Parker & Co

Employment Update

May 2008

INTRODUCTION

This quarter's update focuses on compulsory retirement for non employees, unfair dismissal and ill health retirement. In addition we will look at changes in immigration rules and holiday entitlement for those on long-term sick leave.

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

RETIREMENT – CAN EMPLOYERS FORCIBLY RETIRE THOSE WHO ARE NOT EMPLOYEES?

In the case of employees, dismissal for retirement will not be considered unlawful age discrimination provided the dismissal follows a statutory procedure. However, the compulsory retirement of other types of worker (including partners) must be objectively justified. Two recent cases have focused on the justification defence in which two different approaches were adopted.

Seldon –v- Clarkson Wright Jakes ("CWJ")

Mr Seldon was a partner in a law firm who was forced to retire at 65 in accordance with the provisions of CWJ's partnership deed. CWJ accepted that compulsory retirement was discriminatory but argued that it was a proportionate means of achieving a legitimate aim. The following were considered legitimate aims by the Tribunal:

- Avoiding the need to expel partners nearing retirement for performance management reasons thereby enabling it to maintain a congenial and supportive atmosphere. This was considered a legitimate aim in the context of the size and operating culture of CWJ.
- Ensuring that associates are given an opportunity of partnership after a reasonable period.
- Facilitating the planning of the workforce and partnership by creating realistic expectations as to vacancies.

The Tribunal did not consider it necessary for the firm to have discussed the reasons for having a compulsory retirement age at the time it was introduced as it had been agreed by partners at the time to be appropriate. Had any partner considered it to be inappropriate the matter could have been revisited and Mr Seldon himself could have, but did not, raise the matter.

Hampton –v- Lord Chancellor and the Ministry Justice

Mr Hampton held the judicial office of Recorder which is essentially that of a part-time Judge. He was retired from the role on 31 March 2007 having reached the age of 65. The retirement age had previously been and was in respect of other judicial office holders, 70.

ARTICLE CONTINUES ON PAGE 2 ►

Parker & Co Solicitors
27 Austin Friars
EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578

www.parkerandcosolicitors.com

IN BRIEF

Carers of disabled persons - *Coleman v Attridge Law & Steve Law*

The Advocate General has confirmed that employees, who are associated with disabled people but not disabled themselves, for example carers, are protected from direct discrimination (i.e. discrimination "on the grounds of") and/or harassment. Although this case concerned disability this reasoning also applies in relation to discrimination on the grounds of religion or belief, age or sexual orientation. In this case the Claimant was the primary carer of her disabled son. Though she herself was not disabled she was protected from direct discrimination by association.

Compensation and Constructive dismissal – *GAB Robins –v- Triggs*

The EAT confirmed that in cases of constructive dismissal an Employment Tribunal can only award losses that flow from an actual dismissal. This means that losses caused by events leading up to the dismissal are not recoverable. In this case Mrs Trigg unsuccessfully claimed loss of earnings as a result of time spent on unpaid sick leave prior to the dismissal such absence having been caused by bullying in the work place.

Parker & Co Solicitors
27 Austin Friars
EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578

www.parkerandcosolicitors.com

RETIREMENT – CAN EMPLOYERS FORCIBLY RETIRE THOSE WHO ARE NOT EMPLOYEES? continued from page 1

The Ministry of Justice/Lord Chancellor considered that the retirement age was justified for the following reasons:

- To allow for the recruitment of new Recorders who might subsequently become candidates for full time positions; and
- To provide prospective future candidates for full time judicial positions with a sufficient supply of work to gain the necessary experience

The Tribunal considered that these were legitimate aims but that retiring Mr Hampton at 65 was not a proportionate means of achieving such aims. The Tribunal considered that vacancies were created each year as a result of some Recorders becoming Judges and that further vacancies could be created if those not sitting for the minimum number of days a year were removed from office. In addition the Tribunal heard evidence of a plan to reduce the number of Recorders by 10 per cent over a number of years. The Tribunal also considered that cases could be allocated in such a way as to ensure Recorders gained the necessary experience.

The Tribunal in Seldon allowed CWJ to rely on the firm's own experience and it did not matter that there had been no prior discussion relating to the reason for compulsory retirement. However, in Hampton the Tribunal was not satisfied with such assertions and focused on the discussions and the rationale behind the decision. What is needed to support the justification defence remains unclear, though both cases seemingly considered similar legitimate aim arguments.

