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Employment Update

August 2008

INTRODUCTION

This quarter's update focuses on the following topics: objecting to a TUPE transfer, putting employees on garden leave and discrimination by the Unions. In addition we outline the proposed new discrimination legislation and proposals relating to 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 –

1. Carers of disabled persons
2. Objecting to a TUPE Transfer
3. Indirect discrimination by the GMB Union
4. Can employees be made to go on garden leave where there is no contractual provision providing for this?
5. Another case of the status of agency workers
6. The Equality Bill
7. Agency workers to get equal rights to employees

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

www.parkerandcosolicitors.com

CARERS OF DISABLED PERSONS - *Coleman v Attridge Law & Steve Law*

You may recall that in our May Employment Update, we reported that the Advocate General had 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 as a result of their association with the disabled person. In July, the European Court of Justice reached the same conclusion. The ECJ's decision also indicated, as was suspected, that this reasoning also applies in relation to discrimination by association on the grounds of religion or belief, age or sexual orientation.

The Claimant alleged that on her return from maternity leave she was prevented from returning to her existing role but that the parents of non-disabled children would have been allowed to do so. She was also denied the same flexibility in respect to her working hours as her colleagues with non-disabled children. When the Claimant wanted to take time off to care for her son, her employer called her 'lazy'. Other abusive and insulting comments were made about her and her son.

The Claimant brought claims under the Disability Discrimination Act 1995, arguing that she had suffered discrimination by association with her son's disability.

In this case the Claimant was the primary carer of her disabled son and though she herself was not disabled she was protected from direct discrimination by association. The ECJ considered that the principle of equal treatment applied to particular grounds of discrimination and not to particular types of person, disability was the reason for the less favourable treatment she received. The ECJ was concerned that attempts to combat discrimination would be undermined if this was not the case.

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IN BRIEF

WITNESS INTIMIDATION - Force One Utilities v Hatfield

In *Force One Utilities v Hatfield,* the EAT held that it is appropriate to strike out a Response (ET3) when the employer's main witness threatens the Claimant at the tribunal. The Company argued that this finding was perverse.

Mr Hatfield had brought a claim for unfair dismissal. During the hearing the Respondent's main witness, Mr Shuter, threatened and swore at the Claimant in a car park near the tribunal. Mr Shuter told the Claimant to "watch how [he slept] at night" Mr Hatfield said he then went to his car to put his jacket in the boot. Mr Shuter then drove alongside the Claimant, blocking him in. He wound down the electric window and said: "Me and you – 10 minutes up the road now". The Claimant did not answer.

The EAT held that once intimidation of this kind has occurred, it will be a very exceptional case where it can be said that a finding that no fair trial is possible is perverse. However, the Tribunal did indicate that such a finding may be possible where the intimidation happens very late on in the hearing.

OBJECTING TO A TUPE TRANSFER – Capita Health Solutions v McLean

The Claimant was an occupational health nurse who had been employed by the BBC since May 1988. The BBC announced in February 2006 that it would be outsourcing parts of its Human Resources department, including its Occupational Health Services. This transfer to Capita took effect on 1 April 2006.

The Claimant did not wish to transfer, as she considered that this would involve a significant change in her role, and that the early retirement options in relation to her pension would not be as favourable.

The Claimant objected to the transfer and resigned on 31 March. The BBC suggested, in response to the Claimant's grievance, that she work 6 weeks of her 3 month notice period on secondment to Capita. During this period the BBC and the Claimant agreed that she would remain an employee of the BBC and that the BBC would continue to pay her. While the parties' stated intentions were relevant, they were not determinative of the issue.

Notwithstanding the above the Employment Tribunal and the EAT considered that her employment had transferred, with the Claimant agreeing to work for Capita for a specific limited period. The arrangement was not considered to be a "secondment", as there was no role to which the Claimant could have returned at the end of the 6 week period. Going to work for Capita was not considered compatible with the notion of objecting to the transfer, referring to the arrangement as a secondment made no difference.

TUPE allows employees to object to the transfer and the effect is to terminate the contract of employment. The legislation does not allow employees to work their notice periods with the third party to which the business transfers. The EAT held that if she had successfully "objected" she could not have continued as BBC's employee after 1 April 2006. Therefore she simply insisted that she would only transfer for a limited period of time. Her contract of employment TUPE transferred to Capita for 6 weeks.

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

www.parkerandcosolicitors.com

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IN BRIEF

STATUTORY GRIEVANCES - Procek v Oakford Farms Limited

The EAT has held that a statutory grievance is still a statutory grievance, even where an employee stated that s/he did not want it to be treated as such!

