT LIE.** Instead you must be honest and credible and your representative can always cover off any issues in Submissions. However, if you come up with a bizarre explanation in order to try to hide the skeleton the Tribunal will spot this and may well find that the other (good bits) of your evidence can be given little weight, owing to a lack of credibility.

- 3.17** If you are having difficulty in answering a question, do not seek assistance from either your representative or other Witnesses. Explain to the Tribunal why you are having difficulty in answering the question and/or ask for the question to be explained. Do not be afraid to ask for a question to be repeated.

- 3.18** You can ask for a comfort break pretty much any time.

- 3.19** If there is a break in you giving your evidence then strictly speaking you **MUST** not discuss your evidence with the solicitor or anyone else and in fact if it is a lunch break it would be best if you and your solicitor did not walk down to lunch together! (This is particularly challenging at the Glasgow Tribunal as all the parties – Judges, solicitors, witnesses and clerks all walk along Bothwell St to the same row of sandwich shops!!).

- 3.20** Credibility is crucial. Tribunals assess people's credibility every day and are generally very good at it. As long as you are clear, credible and honest they will not turn on you on the day or in the judgment.

4. SUMMARY

- Be prepared
- Tell the truth
- Dress appropriately
- Listen; pause; answer
- Don't ramble or bore
- Remain calm and dispassionate
- Credibility is key.

Latest Case Round-Up & Forthcoming Legislative Changes, Including The Equality Bill

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CASE UPDATE

1. HOLIDAY PAY & THE LONG-TERM SICK

HM Revenue and Customs v Stringer (House of Lords, June 2009)

The House of Lords finally ruled in June this year, in favour of the claimants, in the long-running case of *HM Revenue and Customs v Stringer*. You may be interested/saddened to know that the original claim in this case was for £16.14!

This long-running case concerned long-term sick employees who brought claims for their statutory holiday pay in terms of the Working Time Regulations ("WTRs"), having been off work long-term sick and having exhausted their entitlement to sick pay. In 2005, the Court of Appeal held that workers on long-term sick leave had no right to take annual leave during their absence from work and that workers on sick leave throughout an entire holiday year had no right to holiday leave or pay in that year. In addition, any claim for holiday pay had to be brought under the WTRs.

The claimants appealed to the House of Lords, which first heard the case in October 2006 but remitted issues to the ECJ. In January this year, the ECJ ruled that:

- (i) a member state could allow a worker to take paid holiday while off sick or preclude them from doing so **but** in the latter case, a worker must be allowed to take it at a later date;
- (ii) a worker is entitled to a payment in lieu of any untaken holiday on termination of employment; and
- (iii) 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.

The case then returned to the House of Lords and was finally heard on 30 April, with the judgment being published earlier this month. In light of the ECJ's ruling, the Revenue accepted that they were obliged, in terms of the WTRs, to pay Mr Ainsworth the sum claimed for, since his right to payment in lieu of holiday on termination of employment was unaffected by sickness absence.

The only remaining issue for the House of Lords to actually determine, therefore, concerned whether a claim for unpaid holiday can be pursued as an unauthorised deduction from wages claim under the Employment Rights Act 1996, as well as under the WTRs. The House of Lords ruled that it *can*, meaning that a worker can now take advantage of the more generous time limits which apply to unlawful deduction claims.

A claim under the WTRs must be brought within three months of *each* failure to pay the holiday pay or termination payment.

By contrast, a claim for unlawful deduction from wages can be brought within three months *of the last in a series of deductions*, so allowing a claim to go back more than three months if the underpayments form part of a series.

It is, therefore, now clear that:

- An employer must allow statutory holiday entitlement to accrue throughout an employee's sickness absence;
- A worker is entitled to a payment in lieu of any untaken holiday on termination of employment;
- An employer can allow employees on long-term sick leave to take paid annual leave. Indeed, it may well be advisable for employers to ensure this happens, thus preventing significant liabilities for holiday pay accruing over time. Alternatively, an employer may choose to wait to see if an employee brings a claim.