ILL-HEALTH RETIREMENT AND THE LINK WITH UNFAIR DISMISSAL - *First Leeds/First West Yorkshire Ltd –v- Haigh*

In June 2005 Mr Haigh, a bus driver with almost 30 years of service, suffered a suspected stroke which resulted in his licence being suspended by the DVLA for 12 months. He subsequently suffered another suspected stroke which according to the Company's occupational health adviser ("OHA"), made it unlikely that he would be able to return to work before October 2006 when he was due to retire. The OHA advised the Company of this in February 2006. In March 2006, after Mr Haigh's dismissal, it became apparent that he may not have suffered strokes and that his condition may well be manageable and the DVLA might consider reinstating his licence.

ARTICLE CONTINUES ON PAGE 3 ►

IN BRIEF

INCREASES IN SMP AND SSP

From 6 April 2008 statutory maternity pay increased to £117.18 per week and statutory sick pay increased to £75.40 per week.

TIME LIMITS: DISABILITY DISCRIMINATION – *Department of Constitutional Affairs v Jones*

The Court of Appeal considered that it was "just and equitable" to extend the time-limit for bringing a disability discrimination claim where the Claimant, suffering from a serious depressive illness, was initially reluctant to acknowledge that he was so mentally ill that he was in fact "disabled" for the purposes of the Disability Discrimination Act 1995.

The Court of Appeal did however emphasise that it was not a general principle that a person with mental health problems is entitled to such an extension as a matter of course. It will very much depend on the particular facts of a case.

ILL-HEALTH RETIREMENT AND THE LINK WITH UNFAIR DISMISSAL, continued from page 2.

Under the Company's sick pay scheme Mr Haigh was entitled to 26 weeks full pay and 26 weeks half pay with the Company having the discretion to extend. The EAT noted that there was no obligation to allow an employee to take all available sick pay before dismissing him. The policy did however stipulate that where an employee had been on long-term sick he/she may be "retired or employment terminated on medical grounds."

The Company's pension scheme allowed retirement on the grounds of permanent incapacity. However, the Company would have to make an additional payment into the pension fund for Mr Haigh to be able to take advantage of this. In addition the Company also had a "holding register" which employees could be placed on to preserve continuity of employment, though there was no entitlement to sick pay attached to this.

In October the Company's manager decided that Mr Haigh should be dismissed on grounds of incapability. The union proposed that Mr Haigh should be placed on the holding register instead.

Mr Haigh did not agree to this and was, at a meeting in November 2005, dismissed with notice which expired on 8 February 2008. Mr Haigh appealed. He was in essence given an ultimatum whereby the Company said it would retain him on the holding register (with a further 3 months of sick pay) if he agreed to make no application for ill health retirement. If he did not agree to this he would be dismissed. He did not agree and was dismissed.

In holding that Mr Haigh was unfairly dismissed, the EAT made the following findings:

1) As the Company's policy refers to consideration of retirement, it should have been considered.
2) For an employee to be eligible for an enhanced pension in these circumstances the Company's OHA needed to confirm the medical position to determine eligibility and the Company therefore has an essential role in ensuring retirement is considered before dismissal
3) Under general principles of reasonableness the action taken by the Company must be considered in the context of this case and such action was not reasonable as a substantial injustice might have occurred.

ARTICLE CONTINUES ON PAGE 4 ►

Parker & Co Solicitors
27 Austin Friars
EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578

www.parkerandcosolicitors.com

IN BRIEF

TERRITORIAL JURISDICTION
- Bleuse v MBT Transport

You may recall that there has been some debate about the rights of employees working for a UK company but based overseas. In 2007 the House of Lords held in *Lawson –v- Serco* that an employee working wholly overseas would need to show that the employment relationship has a closer connection with the UK than with the country in which they are based, for example, the employee is posted abroad to work for a business conducted in the UK.

The EAT held in *Bleuse –v- MBT* Transport that if the legislation is a UK concept (for example unfair dismissal) then the approach taken in the House of Lords in *Lawson –v- Serco* applies. However if the legislation derives from EU legislation then a weaker link to the UK may suffice as national legislation is to be interpreted in a way which gives effect to EU principles.

ILL-HEALTH RETIREMENT AND THE LINK WITH UNFAIR DISMISSAL **continued from page 3**

4) There was no justification for imposing the choice on him. When Mr Haigh was dismissed there was no clear evidence either way.

ARE THOSE ON LONG TERM SICK LEAVE ENTITLED TO HOLIDAY?

