Parker & Co

Employment Update

October 2006

INTRODUCTION

This quarter's update focuses on an equal pay case that made headlines in the media, although not necessarily the correct ones. We also look at how employers are vicariously liable for harassment conducted by employees (pages 5 and 6).

Our other articles include a look at the outcome of an employee secretly recording a disciplinary meeting, how sick pay should be treated for disabled employees on long-term absences, and redundancy and religious belief cases.

Links in blue in the pdf are clickable to take you 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. As ever, your comments are welcome.

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EQUAL PAY: IS EXPERIENCE NO LONGER A JUSTIFICATION FOR PAYING EMPLOYEES MORE?

You may have read this week that a European Court of Justice ruling (*Cadman v Health & Safety Executive*) means that employers can no longer use experience to justify pay differentials between employees. Much of the media has reported that longer service in a role cannot now be rewarded and that employees doing the same job should be paid the same. This is misleading, and employers should not be unduly concerned by the reports.

In fact, the ECJ ruling will not have the effect predicted by the media. The principal is that employers can continue to use experience as a factor in determining pay scales for employees. In general, paying an employee who has five years' experience in a role more than an employee with one year's experience is likely to be justifiable; the more experienced employee is likely to be better at performing the job. This is common sense in accordance with employers' usual practices.

However, the ruling will affect employers if the worker can show evidence capable of raising "serious doubts" that experience is relevant to the payscale; as such, the rates of pay may be unfair and discriminatory. For example, it will be more difficult for employers to justify differentials in pay based on experience where the two employees in question have, say, 15 and 10 years' experience in the role. In that case, both will be very experienced and it will not be as easy to argue that one is better than the other simply by virtue of longer service. Or, if the duties in the role are such that 10 years' experience makes no difference to one year's experience in terms of performance, it will also be difficult for the employer to justify a difference in pay based solely on experience. In those examples, there may be "serious doubts" as to whether experience alone is genuinely capable of justifying such pay differentials. The employer will need to show that, in respect of the role in question, length of service goes hand in hand with experience and that experience enables the worker to perform the duties better.

These issues are most relevant to equal pay and discrimination cases. For example, employers may be able to justify paying a female employee less than a comparable male where the male has more experience in the role in which both are employed if that experience is key to better performance in carrying out the role. In addition, remember that any pay or service-related benefit linked to more than five years' service needs to be objectively justifiable under age discrimination laws.

IN BRIEF

Enhanced Maternity & Paternity Rights

As we reported in our recent alerter here, expectant women who are less than three months' pregnant as on 1 October 2006 receive various new rights with effect from 1 April 2007.

These include six months' ordinary leave and a further six months' additional leave, regardless of service. Those intending to return to work early must now give their employer eight weeks' notice rather than 28 days. "Keeping in touch" days have also been introduced, allowing the employer and employee to agree to up to 10 days of work during the period of leave.

EMPLOYEES PERMITTED TO RECORD DISCIPLINARY AND GRIEVANCE HEARINGS

Most employers forbid employees from making electronic recordings of grievance and disciplinary hearings. In a recent Employment Appeal Tribunal case (*Chairman and Governors of Amwell View School v Dogherty*, 2006), a teacher had secretly recorded the meeting in which she was dismissed and the subsequent appeal hearing. She had also recorded the deliberations of the school governors on her at each hearing.

She issued a claim for unfair dismissal and attempted to have the recordings included within the evidence before the Tribunal. The employer applied for the recordings to be excluded.

The Appeal Tribunal found that the recordings of the meetings themselves were admissible, even though they had been made without authorisation, because that part of the meeting had been minuted in writing and the recordings were essentially a similar form of documenting the meeting. However, it agreed to exclude the private discussions of the school governors as these were genuinely private.

This decision is slightly surprising and has ramifications for employers. It underlines the importance of ensuring that all hearings are conducted correctly and are fully and accurately minuted in the first place so that there are no unexpected surprises as to the content of a meeting if an employee subsequently produces an electronic recording.

We recommend that your grievance and disciplinary and dismissal procedures expressly state that electronic recording of any hearing is prohibited, unless specific consent is given. This may not prevent a Tribunal from ruling that recorded evidence should be excluded from a case, but a clear breach of an internal policy's requirements by the employee may at least go towards the employee's credibility in the Tribunal's eyes.

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IN BRIEF

Collective Redundancies

Following ECJ case law, amendments have been made to collective redundancy legislation. This now provides that where the threshold for collective redundancy consultation is met, notice of the redundancies must be given to the DTI at least 30 days before notice of termination is given to the affected employees, as opposed to 30 days ahead of the actual date of dismissal.

REDUNDANCIES: REQUIRED INFORMATION FOR EMPLOYERS TO PROVIDE TO EMPLOYEES

A Tribunal case (*Alexander & Hatherley v Brigden*, 2006) has held that employers must, during a redundancy process, notify employees of the:

- reasons for the proposed redundancy;
- selection criteria used by the employer to identify the potentially redundant employees; and
- assessment score awarded to the employee, so that the employee can challenge the grades awarded on the grounds of unfairness. Note that the employer is not required to inform the employee of what the break point in the selection criteria (i.e., the mark that the employee would need to obtain to be safe from redundancy) is.