Whilst the House of Lords did not address the question of whether an employee must notify his employer that he is taking annual leave, in order to claim payment, in light of the case law, it is likely that the approach a tribunal will take going forward, is that notice will **not** be required.

The position with regard to carrying forward statutory leave entitlement remains unclear. Whilst the ECJ ruling suggests annual leave accrued by a sick worker cannot be extinguished at the end of the leave year and must be permitted to be carried over, the WTRs do not allow for this.

Ensuring that an employee takes paid holiday while long-term sick will avoid the build-up of holiday entitlement. Otherwise and in any event, as things stand at present, an employer has the option to either:

- Allow an employee to carry forward unused statutory holiday entitlement; or
- Take a robust line, and in accordance with the WTRs, not allow any carry forward of statutory leave entitlement and wait for an employee to make a claim and/or see if the WTRs are amended.

It will be interesting to see whether the WTRs will be amended and/or whether there will be test cases which clarify the position.

There has also been a further twist in the saga that is holiday entitlement and sickness...

Pereda v Madrid Movilidad SA

In the case of ***Pereda v Madrid Movilidad SA*** the ECJ has recently held that the Working Time Directive (No.2003/88) does not preclude national legislation or practices allowing a worker to take annual leave during sick leave (per ***Stringer***). However, where that worker does not wish to do so, annual leave must be granted in a different period, if necessary outside the annual leave period.

The case concerned Mr Vicente Pereda, who worked for MM removing wrongly parked cars from public highways. He was allotted leave from 16 July to 14 August 2007. After an accident at work on 3 July he was unable to work until 13 August. On 19 September 2007 Mr Pereda asked MM to allocate him a new period of paid annual leave as he had been sick during his original annual leave period. MM refused his request without giving any reasons. Mr Pereda challenged this decision in the Spanish court of first instance, which asked the ECJ to determine whether Article 7(1) of the Directive (which provides for the 4 week statutory minimum holiday entitlement) allows a worker in Mr Pereda's circumstances to use his leave on dates different to those originally allocated, irrespective of whether the calendar year to which that leave relates has ended.

The ECJ stressed that Article 7(1) is an important principle of EC law from which there can be no derogation. Although national legislation may lay down conditions for the exercise of this right, or even for the loss of that right at the end of a leave year or carry-over period, the worker must have had an opportunity to exercise that right, per ***Stringer***.

However, the ECJ ruled that in order to allow a worker who is on sick leave during a period of previously scheduled annual leave the full benefit of his annual leave, it is necessary to ensure he has

the right, on request, to take that annual leave during a new period, if he does not want to take it during sick leave. The scheduling of that new period of leave is subject to national law and the interests of the undertaking. However, if the employer cannot agree to the worker's request for a new period of annual leave, it must grant an alternative period of annual leave, even though this may fall outside the reference period for the annual leave in question.

This case therefore supports the implication in *Stringer*, that a worker who does not take their holiday entitlement owing to sickness, should be allowed to carry it forward to a subsequent leave year.

It is interesting to be aware that the ECJ rephrased the original question put to it by the Madrid Court and its answer to that question, has gone much further than the question itself. The question asked by the Madrid Court was specifically based on the assumption that the sick leave resulted from an event (an accident at work) "**which happened before that period of leave [ie the holiday] began**". The Court's rephrasing of the question and its answer are both much wider. The ECJ appears to cover not only the situation which gave rise to this case but also a situation where a worker falls ill **while he is away on holiday**.

It seems that the ECJ's conclusion is therefore that a worker is not only entitled to postpone holiday because of sickness (as in this case) but also provides that if he falls sufficiently ill while absent on holiday to qualify for "sick leave" he will be entitled to insist on being allowed additional holiday to make up after their recovery.

The problem with this decision is that the danger of abuse is evident: an employee could seek to gain additional holiday entitlement by telling their employer they were sick while on annual leave. However, until the courts provide further clarification, it will be at least arguable that employers should be entitled to require workers to produce appropriate evidence of sickness while on holiday and that it would have rendered them unfit for work, before allowing workers to reallocate holidays. Depending on the wording of annual leave/sickness absence policies and procedures, an employer could, for example, require an employee to phone in sick each day of their holiday (where that is the case).