The Claimant submitted a grievance which expressly stated that it was intended to be informal but that if it was not addressed, a formal grievance, under the 2004 Regulations, would follow. This did not happen.

The EAT held that the letter was nevertheless a valid grievance under the Employment Act 2002, as the only issue was whether or not it satisfied the requirements for a Step 1 grievance letter and it did. The Claimant's attempt to classify the document as something else was considered irrelevant. The Respondent had therefore failed to comply with the statutory grievance procedure.

However, the EAT did highlight that the Tribunal has a discretion to conclude that it would not be "just and equitable" in such circumstances to award an uplift.

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

www.parkerandcosolicitors.com

INDIRECT DISCRIMINATION BY THE GMB UNION - *Allen and ors v GMB*

The Court of Appeal has held that the GMB union indirectly discriminated against some of its female members who had potential equal pay claims against a local authority.

The Claimant was one of a number of women employed by Middlesbrough Metropolitan Borough Council who had been paid less than men doing work of equal value or equal work. Under the Equal Pay Act 1970, claims can be made for six years of back pay.

The GMB negotiated an agreement with the Council which brought all employees onto a single pay structure. GMB recognised that the Council had limited finances and it therefore gave priority to securing pay protection for staff whose jobs were being downgraded and did not secure back pay for those in the Claimant's position. The GMB did not properly explain the situation or the consequences of entering into this agreement, to the Claimant or to those in a similar position.

The Court of Appeal considered that the GMB had manipulated the situation in order to secure agreement to the deal. The women concerned were not informed that they 'were being offered substantially less than they were likely to receive' from litigation, or that they had strong claims.

The GMB's policy of prioritising pay protection over securing back pay had a disproportionate adverse effect on women. The Court of Appeal felt that this could not be objectively justified in this case because the manipulation referred to above was not a proportionate means of protecting pay and avoiding redundancies.

While this case may concern unions, it should be noted that in other situations it may well be possible to justify such a policy. This case does serve as a warning to unions to ensure that members of fully informed of their rights and the consequences of entering into such an agreement.

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IN BRIEF

EQUAL PAY COMPARATORS Walton Centre for Neurology and Neuro Surgery NHS Trust v Bewley

The Claimant was employed by the Trust as a senior health care assistant/nursing assistant. Her job had been evaluated under the Agenda for Change Job Evaluation Scheme at band 3 with effect from 1 October 2004. In bringing a claim under the Equal Pay Act 1970, the Claimant identified a number of comparators.

A comparison can be made with a comparator who was employed at the same time as the Claimant. However, the issue in this case was whether or not the Claimant could make a comparison for a certain period of time in circumstances where she was employed but the comparator was not. The EAT decided not.

The Tribunal had relied on the case of *Diocese of Hallam Trustee v Connaughton 1996 ICR 860* which had held that a woman's successor in the same job was a valid comparator for an equal pay claim. The EAT consider this case to have been wrongly decided.

CAN EMPLOYEES BE MADE TO GO ON GARDEN LEAVE WHERE THERE IS NO CONTRACTUAL PROVISION PROVIDING FOR THIS?

The High Court's decision in the recent case of *SG & R Valuation v Boudrais* demonstrates that an employer can in certain circumstances obtain an injunction to keep an employee on garden leave even if there is no garden leave provision in the employee's contract.

This case concerned two senior employees who resigned to join a competitor giving 3 months' notice. Almost immediately after, the employer discovered wrongdoing by the employees, including disclosure of confidential information, plans to take business opportunities to the competitor, solicitation of staff and an expressed intention to damage the employer's business. Although there was no contractual entitlement to do so, the employer put the employees on garden leave and subsequently suspended them pending disciplinary action. The employees resigned with immediate effect alleging a repudiatory breach of contract by the employer in placing them on garden leave, and claimed that they were free to start work for the competitor immediately. The employer applied for an injunction to prevent them from doing so.

The judge first considered whether the employees had any right to work. He decided that they had, bearing in mind their seniority, specialist skills and entitlement to a performance-related bonus. He went on to consider previous cases which demonstrated that such a right is not absolute. He also found that where there was evidence to show that where an employee had breached his or her contractual duties and been found guilty of a wrongdoing from which the employee stood to make a profit, there was no obligation on the employer to provide the employee with any work. In this case, the employer was therefore entitled to make the employees stay at home (on full salary) until the end of their notice period. An injunction was granted to this effect.

