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Employment Update

June 2011

Welcome to the latest edition of Parker & Co's Employment Update. We focus on the most recent proposed changes to employment law, an EAT decision on redundancy selection criteria and a High Court case on negligent misstatement. We also consider new Regulations which will give rights to agency workers in October this year.

Employment Law Reform

Coalition Government consulting on various changes to employment law.

The Coalition Government is continuing its review of employment law. We are awaiting the outcome of the Resolving Workplace Disputes Consultation focusing on Tribunal reform, which closed on 20 April 2011. The latest consultation focuses on flexible parental leave, flexible working, working time and equal pay.

In its latest consultation document, "Consultation on Modern Workplaces", the Coalition Government makes a number of significant proposals particularly in the area of flexible working:

- **Flexible parental leave**: Maternity leave will be reduced to 18 weeks and the current statutory maternity pay ("SMP") will be retained for this period. In addition, the current arrangements in respect of paternity leave will also be retained. The remaining 34 weeks of what is currently maternity leave will be reclassified as parental leave and will be available to either parent. However, each parent will be given exclusive use of 4 weeks' parental leave which may be taken consecutively or concurrently. This would allow for example, a father to add 4 weeks of parental leave to his paternity leave. Currently SMP is available for 39 weeks and therefore 21 weeks of parental leave will be paid and the existing SMP arrangements will be retained. The proposals also include greater flexibility in taking parental leave. Employees will be able, if their employer agrees, to take leave in blocks of days rather than weeks and use parental leave to facilitate part-time working.

Employment Law Reform .....continued

Leave for parents, flexible working rights and holiday entitlement are on all on Coalition Government's radar.

- **Flexible working**: The right to make a flexible working request is to be extended to all employees. This is currently only available to those with children under 17 (under 18 if disabled) and to certain carers. In addition, consideration is being given to allowing a second request in any 12 month period if an employee states in the original request that the arrangement is expected to be temporary.

- **UK's Working Time Regulations ("WTR"):** The WTR will be amended to reflect European case law, which has established that those who have not taken annual leave due to sickness or maternity/parental leave must be able to carry leave forward. Whereas, the European Working Time Directive imposes a minimum requirement of 4 weeks' leave, the WTR provides for a current minimum of 5.6 weeks'. The Coalition Government proposes to limit carried leave to the minimum 4 weeks for those who are on sick leave, meaning the additional 1.6 weeks and any contractual entitlement would be lost. More generally comments are requested on the idea of allowing employers to "buy-out" or defer the additional 1.6 weeks.

- **Equal Pay:** The Coalition Government has proposed that ETs should require employers who are held to have breached equal pay legislation to conduct a pay audit.

The Coalition Government has also announced that its review of employment law will include collective redundancy consultation periods, TUPE and compensation in discrimination claims.

Finally, April saw the launch of the Coalition Government's "Red Tape Challenge", allowing the public and businesses to vote for regulations they think should be scrapped. Employment regulations can be found here:

www.redtapechallenge.cabinetoffice.gov.uk/employment-law/

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Employment Update | June 2011

Maternity Leave & Redundancy

EAT decision highlights some of the difficulties employers face in applying redundancy selection criteria where maternity leave is involved.

In *Eversheds Legal Services Ltd v De Belin*, the EAT has upheld the ET's decision that favouring a woman on maternity leave in a redundancy scoring exercise was sex discrimination against a man in the same selection pool.

The obligation to protect employees who are pregnant or on maternity leave cannot extend to favouring such employees beyond what is "reasonably necessary to compensate them for the disadvantages occasioned by their condition".

The Claimant relied on section 2(2) of the SDA 1975, which provides that the provisions apply equally to men and women and that "no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth".

The employee on maternity leave was considered to have received "an unfairly inflated score". She received the maximum score for the criterion measuring the time between work being done and payment, which resulted in the Claimant receiving a lower overall score.

The EAT concluded that the employer's approach to scoring an employee on maternity leave in a redundancy selection exercise was not proportionate and went beyond what was reasonably necessary.

There were alternative ways of dealing with the situation, such as looking at the performance of both candidates when they were last at work. This would have enabled the employee on maternity leave to be scored on a basis that reflected her performance unaffected by her absence.

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Employment Update | June 2011

Negligent Misstatement – References and Beyond

High Court decision reminds employers of the dangers of statements made after an employee leaves.

In *McKie v Swindon College*, the Claimant was awarded damages after his former employer was held to have been negligent in passing on information about him to a subsequent employer.

The Claimant worked for the Respondent between 1995 and 2002 and left with an excellent reference. Subsequently he was employed by the University of Bath and this position involved visiting and liaising with his former employer.