2. AGE DISCRIMINATION

The Queen on the application of Age UK v Secretary of State for Business, Innovation & Skills (High Court, September 2009)

As you will be aware, Age Concern England (now "Age UK"), challenged UK law to the extent that it allows employers to compel workers to retire at 65, on the basis that to allow this is inconsistent with the EU Equal Treatment Framework Directive and is age discrimination.

Back in March, the European Court of Justice agreed with the Advocate-General's opinion given last year and ruled that a designated retirement age ("DRA") of 65 was *capable* of being objectively justified and it was for the UK courts to decide whether that test was met.

The case returned to the High Court, which has now ruled that the DRA is lawful, the UK having succeeded in objectively justifying it as a proportionate means of achieving a legitimate aim. The question is, for how long...

The Court ruled that the government had proved that a DRA achieved legitimate social policy aims such as securing the integrity of the labour market and its short-term competitiveness. As to proportionality, the Court considered both:

(i) the adoption of a DRA; and

(ii) the adoption of age 65 as the DRA.

In relation to (i), the Court, for example, contrasted the use of a DRA with a *mandatory* retirement age. Whilst the latter affords no discretion to either employee or employer, a DRA does not *require* an employer to dismiss on grounds of age/retirement but merely *enables* it to do so lawfully when that age is reached. In the circumstances, the Court did not consider this to be a disproportionate way of giving effect to the social aim of labour market confidence.

With regard to (ii), the Court recognised that there were powerful reasons why a DRA higher than 65 could have been adopted, such as, creating a cultural change in relation to age discrimination and retirement. In addition, the Court commented that a DRA of 65 seemed "*particularly odd*" in light of the government's intention to increase pensionable age to 68 in the future and recognised that the use of, for example, age 68 as the DRA would not have undermined or diminished any of the government's objectives in adopting a DRA at all.

However, the Court also had regard to the fact that a DRA of 65 had the support of the preponderance of consultees in the consultations on the Regulations and continuing practice elsewhere in the EU. In addition, no one was making a case for age 68 and age 70 had commanded little popular support in the consultations. Finally, an appropriate margin of discretion had to be afforded to government in the selection of a DRA. The Court therefore concluded that setting the DRA at 65 was within the competence of the government in implementing the Directive and was not void.

Interestingly, the Court placed importance on the fact that the case had to be considered on the basis of when the Regulations came into force, i.e. 2006 and not *now* and also that a review of the Regulations was imminent. The Court indicated that if a DRA of 65 had been introduced in 2009, it would **not** have found it to be proportionate, since it *"creates greater discriminatory effect than is necessary on a class of people who both are able to and want to continue in their employment. A higher age would not have any general detrimental labour market consequences or block access to high level jobs by future generations. If the selection of age 65 is not necessary it cannot therefore be justified..."*

Save for one reference to the "changed economic circumstances", it is not entirely clear, however, why this reasoning would not have applied in 2006 to render a DRA of 65 disproportionate.

In any event, the decision confirms that employers *can* lawfully retire employees at age 65, provided this is done in accordance with the statutory retirement procedure and means that the numerous employment tribunal claims which have been sisted, pending the outcome of this case, are likely to be dismissed. The DRA is, however, to be reviewed in 2010 and is unlikely to remain at 65, if at all, in light of Mr Justice Blake's view that: *"in the light of changed economic circumstances and the generally recognised problems that a longer living population creates for the social security system, the case for advancing the DRA beyond the minimum age of 65 at least would seem to be compelling."* He went on to say that he could not *"presently see how 65 could remain as a DRA after the review"*.

LEGISLATION UPDATE

3. THE EQUALITY BILL

3.1 Introduction

The long-awaited Equality Bill was published at the end of April this year. 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.

Note: The Bill is something of a "moving target" and various changes have already been introduced in the course of the Parliamentary process to date and there are indications that the Government intends to "look again" at a number of provisions.