Despite the judgment in this case, it is always advisable to include a garden leave clause in key employee contracts. If the employee then wishes to join a competitor, the employer can keep the employee out of the market during their notice period.

ARTICLE CONTINUES ON PAGE 5 ►

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

www.parkerandcosolicitors.com

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IN BRIEF

THE IMPACT OF UNREASONABLE DELAY
Selvarajan v Wilmot

In this case the employer took approximately four months to deal with an appeal against dismissal.

The Court of Appeal held that unreasonable delay did not make the dismissal automatically unfair, as the statutory procedure had been completed. The Court of Appeal considered that completion should be given its ordinary meaning and that it is not conditional on compliance with the general requirements of the procedure. Non-compliance with the general requirements may lead to an increase in compensation but should not lead to an automatic finding of unfair dismissal.

CAN EMPLOYEES BE MADE TO GO ON GARDEN LEAVE WHERE THERE IS NO CONTRACTUAL PROVISION PROVIDING FOR THIS?, continued from page 4

If there is no garden leave clause, it can be difficult to keep the employee away from work unless, as this case demonstrates, there is clear proof of wrongdoing which amounts to a breach of contract or duty by a key employee. Obtaining specific evidence of such conduct is difficult and employers should therefore not rely on the judgment in this case.

ANOTHER CASE ON THE STATUS OF AGENCY WORKERS, *Consistent Group Limited v Kalwak & Others*

Recent case law, such as *James v Greenwich Council*, has denied agency workers employee status. In *Consistent Group Limited v Kalwak & Others*, Polish workers were recruited to work in the UK, having signed a document called a "Self Employed Sub-contractor's Contract for Services" with CG. The workers were provided to a food processing company, Welsh Country Foods Ltd. Ultimately they were dismissed and brought claims for breach of contract and unfair dismissal. The contract expressly stated that the workers were not employed by CG, that CG were not obliged to offer work and if they did the worker could decline.

The ET and the EAT both held that, notwithstanding the contract, the workers were employees of CG, based on their personal service, mutual obligation and the control exercised over the relationship by CG, which included providing work, transport and accommodation.

The ET and the EAT were influenced by the fact the workers could not provide a substitute to perform work and, notwithstanding the fact they were free to decline, the contract stated that the worker could not work elsewhere.

The Court of Appeal has now overturned the EAT's decision, stating that the ET failed to provide sufficient reasons for deciding that the contractual clauses were, effectively, a pretence and why it had preferred the evidence of the workers over CG's.
The Court went on to state that it was insufficient for an ET to simply say that the practical operation of the contract differed from its terms. The case has now been remitted to a differently constituted ET to be reheard.

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

www.parkerandcosolicitors.com

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IN BRIEF

DISABILITY DISCRIMINATION & REASONABLE ADJUSTMENTS

The EAT has, in Chief Constable of *Lincolnshire Police v Weaver*, reaffirmed the principle that employers can consider factors not relating to an individual employee when determining whether an adjustment is reasonable for the purposes of the Disability Discrimination Act.

Mr Weaver had a disability which meant he no longer served as a fully operational officer but worked in an office based role on restricted duties. With more than 30 years' experience, he could apply to a Thirty+ Retention Scheme, enabling him to claim a pension but continue working on favourable terms. Mr Weaver was not accepted for the Retention Scheme because he was performing restricted duties and these roles needed to be available to other officers.

Disagreeing with the ET, the EAT held that the wider operational objectives of the police can be considered. In view of such objectives, the adjustment was not reasonable, as encouraging Mr Weaver to remain employed would reduce the number of available roles suitable for officers on restricted duties.

THE EQUALITY BILL – HARMONISING DISCRIMINATION LAW

The Equality Bill, which is currently before Parliament, proposes the harmonisation and consolidation of existing discrimination rights to ensure that the EU Equal Treatment Directive is finally fully transposed into UK law. The Bill is under consultation and the Government has recently issued a response to this.

The proposed issues for the Bill and arising from the consultation are:

- positive action permitted in certain recruitment situations, to allow employers to use a "tie-breaker" of under-representation (for example, of an ethnic group, or gender) when selecting between two equally qualified candidates;
- outlawing pay secrecy clauses in employment contracts and to make it unlawful to prevent employees from disclosing their pay to each other and third parties. Numerous City institutions currently attempt to restrict employees in this way;
- broadening Employment Tribunals' powers to make recommendations as a result of discrimination claims, meaning that recommendations could be applied across the entire workforce, rather than just limited to the successful claimant as at present. It is also proposed that a failure to comply with such recommendations could be taken into account in any further discrimination claims against the employer so that evidence of previous discrimination could be relied upon;
- imposing a single equality duty on public sector employers, which would include duties in relation to gender reassignment, age, sexual orientation and religion or belief, in addition to the current duties in respect of race, disability and gender; and
- outlawing age discrimination in the provision of goods and services.