Earlier this year the Attorney General gave important decisions in two cases (*Stringer and ors v HM Revenue and Customs* (previously known as Ainsworth) and *Schultz-Hoff v Deutsche Rentenversicherung Bund*) in respect of an employee's entitlement to holiday pay while on sick leave. Arguably findings relating to holiday and sick leave are equally applicable to holiday and maternity leave.

The AG in Stringer considered that the right to annual leave was not dependent on being "fit and healthy" and therefore statutory holiday continues to accrue during sick leave. However, holiday should not be taken or payment in lieu of such holiday made, during a period in which an individual would otherwise be absent through illness.

This would defeat the health and safety objective of the Working Time Directive and provide the individual with a windfall. The AG went on to say that those absent for an entire holiday year should be able to take their full statutory holiday when they return to work.

If the ECJ and House of Lords follow the AG's opinion it may be that in future where a period of sick leave or maternity leave falls over two holiday years, employees will not lose any statutory holiday entitlement but will be able to carry over their unused statutory entitlement to use during the next holiday year. It will however only be possible to pay an employee in lieu of any holiday entitlement if their employment terminates.

These decisions may give rise to problems for employers where employees return to work following several years on sick leave. Such employees may have accrued significant statutory holiday entitlement which they will likely need to take during the holiday year in which they return. However, these decisions did not specifically address situations where an employee has been absent for a number of years. Therefore the extent to which holiday will continue to accrue in such circumstances is unclear.

Parker & Co Solicitors
27 Austin Friars
EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578

www.parkerandcosolicitors.com

IN BRIEF

EXPIRED DISCIPLINARY WARNINGS - *Airbus UK Ltd – v- Webb*

The Court of Appeal has held that an employer may take expired disciplinary warnings into account when deciding whether to dismiss an employee. However, this should not be done as a matter of course and is the exception rather than the rule. In this case a final written warning for misuse of company time expired a month before Mr Webb was caught watching TV during company time with some of his colleagues. He was dismissed but his colleagues, who did not have previous final warnings, were not.
The Court of Appeal considers that the expired disciplinary warning could be a relevant factor in deciding whether the employer has acted reasonably.

POINTS BASED IMMIGRATION SYSTEM INTRODUCED

Tier 1 of the new Points Based System (PBS) has now been partially introduced. As you may know, the UK is in the process of overhauling its entire immigration system. Around 80 different routes of entry to the UK are progressively being rationalised into a new 5 tier PBS.

February 29 saw the previous Highly Skilled Migrant Programme (HSMP) close to UK based applicants, while the HSMP was withdrawn for Indian applicants on 1 April. The HSMP is expected to remain open to other overseas nationals until this summer, meaning a dual system is currently in place depending on the applicant's location and nationality.

In country and Indian nationals now apply for permission under Tier 1 (General) - highly skilled. Applications are assessed based on qualifications, previous earnings, age, UK experience, English language ability and available funds for maintenance. While the requirements differ slightly depending on the type of application submitted, the points awarded are similar to those under the HSMP. Applicants must still score 75 points in the age, qualifications, previous earnings and UK experience attribute sectors, in addition to scoring 10 points for English language ability and 10 points for available maintenance.

However, the English language requirement can now be satisfied automatically for applicants from certain specified English language speaking countries, including Australia, New Zealand and America. The maintenance requirement is being phased in and requires applicants to demonstrate that they have a minimum level of available funds at specific times, which currently varies depending on the timing of the application and the applicant's location.

Initial Tier 1 applicants are granted 3 years' leave, as opposed to 2 years' under the HSMP. The other main difference between Tier 1 and the HSMP is that the application process is streamlined (although not necessarily quickened). HSMP applicants first needed to obtain approval under the HSMP rules before making a subsequent applicant for leave to remain or entry clearance. Tier 1 requires a single application, although this does mean applicants may be without their passports for longer.

ARTICLE CONTINUES ON PAGE 6 ►

Parker & Co Solicitors
27 Austin Friars
EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578

www.parkerandcosolicitors.com

IN BRIEF

DISABILITY DISCRIMINATION

A physical or mental condition must be long-term in order to amount to a "disability". This means that it has lasted or will last for more than 12 months. Some impairments recur over time making the assessment of whether a condition is long-term difficult. A Tribunal is required to enquire into the likelihood of recurrence.

In *Richmond Adult Community College v McDougall*, the Court of Appeal confirmed that the likelihood of recurrence must be assessed as at the time that the alleged discrimination took place; any subsequent recurrence is not to be taken into account. The Claimant's persistent delusional and 'schizo-affective' disorders had recurred after the original act of discrimination, and not long before the Tribunal hearing. However, the CA held that the key was to look at whether it was likely, at the time of the discrimination, for a recurrence to be foreseen and thus for the condition to be long-term.