3.2 Key provisions

(a) "Protected characteristics"

The Bill refers to "protected characteristics" – that is, the grounds on which discrimination will be deemed unlawful. These are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnerships
- Pregnancy and maternity (included as a separate category for the first time)
- Race
- Religion or belief
- Sex
- Sexual orientation

Generally, the definitions replicate those which apply at present. One change worth being aware of, however, is that protection from transgender discrimination under the Bill extends to those who propose to undergo, are undergoing or have undergone a gender reassignment process, whether or not the process involves medical supervision. At present, under the Sex Discrimination Act 1975 (as amended), only gender reassignment under medical supervision is covered.

This change means, for example, that a man who chooses to present as a woman but does not seek medical advice or undergo surgery will be protected from discrimination.

(b) New definition of direct discrimination

A new definition of direct discrimination will apply to all the protected characteristics.

A will discriminate against B if, "*because of a protected characteristic*", A treats B less favourably than A treats or would treat others. This replaces the "on the grounds of" formulations currently found in the equality enactments and there is no longer any reference to the protected characteristic of any particular person, as there is under the current age, sex and disability legislation. This allows direct discrimination to be interpreted very widely.

For example, at present, under the Employment Equality (Age) Regulations 2006, direct discrimination is defined as occurring where A treats B less favourably than others "on grounds of B's age". The Equality Bill's reference to treatment "because of [age]" removes the need to consider whether the complainant's age was the reason for the treatment complained of.

This new definition is also designed to cover discrimination by association (in relation to any protected characteristic), bringing the law into line with ***Coleman v Attridge Law***. For example, if A treats B less favourably because B cares for an elderly relative, A can be held to have discriminated against B *because of age*, even though B's age is not the reason for the treatment. Such a claim is not currently possible in terms of the Employment Equality (Age) Regulations.

In addition, the wide definition of discrimination will also cover discrimination on the basis of a *perceived* protected characteristic. There is however, an exception in respect of marital or civil partnership status. In this regard, the Bill provides that an individual may only claim discrimination in employment on the basis of marriage or civil partnership if the reason for the treatment complained of is that the individual is married or a civil partner. A *perception* that he or she is married or a civil partner, or his/her association with someone who is married or civil partnership status, will **not** suffice.

Note, however, that as regards pregnancy discrimination, a woman will only have to show that she has been treated "*unfavourably*" rather than "*less favourably*".

(c) Indirect discrimination

The Bill adopts a standard definition of indirect discrimination, that is: "A" discriminates against "B" if A applies a provision, criterion or practice, (PCP) to B which is discriminatory in relation to a relevant protected characteristic of B's. Such PCP is discriminatory if it is applied to others with whom B does not share the characteristic, it puts those with whom B shares the characteristic at a particular

disadvantage when compared with persons with whom B does not share it, it puts B at that disadvantage, and that PCP is not a proportionate means of achieving a legitimate aim.

For the first time, this will also apply to disability discrimination, as well as all the other protected characteristics (save for pregnancy and maternity).

Note also that all forms of race discrimination will be covered, including colour and nationality (presently excluded owing to an anomaly in the current legislation). Otherwise the definition of indirect discrimination is intended to be similar to that in existing legislation.

(d)Discrimination arising from disability

Following consultation, the government accepted that indirect discrimination alone would not solve the problem created by 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). It has therefore opted to introduce a new measure, "*Discrimination arising from a disability*", 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.

Unlike the current DDA provision on disability-related discrimination, there is no requirement for the disabled person to establish that their treatment is less favourable than that experienced by a comparator; the focus, instead, is on whether the treatment amounted to a detriment, i.e. a disadvantage, for the disabled person. As a result, the main issue in ***Malcolm***, i.e. what comparator should be used, is avoided. Instead, the focus is on whether the treatment amounts to a detriment, and whether it can be justified.

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 indirect discrimination provided for in the Bill and the duty to make reasonable adjustments is also retained.

NB: We understand that discussion at the Committee stage reflected a concern among interested parties that the wording of the Clause (15) may have been drafted too widely and the Solicitor General has announced an intention to attempt to redraft the definition in time for the Report stage of the Bill's progress through Parliament.

