Parker & Co

Employment Update

November 2008

INTRODUCTION

This quarter's update focuses on the following topics: age discrimination, changes in immigration rules and maternity related legislation. We also look at claims for personal injury induced by stress at work, and we review yet more cases on the status of agency workers.

Where you see links in blue in the pdf form, you can click on them to be taken to the appropriate site. If you have any questions arising from the articles, please call or email us and we will be happy to discuss them with you.

CONTENTS

IMMIGRATION – Tier 2 – The New Work Permit

The UK BA has now confirmed the requirements for leave to remain or to enter the UK under Tier 2 of PBS, which will replace the current work permit system from 27 November 2008. To qualify under Tier 2, the job must meet minimum skill levels, be remunerated at the appropriate rate and either pass the Resident Labour Market Test, be an intra company transfer (ICT) or be in short supply.

ICT's will remain a relatively straightforward route for employees with 6 months' service overseas provided their employer has a link of common ownership with the UK sponsor. For non ICT entrants, the role must either be listed as a shortage occupation or an employer will need to advertise in accordance with sector specific Codes of Practice to demonstrate that there are no suitably qualified EEA nationals who could perform the role.

Scoring Points

Sponsorship Certificate		**Qualifications**		**Prospective UK Earnings**	
Shortage Occupation	50	Accepted sub degree level	5	£17,000 – £19,999	5
RLMT	30	Bachelors or Masters	10	£20,000 – £21,999	10
ICT	30	PhD	15	£22,000 – £23,999	15
Switch from post study	30			£24,000 +	20
Maintenance					10
English (unless initial entry as ICT)					10
70 points (including 20 for Maintenance and English) needed					

ARTICLE CONTINUES ON PAGE 2 ►

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IN BRIEF

TIME OFF FOR DEPENDANTS
RBS v Harrison

On 8 December 2006 the Claimant became aware that her childminder was unavailable on 22 December. The Claimant tried to make alternative care arrangements but was unsuccessful. She therefore asked the Respondent for the day off, under section 57A(1)(d) of the Employment Rights Act 1996. The request was refused.

Notwithstanding this, the Claimant stayed at home to look after her children. The Respondent disciplined her for doing so, arguing that she had had two weeks to make arrangements and that therefore this was not sudden or an emergency.

The Employment Tribunal found that she was entitled to take time off, and considered that the disciplinary action amounted to an unlawful detriment.

The EAT held that there was no grounds to support the insertion of the words "sudden" and/or "in an emergency" into section 57A(1)(d) and that the two weeks period did not make taking the time off unnecessary.

IMMIGRATION - Tier 2 – The New Work Permit, continued from page 1

An employee must score 70 points to qualify for Tier 2. Points are awarded for holding a sponsorship certificate, prospective earnings and qualifications. Tier 2 applicants must also meet a new maintenance requirement and have basic English language skills.

Maintenance
Applicants must prove they have £800 in personal savings, together with a further smaller sum for each dependent, held at the required level for at least 3 months prior to the application date. Alternatively, an A rated sponsor may provide a written undertaking that it will maintain and accommodate the employee (but not dependants) during the first month of employment.

The maintenance rule will be phased in, meaning applicants who apply in the first 4 months of Tier 2 only need to show the required funds are available immediately prior to applying.

English ability
Applicants need to demonstrate that they can speak English to a minimum standard. Certain nationals of majority English speaking countries, including Australia, Canada and the USA, are exempt and are automatically awarded 10 points. All other applicants can meet the requirement if they hold a UK equivalent degree taught in English or by passing an approved English language test. ICT employees do not, however, need to speak English unless staying in the UK for more than 3 years.

Application Process
Once an employer is satisfied that an employee can meet the requirements of Tier 2, a sponsorship certificate can be issued. This is used by the employee to apply for entry clearance (if overseas) or leave to remain (if in the UK). Initial Tier 2 leave is limited to 3 years, meaning new entrants must extend their leave to be eligible for settlement.