Practically, this means that employers should review all evidence available at the time to assess whether or not a recurrence of the employee's impairment is likely. If it is, then it is more likely that the condition will be considered to be long-term.

Parker & Co Solicitors
27 Austin Friars
EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578

www.parkerandcosolicitors.com

POINTS BASED IMMIGRATION SYSTEM INTRODUCED,
continued from page 5

The Border Agency was deluged with HSMP applications prior to closing the scheme and it is currently taking approximately 2 months for an application submitted in the UK to be processed. The service standard for processing is stated as 5 – 14 weeks.

Working holidaymakers are no longer eligible to switch to highly skilled status in the UK. This means that they must return to their home country to apply for entry clearance (even if they applied before the introduction of Tier 1 and have a HSMP approval letter).

Various immigration categories will be subsumed into Tier 1 later this year, including the recently introduced International Graduates Scheme, as the Entrepreneur, Investor and Post Study Work strands of Tier 1 are introduced. A definitive date for these changes has not been published, but they will not be implemented earlier than 30 June 2008. Tier 2 of PBS, which will replace the current work permit scheme, is likely to be introduced later this year and we will keep you updated on developments.

EQUAL PAY – GENUINE MATERIAL FACTOR DEFENCE,
Cumbria County Council v Dow and ors (No.1), EAT

Men and women carrying out equal work for the same employer are entitled to the same terms and conditions of employment. They also have the right to receive equal pay for equal work unless there is a genuine and material reason for the inequality in pay that is not related to sex. In *Cumbria County Council v Dow & ors (No.1)*, the EAT considered whether a 'productivity bonus' scheme which benefited male and not female council workers could be objectively justified.

The scheme had been introduced to incentivise road workers (who were predominantly male) to increase productivity and the Council sought to justify the scheme on this basis. The EAT found that although real productivity gains were made when the scheme was first introduced, it had ceased to be applied in a rigorous way with 'bonus' payments becoming mere automatic additions to the road workers basic wage. Therefore there was no material reason for the inequality and the scheme was tainted by sex discrimination as female council workers were generally not eligible for the productivity bonus as they tended to work in the care, cleaning and catering sectors.

ARTICLE CONTINUES ON PAGE 7 ►

WHAT'S COMING UP?

1 October 2008: The statutory minimum holiday entitlement will be increased from 24 days to 28 days (including bank holidays).
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

EQUAL PAY – GENUINE MATERIAL FACTOR DEFENCE, *Cumbria County Council v Dow and ors (No.1), EAT* continued from page 6

The EAT set out the following principles:

- To establish a 'genuine material factor' defence an employer must prove that the variation between a female and a male employee's contract is not tainted by sex. Failing this, the employer must provide objective justification for the disparity. Further, the employer should be able to prove that the alleged factor is still relevant at the time complained about and not merely historic.

- Market forces are capable of being a 'genuine material factor', even when adversely affecting women, provided the market does not operate on sexist principles.

- The aim of improving productivity through bonuses can be a 'genuine material factor' defence but an employer must monitor it rigorously. It cannot be proportionate to pay bonuses to achieve a legitimate objective when that objective is not being realised.

- Where a woman is doing (i) like work to a man; (ii) work rated as equivalent to work done by a man, or (iii) work of equal value to work done by a man and her employer fails to prove the difference in pay is genuinely due to a material factor which is not the difference of sex, an 'equality clause' will be implied into her contract. She will be entitled to claim for the difference in pay.

Employers should keep their remuneration policies under close review to ensure that where there is a potentially discriminatory pay differential it continues to be justified. This could for example be done by regularly monitoring performance to show that improvements are being made, with bonuses being withheld as appropriate.

CONTACT US

Helen Parker	020 7614 3501	helen.parker@parkerandcosolicitors.com
Richard Woolmer	020 7614 3505	richard.woolmer@parkerandcosolicitors.com
Dan Begbie-Clench	020 7614 3504	dan.begbie-clench@parkerandcosolicitors.om
Jackie Holden	020 7614 3508	jackie.holden@parkerandcosoliitors.com
Charlotte Schmidt	020 7614 3503	charlotte.schmidt@parkerandcosolicitors.com

Parker & Co Solicitors
27 Austin Friars
EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578

www.parkerandcosolicitors.com