In terms of amending current discrimination law, the Government has indicated that it intends to:

- harmonise the definition of indirect discrimination in all discrimination rights. This will be done using the test of a particular disadvantage suffered by an applicant or employee which arises from the application of a "provision, criterion or practice" by the employer;

ARTICLE CONTINUES ON PAGE 7 ►

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

www.parkerandcosolicitors.com

IN BRIEF

Howes v Hinckley Borough Council

This case primarily concerned legal advice privilege. Legal advice privilege protects confidential communications between a client and his professional legal adviser made for the purpose of giving or seeking legal advice. It does not matter whether litigation is anticipated or not.

The EAT confirmed that legal advice privilege does not attach to the advice of employment consultants. It also expressed the opinion that in theory, this could be extended. Qualified solicitors who do not hold themselves out as acting in the capacity of a solicitor (e.g. where part of a firm of employment consultants) may find that privilege does not attach to their advice.

WHAT'S COMING UP?

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

5 October 2008: Employees whose babies are due on or after 5 October will be entitled to all contractual benefits during both ordinary and additional maternity leave.

THE EQUALITY BILL – HARMONISING DISCRIMINATION LAW,
continued from page 6

- harmonise the test for justifying indirect discrimination across the board, using the test of whether the treatment was a "proportionate means of achieving a legitimate aim";
- introduce the defence of discrimination being justified by a "general occupational requirement" across all protected grounds, except disability where the current reasonable adjustments test is likely to cover such issues already;
- extend protection against racial harassment to the grounds of nationality and colour. Currently only harassment on grounds of race or ethnic or national origins is expressly covered;
- extend protection from indirect discrimination to transsexuals;
- consider if it is possible to allow discrimination claims to be brought on combined multiple grounds; and
- consider extending employers' liability for persistent third party harassment of employees to all areas of discrimination. Currently, employers only have liability for third party harassment in relation to sexual harassment and harassment on the ground of a person's sex or gender reassignment.

The Government is also understood to be considering whether findings in a number of recent landmark cases, such as the extension of disability discrimination protection to carers (*Coleman v Attridge Law*, see elsewhere in this update), should be considered for inclusion in the Bill. At the very earliest, the Bill could become law in April 2009. We will keep you updated of progress as it passes through Parliament.

AGENCY WORKERS TO GET EQUAL RIGHTS TO EMPLOYEES

The European Parliament is currently considering a Directive to require agency workers to be given equal rights by employers comparable to those enjoyed by "permanent" employees. Numerous provisions are under consideration, including:

- when such equal treatment should begin, possibly as early as the first day of the engagement (but see the limitations below). This would clearly have huge implications for employers who habitually engage short-term agency workers;

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

www.parkerandcosolicitors.com

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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

AGENCY WORKERS TO GET EQUAL RIGHTS TO EMPLOYEES,

continued from page 7

- what the equal treatment should consist of, including pay, family-related leave and access to collective facilities such as child care and transport. Pension benefits are currently excluded;
- whether domestic agreements could limit these rights. The current draft Directive approves the UK position adopted by the CBI and TUC, who agreed that agency workers should only receive equal treatment after 12 weeks';
- that temporary agency workers should be informed about permanent employment opportunities within the employer;
- trying to stimulate the labour market by improving access to training and child care facilities that temporary agency workers have during time between assignments to increase their employability; and
- that domestic penalties should be introduced to address non-compliance by temporary agencies and employers.

The draft Directive needs the approval of the European Parliament before being passed back to the EU Council. This is not expected for several months; the Government will then be set a timeframe within which it must introduce domestic legislation to ensure compliance.

THE RIGHT TO REQUEST TIME OFF FOR TRAINING

The Government launched consultation on the new right to request time off work for training available to employees who have been employed for at least 26 weeks. The right is expected to be implemented during 2010. The right will operate in a similar way to the right to request flexible working. Employers will only be able to refuse a request for defined business reasons. For example where the training would not improve business performance or productivity. Employers will not have to pay for the training under the proposals, and employees may only make one request in a 12 month period.

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.com
Jackie Holden	020 7614 3508	jackie.holden@parkerandcosolicitors.com
Charlotte Schmidt	020 7164 3503	charlotte.schmidt@parkerandcosolicitors.com

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

www.parkerandcosolicitors.com