Transitional arrangements have also been recently announced for those currently in the UK as work permit holders to enable them to extend their leave under Tier 2.

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IN BRIEF

DISCRIMINATION OCCURING ABROAD

In *Traditions Securities and Futures SA v X*, Claimant X brought a claim alleging sex discrimination over a five year period, three of which she had spent in Paris, on the basis that such discrimination was a "continuing act" under section 76 of the Sex Discrimination Act 1975 ("SDA"). In 2005 the SDA was amended so that employment is to be regarded as being at an establishment in Great Britain "if… the employee does his work wholly or partly in Great Britain". Prior to 2005 this was not the case and at the time of the alleged acts of discrimination in Paris, the Employment Tribunal had no jurisdiction.

Jurisdiction cannot retrospectively be acquired as a result of alleged discrimination while working in London. Although the whole period of employment should be considered, if at the time of the discrimination, the Claimant was excluded by the jurisdictional limits of the SDA then they cannot form part of a UK claim. Section 76 relating to "acts extending over a period" of time, is relevant when deciding whether a claim has been brought in time, as the last act in a continuing act sets the time limit running. Section 76 does not determine the issue of jurisdiction.

HIGH COURT INJUCTIONS & RESTRICTIVE COVENANTS

UBS Wealth Management (UK) Ltd & anor v Vestra Wealth LLP & ors (HC)

The High Court granted UBS a springboard injunction following a mass poaching of staff in the wake of one of its former senior managers establishing a new business. Despite the fact that the manager was no longer subject to restrictive covenants after leaving the employment of UBS, the HC held that he was not free to assist and encourage the staff of UBS to *"act collectively to sabotage UBS in breach of their own duties of loyalty and fidelity"*. The knockout blow in this case was the alleged secret plotting and en masse resignations. In making its decision the HC also rejected an argument that staff were so dissatisfied that they would have left anyway.

The HC confirmed that a springboard injunction is not confined to cases in which confidential information is used to gain an advantage, it also applies where the unfair advantage is gained through a breach of contract. In this case the implied duty of fidelity after the employment had terminated had been breached. The case settled but this preliminary ruling will be useful to those finding themselves in similar circumstances.

SG&R Valuation Service Co v Boudrais and ors, High Court

The High Court ruled that employers may place employees on garden leave even where there is no express contractual right to do so but only if there is clear evidence of actual (as opposed to anticipated) wrongdoing on the part of the employee.

In this case, two senior employees resigned to join a competitor. Immediately after SG&R found emails revealing their planned departure and poaching of confidential information and potential business opportunities. They were put on garden leave, prompting them to resign with immediate effect claiming a fundamental breach of contract (as there was no contractual right to put them on garden leave). SG&R applied for an interim injunction to stop them joining a competitor for the remainder of their notice periods.

In reaching its decision the HC considered whether there was a right to work because they had specialist skills and any removal from the market for a substantial period would result in their skills going stale. Further, a significant part of their remuneration included a bonus payment. Their inability to work during their notice period would affect their earning capacity for that period. To succeed, an employer will need to provide clear evidence of the employee's wrongdoing and this will often be difficult to find. Therefore it is prudent to include a garden leave clause in the employee's contract.

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TEMPORARY AGENCY WORKERS DIRECTIVE APPROVED

In our last Employment Update in August, we outlined details of the draft European Directive giving agency workers equal rights, after 12 weeks, comparable to those enjoyed by permanent employees including equal treatment in relation to pay, family-related leave and access to collective facilities such as child care. The Directive has now been approved by the European Parliament and must now be implemented into UK law within three years.

NAMES OF ALL RESPONDENTS IN THE EMPLOYMENT TRIBUNAL TO BE DISCLOSED

The Information Commissioner's Office has announced that the names and addresses of all organisations involved in Employment Tribunal cases must be made public under the Freedom of Information Act 2000. The ICO considers that disclosure is in the public interest and this is a return to the pre-2001 position. At the moment details of individuals involved in cases will not be published prior to any hearing.