(e) Extended public sector equality duty

In place of the three existing public sector equality duties concerning race, disability and sex, there will be a new duty for certain public bodies when carrying out their functions and for others when carrying out public functions, to have due regard to eliminating unlawful discrimination, harassment or victimisation, advancing equality of opportunity for those with a protected characteristic and fostering good relations. The new duty will cover 8 protected characteristics, adding coverage of age, religion or belief, sexual orientation, gender reassignment, and pregnancy and maternity.

(f) Equal Pay

The Equal Pay Act is substantially replicated in the Bill and there are no significant changes to existing equal pay law. The Bill does, however, make minor changes to clarify the law. These include:

- the "genuine material factor" defence will become a "material factor" defence, on the basis that the word "genuine" added nothing;
- the provision specifically states that the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

Whilst the Bill does not introduce the use of hypothetical comparators in equal pay claims, a new provision *does* allow claims to be brought where a person can show evidence of direct sex discrimination in relation to contractual pay but is unable to rely on a sex equality clause due to the absence of a comparator doing equal work. The example given in the Explanatory Notes is of an employer telling an employee: "I would pay you more if you were a man".

(g) Gender pay gap information

The Bill introduces a power to require employers with at least 250 employees (150 for public authorities), to publish information on differences in pay of male and female employees. Note, however, that the government has committed not to use this power before 2013. In the meantime,

employers will be encouraged to provide such information voluntarily and, if employers comply, there may be no need to activate the provision. The government has indicated that it is working with employers to devise an appropriate format for the provision of the information and will monitor progress.

(h) Pay secrecy clauses

The Bill outlaws pay secrecy clauses so that employers will no longer be able to prevent staff discussing salaries with their colleagues. In addition, any "relevant pay discussion" will be designated as a protected act for the purpose of victimisation. The example given is:

"A female employee thinks she is underpaid compared with a male colleague. She asks him what he is paid and he tells her. The employer takes disciplinary action against the man as a result. The man can bring a claim for victimisation against the employer for disciplining him".

Note, however, that, as currently drafted, the provision only appears to protect an employee in relation to discussions about pay with colleagues in connection with potential discrimination. More general discussions about pay matters will not be protected.

(i) Harassment

The Bill will establish a freestanding test of unlawful harassment and the protection which is to be widened such that it concerns conduct "related to" a relevant protected characteristic (as opposed to "on the ground of "). This means there will be no need for a particular person's characteristic to be the reason for the unwanted conduct to trigger liability.

In this regard, it is worth being aware that marriage and civil partnership and pregnancy and maternity or not "relevant" protected characteristics for this purpose and so are not covered as potential grounds of harassment. Whilst this may at first appear to be a strange omission, these grounds are not covered by the current domestic or European law.

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.

Finally, in this regard, the Bill also extends protection against racial harassment to conduct related to colour or nationality as well as race or ethnic or national origins. Colour or nationality harassment are not currently protected.

(j) Victimisation

The provisions concerning victimisation in the Bill take a slightly different approach to the equality enactments as currently drafted. At present, a claimant must show that an employer has treated him less favourably than he treats or would treat other persons in the same circumstances and did so by reason that the claimant has done or intends to do a protected act. Under the Bill, however, the claimant will have to show that he or she has been **subjected to a detriment** because he or she has done or intends to do a protected act.

The Bill therefore removes the need for the tribunal to construct an appropriate comparator since, if the claimant can show detriment, then the tribunal can move straight to considering the reason for it. Note, however, that in many cases, a comparison of the claimant's treatment with that of an appropriate comparator will remain an effective way of establishing the reason for the treatment.

(k) Positive action

This is one of the areas to have received most press attention.

The Bill extends the scope of positive action to allow employers to appoint a person from an under-represented group in preference to another, provided the candidates are equally suitable.

This will only apply to recruitment and promotion and where an employer "reasonably thinks" that people who share a protected characteristic are disadvantaged or that a protected group is disproportionately badly represented. Positive discrimination (i.e. employing someone because of a particular characteristic, regardless of merit), will remain unlawful.