If the employee is not provided with the above information during the redundancy process, the employer can be held to have breached the statutory disciplinary and dismissal procedures and to have automatically unfairly dismissed the employee (with a potential uplift in compensation of between 10% and 50% at the Tribunal's discretion).

FIRST MAJOR RELIGIOUS DISCRIMINATION RULING

The first major case involving the Employment Equality (Religion or Belief) Regulations 2003 (the "Regulations") has been reported, although the EAT held that the claimant was not in fact entitled to make a claim under the Regulations. In *Mohmed v West Coast Trains Ltd*, the employer had a uniform policy which stated that beards should be neatly trimmed and smart. Mr Mohmed, a Muslim of Indian origin, was asked to trim his beard when recruited by WCT in June 2003. He refused and when his employment terminated eight months later, brought a number of claims on the grounds of race and religious belief, asserting that WCT's requirement for him to trim his beard was discriminatory. These claims were rejected by the Employment Tribunal ("ET").

The ET found that no issues regarding Mr Mohmed's beard had arisen after September 2003; WCT had not asked him to trim it after that time. He could not therefore bring a claim under the Regulations as they did not come into force until December 2003. Further, the ET found that a Sikh employee of WCT was not required to cut or trim his beard to comply with the uniform policy; he simply kept it tidy. On appeal, the EAT confirmed that on these facts there was no proof that WCT had treated Mr Mohmed less favourably.

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Minimum Wage

The national minimum wage has now increased to £5.35 per hour for those aged 22 and over, to £4.45 per hour for 18 to 21 year olds and to an hourly rate of £3.30 for those aged 16 and 17. Recent publicity has indicated that a potential claim is being considered against the Government under the new age discrimination laws and setting different rates of minimum wage by age.

DEALING WITH SICK PAY FOR DISABLED EMPLOYEES ON LONG-TERM ABSENCES

Many employers have a sick pay policy that provides for employees' pay to be automatically reduced after a certain length of sickness absence. It has been argued in recent case law that where a disabled employee's sick pay is so reduced, it may be a "reasonable adjustment" under disability discrimination legislation for the employer to exercise its discretion to continue to pay full salary. It has also been argued that the failure to do so constitutes direct or indirect disability discrimination in itself. The Employment Appeal Tribunal (in *O'Hanlon v HMRC*, 2006) has now provided some clarity on the issue.

The EAT ruled that it would be very rare for employers to have to pay disabled employees on sick leave more than non-disabled employees in the same position. The EAT noted that the intention of the legislation is not to disincentivise disabled employees to return to work. The EAT further held that where an employer reduces a disabled employee's pay because of their sickness absence, this can constitute disability-related discrimination. However, an employer can justify that discrimination if its action is material to the circumstances and substantial.

This does not mean that employers are at liberty to reduce disabled employees' sick pay without due consideration. The key issue for employers is to consider whether maintaining an employee's sick pay at a particular level is a reasonable adjustment. It is important to go through this process and to record the decision. In circumstances where the employer has failed to carry out reasonable adjustments in relation to the employee's disability that would, had they otherwise been introduced, have helped the employee return to work, maintaining full pay beyond the normal cut-off point may be a reasonable adjustment (to reflect the employer's other failures). Note that in this case it appears that the EAT was influenced by the fact that the employer had thousands of employees, and that the cost implications of having to increase sick pay for all disabled employees would have been very large. This appears to be odd reasoning, as the effect on a small employer with one or two disabled employees of having to increase sick pay in this way would also be proportionately large.

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Holidays

The DTI has recently completed its consultation on the Government's proposals to extend minimum statutory holiday entitlement to include permanent bank and public holidays. This would increase workers' minimum holiday entitlement from four weeks each year to 5.6 weeks.

If approved, the statutory entitlement of a full-time worker working five days per week would increase from 20 to 28 days, although employees could still be required to work on bank holidays. The Government's response and draft regulations are expected in December 2006.

BULLYING AND EMPLOYERS' LIABILITY

You may have seen the recent press regarding the City employee who was awarded in the region of £800,000 in damages for bullying suffered at work (*Green v DB Group Services (UK) Limited*). Helen Green instigated proceedings against her former employer Deutsche Bank, claiming harassment by colleagues and a lack of support from bosses amounted to bullying and a breach of Deutsche Bank's statutory duty to protect her from harassment under the Protection of Harassment Act 1997 (please see the article on vicarious liability on the next page for a fuller explanation of this). Deutsche Bank denied the allegations.

Ms Green alleged that she had suffered psychiatric injury after working in the secretariat division from 1997 until 2001. She claimed to have been verbally abused, ignored and made to feel uncomfortable by crude and lewd comments that continued for a lengthy period of time. Miss Green further alleged that her colleagues would hide her post and remove papers from her desk. After receiving stress counselling and assertiveness training, Ms Green suffered a nervous breakdown. She returned to work but later relapsed. Deutsche Bank terminated her employment in September 2003. Expert medical opinion agreed that she had developed a depressive disorder, but could not agree on the cause.