PERSONAL INJURY & STRESS-RELATED CLAIMS
Dickens v O2 Plc

In determining whether an employee has a valid claim, the court will need to be satisfied that the employer owes a duty of care, that the employer has breached the duty, that the employee has suffered a serious injury, that the employer's breach caused the illness and that the particular type of injury/illness was a reasonably foreseeable consequence.

Ms Dickens was long-serving and, importantly, had been promoted to the limits of her capabilities in a very demanding role with a lack of training. There were warning signs over an 18-month period that she was not coping well with aspects of her job. Her employer, O2, had removed certain duties from her because she was not able to deal with them. She was undergoing counselling with her doctor because it was thought that her IBS was stress-related (which O2 was aware of). Ms Dickens had asked her manager about moving to a less stressful job, explaining to him that the work was too much and that she needed help. She was late for work almost every day, as she had difficulties getting up as she was exhausted.

However, although all of this had taken place, the key date was very near the end of the 18-month period, when Ms Dickens notified her manager that she was at the end of her tether, could not cope any longer and did not know how much longer she could carry on without being off sick, and stated that she needed six months off work. Not long afterwards she suffered a breakdown. O2's failure to take action at this point was deemed by the Court to be the point at which it breached its duty of care towards her. At this point it should have been clear to O2 that Ms Dickens was suffering from palpable extreme stress and was close to cracking up. Whilst the warning signs over the prior 18 months were relevant and important to take into account in determining knowledge, O2's failure to take action at those times did not breach its duty towards the employee.

While this case does not change the position much from previous practice, the facts of the case are a useful illustration of how the Court will approach such cases. The Court followed the settled case law in determining responsibility and establishing the employer's liability.

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European Commission proposes new maternity rights

Many of the proposals will not impact on the UK where women enjoy greater rights than the minimum required under European Law. However, some proposals would have an impact and include:

- increasing the amount of compulsory maternity leave to 6 weeks;

- offering greater flexibility to women in determining when to take maternity leave. Women would no longer be obliged to take a portion of their non-compulsory maternity leave before childbirth, as is currently the situation in a number of Member States; and

- offering women greater protection during and on their return from maternity leave. If implemented women would be able to request written reasons for dismissal for up to six months after childbirth. At present women can only request such reasons if they are dismissed while on maternity leave.

The Commission hopes that agreement can be reached in 2009. Member states would then have two years to implement the changes.

CHANGES TO MATERNITY LEAVE

In October, there were some changes to employee maternity and adoption leave rights meaning that maternity policies will need to be amended. The distinction between ordinary maternity leave (OML) and additional maternity leave (AML) for the purposes of non-pay benefits under the contract of employment has been eliminated. Prior to October, during OML, terms and conditions, except those relating to normal remuneration continued to apply.

By contrast, during AML an employee was only entitled to a few of the normal contractual rights, such as maternity-related remuneration, notice of termination of employment and compensation in the event of redundancy. The High Court has now accepted the argument that there is no reason why OML and AML should be treated differently and the distinction has therefore been removed.

The Sex Discrimination Act 1975 (Amendment) Regulations 2008 SI 2008/656 give women the right to the same terms and conditions during AML as during OML. The same change has been made in respect of adoption leave.

The effect of the Regulations is that employers who remove benefits during AML that are available during OML, such as company cars, gym membership and health insurance are likely to face claims of unlawful discrimination. This is a significant change, and likely to have cost implications for employers.

There has been some debate as to whether pension contributions are to be considered a benefit or remuneration for these purposes and therefore whether it is payable for 52 weeks or 39 weeks. At the moment based on the advice from the Department for Business, Enterprise and Regulatory Reform (formally the DTI), it appears that pension contributions will only be payable for 39 weeks.