Note also that an employer may only rely on this provision if A is "as qualified" as B to be recruited or promoted and the employer *"does not have a policy of treating people in the protected group more favourably in connection with recruitment or promotion than persons who do not share it."*

It will be interesting to see whether employers use this provision as it is likely employers will be concerned that they could face discrimination claims from unsuccessful candidates if they rely on it.

(l) Age discrimination

At present, there is no legislation which protects against age discrimination outside the workplace. The Bill makes provision for the protection of people over 18 against age discrimination when providing services or carrying out public functions. The aim is to bring about phased implementation of legislation for financial services (including insurance) and all other services, except health and social care, by 2012.

(m) Combined discrimination: dual characteristics

The introduction of a "combined discrimination" provision is designed to plug a gap in current discrimination legislation, a gap which was highlighted in the case of *Bhal v The Law Society* back in 2004, in which the Court of Appeal held that discrimination experienced as a result of a number of characteristics must be considered on each individual ground, for example, sex or race. This confirmed that claimants who had suffered "multiple discrimination", where the discrimination had involved more than one protected characteristic but in an inseparable way, were not protected in terms of discrimination law.

Example: A TV presenter who is dismissed because she is a woman over 50 when she would not have been dismissed if she had been a younger woman or a man of the same age. At present, such a woman would have to bring both age and sex discrimination claims and these would fail if she could not show that the principal reason for her dismissal was either age or sex.

So, new Clause 14 of the Bill: "Combined discrimination: dual characteristics", allows a claim to be brought for less favourable treatment on the basis of a combination of two (but no more) of the following protected characteristics: age, disability, gender reassignment, race, religion or belief, sex or sexual orientation. For such a claim to succeed, it will not be necessary that there is sufficient evidence to support a claim based on either of the protected characteristics individually.

The relevant provision states:

"A person (A) who discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics".

NB: marriage and civil partnership, and pregnancy and maternity, are not potential grounds of dual discrimination, despite being "protected characteristics" in terms of the Bill.

It will only be possible to bring a claim of **direct** dual discrimination. Claims for indirect discrimination and harassment based on dual discrimination will not be possible. It will, however, be possible to bring separate claims for any individual protected characteristic, in addition to a dual discrimination claim.

The Bill, if it becomes law, is expected to start coming into force in October 2010, although who knows what impact a General Election in May 2010 could have.

4. TRANSFER OF MATERNITY LEAVE TO DADS

The Government has announced a consultation on allowing new mothers to transfer some of their maternity leave entitlement to the father. Under the proposals, mothers with maternity leave outstanding in the second six months of a child's life will be able to transfer up to six months of maternity leave to the father.

Up to three months of that leave will be paid at the same rate as Statutory Maternity Pay if the leave is taken during the mother's 39-week maternity pay period. Consultation on implementing regulations will begin shortly.

The Government intends that the law will be in force by **April 2010** and will be **effective for parents of children due on or after 3 April 2011**, to allow employers time to adjust to the measures.

As regards administering the new system, parents will be required to 'self certify' by providing details of their eligibility to their employer. However, employers and HMRC will both be able to carry out further checks on entitlement if necessary.

5. IN FORCE FROM 1 OCTOBER 2009

5.1 National Minimum Wage

As happens each year, the national minimum wage rates have been increased, as follows:

- For workers aged 16 and 17: £3.57 (from £3.53).
- For workers aged 18 – 21: £4.83 (from £4.77).
- For workers aged 22 and over: £5.80 (from £5.73).

5.2 Increase in a "week's pay"

Following the announcement in the Budget, the statutory limit on a week's pay for the purposes of calculating statutory redundancy payments has been increased from £350 to **£380**, where the effective date of dismissal occurs on or after today. The increase will also apply to other things to which the weekly limit also applies, for example, the basic award for unfair dismissal.

As a result the maximum statutory redundancy payment/basic award will now be £11,400 (previously £10,500).

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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