Awarding damages of nearly £800,000, the judge stated that Ms Green had been subjected to a "relentless campaign of mean and spiteful behaviour designed to cause her distress". She was awarded £128,000 for lost earnings, £35,000 in respect of pain and suffering, £25,000 for disadvantage in the labour market and £640,000 future loss of earnings including pension loss.

Clearly this is an exceptional case both in terms of the factual background and Ms Green's level of future loss. The high award reflected the fact that she was well paid and that she would never find an equivalent role in the City again. However, it should serve as a stark reminder to employers of the possible consequences which can arise if bullying is not identified and dealt with. Line managers and Human Resources should be made aware of the importance of ensuring that employee complaints are properly responded to and to ensure as far as possible that environments conducive to bullying and harassment are not created.

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IN BRIEF

Judicial Mediation

A judicial mediation pilot scheme has recently been launched. Where the parties consent to mediation, the claim will be stayed pending a mediation by a full-time Tribunal Chairman. Participating Chairman will receive special training in the mediation process.

The scheme will initially apply to sex, race and disability discrimination claims, usually where the employment relationship is continuing. The trial will run at the Tribunals in London Central, Birmingham and Newcastle (which will also mediate equal pay claims). If it proves successful, the scheme may be extended to cover other Tribunals and a broader set of claims.

EMPLOYERS' VICARIOUS LIABILITY CONFIRMED

The House of Lords (in *Majrowski v Guy's and St. Thomas' NHS Trust*, 2006) has confirmed that employers can be held vicariously liable for employees' actions amounting to harassment under the Protection from Harassment Act 1997 (the "Act"). A claim of harassment under the Act can result in damages for distress, anxiety and financial losses. The Act does not require an employee to prove negligence or prove that they suffered any physical or psychiatric injury.

The Act provides that a person must not pursue a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment of the other. "Course of conduct" means on at least two occasions, but the Act can also apply where the victim fears repetition of the course of conduct.

The Claimant was a clinical audit co-ordinator with the NHS Trust and made complaints of harassment, bullying and intimidation against his departmental manager on the grounds that she was homophobic. His complaints included that she: was excessively critical of his time-keeping and performance; isolated him by refusing to speak to him; was rude and abusive in front of other members of staff; and that she set unrealistic targets, threatening disciplinary action if he did not achieve them. The NHS Trust investigated and upheld his complaints. The Claimant was later dismissed for unrelated reasons. Four years later he brought a claim against the NHS Trust for harassment under the Act, although he did not bring a claim against the manager herself.

The Act was aimed at preventing stalking and the NHS Trust argued that it was not meant for the workplace, arguing that applying the principle of vicarious liability would have consequences for employers that Parliament had not intended. The Claimant argued that the manager's behaviour amounted to harassment in breach of the Act and that the Trust was vicariously liable for it. The House of Lords agreed, ruling that the purpose of the Act was "to protect victims of harassment, whatever form the harassment takes, wherever it occurs and whatever its motivation" and that the principle of vicarious liability applied to it.

Employers now the potential risk of being liable for harassment committed by employees in the course s in respect of vicarious liability for harassment claims under the Act because its ambit is much wider than that of the discrimination legislation. Further, the employer's usual defence to discrimination claims (that it took reasonable practicable steps to prevent the unlawful act) is not available in respect of vicarious liability. The Act allows employees a six-year period in which to bring claims, and employers should be aware of this vastly increased timeframe which can be used to circumvent the usual three-month time limits applicable to discrimination legislation.

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WHAT'S COMING UP?

1 December 2006: the pension provisions in the age discrimination legislation come into force

1 April 2007: new maternity rights first take effect (see article on page 2)

6 April 2007: employers with between 100 and 149 employees become subject to the Information and Consultation Regulations (the regulations already apply to businesses with 150 employees or more)

AGE DISCRIMINATION LAWS INTRODUCED BUT DELAY IN PENSIONS CHANGES

As you (hopefully!) all know, the new Regulations outlawing age discrimination are now in force.

However, the Government has announced that the pensions provisions will be delayed until 1 December 2006, while they undergo a further period of informal consultation with employers on the existing provisions.

In addition, the DTI has recently published the age discrimination questionnaire, which can be used by complainants to seek an explanation of treatment they feel is discriminatory on the basis of age and ask further questions aimed at extracting further information about the employer's practices. The questionnaire is similar in format to the questionnaires under the existing discrimination legislation and can be used as evidence in Tribunal proceedings.

The response period is eight weeks and while there is no obligation to reply, a Tribunal can draw adverse inferences in any subsequent proceedings if an employer does not respond, or responds in an evasive or equivocal manner without good reason. As with the other forms of discrimination, the statutory questionnaire is likely to be an important tactical weapon utilised by claimants and the replies should be carefully considered.

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