There has also been a minor change to the law on pro-rata discretionary bonuses during maternity leave. Where a woman has taken maternity leave for part of the period to which the bonus payment relates, EU law permits the employer to reduce her bonus pro-rata to take account of the time she has spent on maternity leave, but any compulsory maternity leave period must be treated as time worked for these purposes. The effect is that compulsory maternity leave is now counted as working time for the purposes of bonus allocation.

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IN BRIEF

DISCRIMINATION BY ASSOCIATION
Saini v (1) All Saints Haque Centre (2) Mr D Bungay (3) Mr S Paul

The EAT has held that Regulation 5(1)(b) of the Employment Equality (Religion or Belief) Regulations 2003 ("Regulations") will be breached where an employee is harassed because *someone else* holds certain religious beliefs. Both the second and third Respondents, who belonged to the Ravidassi faith, resented the fact that they had lost their posts while non Radivassis had been retained by the Hindu manager, Mr Chandel.

The second and third Respondents (in their capacity as members of the Board) began a disciplinary investigation. The Centre subjected Mr Saini to investigations and interviews and Mr Saini felt that he was being bullied and intimidated into providing the Centre with "ammunition" to take action against Mr Chandel. Mr Chandel was dismissed summarily for misconduct and Mr Saini resigned, claiming constructive dismissal.

The EAT held that Mr Saini has been discriminated against under the Regulations and it did not matter that he was harassed because Mr Chandel was Hindu and not because he himself was.

AGE DISCRIMINATION AND REDUNDANCY

Rolls Royce PLC v Unite the Union

The High Court has held that two collective agreements that set out an approach to redundancy that gives points for length of service in the selection process are lawful under the Employment Equality (Age) Regulations 2006 ('Age Regulations').

Rolls Royce PLC and Unite entered into collective agreements in respect of redeployment and redundancies at two factories. The Assessment Matrix provided that employees could score between four and 24 points and were assessed in various categories such as expertise and versatility. They then received one point for each year of continuous service. Those with the lowest scores were selected for redundancy.

Rolls Royce argued that using length of service as a criterion in its redundancy Assessment Matrix was unlawful age discrimination which could not be justified. Unite argued that although the criterion was lawful under regulation 32 of the Age Regulations, it was otherwise justified. The parties applied to the High Court, under Part 8 of the Civil Procedure Rules, to determine whether:

- Length of service, as a selection criterion, was a "benefit" under regulation 32(1) of the Age Regulations and therefore within the exception for service-related benefits awarded by reference to a length of service criterion of up to five years; and, if it was, whether it fulfilled a business need under regulation 32(2);
- Using length of service as part of its selection matrix was a proportionate means of achieving a legitimate aim within regulation 3(1) of the Age Regulations.

The High Court held that Rolls Royce's use of length of service as part of its matrix for selection for redundancy was lawful. For the purposes of regulation 32, awarding points for length of service as part of the matrix was the award of a benefit, in this case remaining in employment while others lose their jobs.

The High Court also held that Rolls Royce's selection matrix pursued the legitimate aim of achieving a peaceful and fair selection process that had been agreed with a recognised trade union for the purposes of regulation 3 of the Age Regulations. The criterion of length of service respects the loyalty and experience of the older workforce and protects the older employees from being put into the labour market at a time when they are less likely to be able to find alternative employment. It could therefore be justified.

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IN BRIEF

HEYDAY

The Advocate-General has handed down his opinion in the Heyday Appeal. Heyday argues that the UK's mandatory retirement age of 65 is age discriminatory. The AG concluded that:
-the relevant European Directive applies to national rules which permit employers to dismiss employees aged 65 and over by reason of retirement;

- Member States may introduce legislation allowing different treatment constituting discrimination on grounds of age if the legislation is a proportionate means of achieving a legitimate aim; and

- a rule which permits employers to dismiss employees aged 65 or over by reason of retirement, can be justified if it is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and if the means implemented to achieve the aim of public interest are appropriate and necessary for the purpose.

The AG's opinion is not binding but an indication of the ECJ's decision (expected in December). Whether or not a mandatory retirement age of 65 is lawful is still an issue for national courts to decide.