The Respondent's new Human Resources Director emailed the University of Bath explaining that the Claimant would not be allowed on its premises as it needed to safeguard its students and stating that there had been serious staff relationship problems but the Claimant had left before any action could be taken.

In response to the email, the University of Bath dismissed the Claimant.

The High Court found the information supplied in the email to be untrue. The Respondent was held to have owed a duty of care to the University of Bath not to make a negligent misstatement on which it may reasonably be expected to rely to its detriment. In this situation the University of Bath suffered no loss.

However, the High Court considered the duty could be extended to include the Claimant who had suffered foreseeable loss as a result of the negligent misstatement.

The High Court therefore extended the duty of care owed to employees/former employees beyond the provision of a reference. The information supplied had not been part of a reference or in response to a reference request and therefore was not considered to be a reference.

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Agency Workers

New Regulations will increase the rights of agency workers from October 2011.

The Agency Workers Regulations 2010 will give agency workers new entitlements later this year. From 1 October 2011, all agency workers must be given access to facilities such as canteen or childcare and to information on internal job vacancies.

After 12 weeks in the same role, agency workers will become entitled to the same basic employment and working conditions as other employees to include pay (which includes bonuses and commission payments where such payments are linked to individual performance and allowances for anti-social hours), hours of work, annual leave, rest breaks, night work, paid time off for ante natal appointments.

However, the statutory rights of agency workers are not affected by the Regulations and therefore there is no entitlement to notice pay, maternity pay, sick pay or redundancy pay. For those agency workers already in situ, the 12 week qualifying period will begin on 1 October 2011.

The 12 week qualifying period will begin again if an agency worker begins a new assignment with a new hirer, if an agency worker remains with the same hirer but changes role, and if there is a break between assignments with the same hirer of 6 weeks or more.

There are some circumstances in which the qualifying period will pause. For example, where an agency worker is on annual leave or absent due to illness, such periods will not count towards the qualifying period; it will simply resume following the period of absence.

The Regulations will apply to those who work as temporary agency workers, those individuals or companies involved in the supply of temporary agency workers and those who hire such workers.

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Employment Update **June 2011**

News in brief & what's coming up

Recent changes:

→ The period for phasing out the default retirement age of 65 began on 6 April 2011.

→ Maximum compensation for unfair dismissal claims now stands at £68,400.

Disability discrimination & reasonable adjustments: The EAT has held in *Tameside Hospital NHS Foundation Trust v Mylott* that an ET is not entitled to find that section 4A of the Disability Discrimination Act 1995 (now found in section 20 of the Equality Act 2010) gives rise to a duty on the employer of a disabled employee to take steps to facilitate an application for ill health retirement. Reasonable adjustments involve steps to enable the employee to stay in employment, not to compensate him for having to leave it. The EAT found that offering ill-health retirement, therefore, does not fall within the scope of "reasonable adjustments".

Notice: The EAT has held that contractual notice (whether oral or written) begins the day after notice is given, unless the contract provides otherwise. In *Wang v University of Keele*, the Claimant received and read an email on 3 November 2010 attaching a letter giving him three months' notice. A claim for unfair dismissal was submitted on 2 May 2011. The Respondent contended that the claim was out of time as the effective date of termination was 2 February 2011, notice having begun on 3 November. The ET agreed. However, the EAT held that notice begins the day after it is given, unless the contract states otherwise. It did not matter that the Claimant had been paid and worked to 2 February, as the Respondent had shortened the Claimant's notice period without agreement.

TUPE: The EAT held in *Spaceright Europe Ltd v Baillavoine* that, for a dismissal to be automatically unfair, it is not necessary for the Respondent to have a specific buyer in mind. The Claimant was MD of a business which was up for sale. Although no buyer had been identified, the MD was considered too expensive for a purchaser and he was dismissed, on the ground of redundancy. This, the ET held, connected the dismissal to the ultimate transfer. The economic, technological or organisational defence was not available as there was a continuing need for an MD.

Immigration Status: In *Kurumuth v NHS Trust North Middlesex University Hospital*, the EAT held that it was reasonable for the Respondent to have dismissed the Claimant as a result of her uncertain immigration status. The Claimant came to the UK on a work permit but was subsequently refused leave to remain. She was allowed to remain in the UK while her appeal was ongoing. Following the introduction of the points-based system, her status became unclear and the UK Border Agency failed to satisfy the Respondent that the Claimant had the right to work in the UK. The Respondent genuinely believed that the Claimant did not have the right to work and therefore the dismissal was held to be fair.

Parker & Co

Employment Update | **June 2011**

Contact us

If you have any questions arising from the articles or on other areas of employment law, please call or email us and we will be happy to discuss them with you.

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