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NEW CASES ON THE STATUS OF AGENCY/CONTRACT WORKERS

Autoclenz v Belcher & Ors
The Claimants worked as car valets for the Respondent and were paid for each car cleaned. The terms of this arrangement were set out in an agreement which made clear that the Claimants were subcontractors and allowed a valet to provide a substitute to carry out his/her obligations. The valets were not obliged to provide their services on any particular occasion and the Respondent offered no guarantee that it would engage their services. The Tribunal held that the Claimants were employees, as in reality it was not intended that the substitution clause would ever be invoked.

The EAT disagreed holding that the Claimants were "workers" and not employees. The EAT considered that there must be clear evidence that the parties intended to mislead and that the substitution clause was in fact a sham before the Employment Tribunal can look behind the terms of the agreement. The EAT considered that the Claimants were workers as they provided personal services under a contract and the Respondent was not a client or a customer of the valets or their business undertaking. While workers have more limited employment rights than employees and are not protected from unfair dismissal, they are entitled to protection in respect of the national minimum wage and holiday pay.

Redrow Homes (Yorkshire) Ltd v Buckborough
Redrow Homes appears to go further than Autoclenz. In Redrow Homes, the EAT held that a contractual term may be considered a sham where the parties intend to deceive a third party, but in addition, it considered that such a term may also be a sham where the parties simply do not intend the term to apply. The Claimant was a bricklayer for Redrow Homes. The agreement allowed him to provide a substitute to carry out the work. The Claimant claimed that he was entitled to holiday pay. In order to be entitled to holiday pay the Claimant needed to establish than he was a "worker".

The Tribunal held that the Claimant was a worker as the substitution clause was a sham, it was clear that he was to carry out the work personally. In any event, the Tribunal held that he was a worker, required under the substitution clause ensure that the services were provided, even if it was by someone else. The EAT agreed holding that a sham could also occur where the parties did not intend the provision to constitute an effective obligation. In relation to the meaning of "worker" the EAT agreed with the Tribunal as it considered that Parliament must have intended "services" to have a wider meaning that simply "work".

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WHAT'S COMING UP?

1 April 2010: Statutory maternity and adoption pay will increase from 39 weeks to 52 weeks in respect of babies due on or after 1 April 2010.

1 April 2010: Paternity leave and pay will increase in respect of babies due on or after 1 April 2010.

DISCLAIMER
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ACAS CODE – THE STATUTORY PROCEDURES

As reported in our January 2008 Employment Update, the Government has been consulting over the Employment Bill 2008 which includes abolishing the universally unloved statutory disciplinary and grievance procedures.

The Bill received Royal Assent on Friday 14 November and is now the Employment Act 2008. It is expected to come into effect on 6 April 2009. In the meantime, ACAS has published a draft of its new Code of Practice on Disciplinary and Grievance Procedures, which is available on its website at:
http://www.acas.org.uk/CHttpHandler.ashx?id=961&p=0

Although the basic steps of the current statutory procedures are likely to be abolished in law, they are still part of the draft ACAS Code, which recommends an increase of up to 25% in compensation if employers fail to follow them. However, some practical differences are that the Code expressly does not apply to dismissals on the expiry of a fixed-term contract and in a redundancy situations, whereas the current statutory procedures do apply in such cases (unless the redundancy takes place following a collective consultation), and that it does not require employees to lodge a grievance before issuing a Tribunal claim.

The Code does not have binding legal status but will be a benchmark for employers and the Employment Tribunals. As such we do not expect that the changes should significantly alter employers' approaches to dealing with disciplinary and grievance matters in practice, although they will certainly make technical differences at the Tribunal stage. Employers should not need to make wholesale changes to their grievance and disciplinary procedures to adapt them for the abolition of the statutory requirements, since it will still be necessary to demonstrate that a fair and thorough process is followed. However, some additional flexibility can be included in internal procedures to allow for the statutory procedures no longer being mandatory and we will advise our clients in due course on the appropriate amendments.

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