Parker & Co

Employment Update

April 2007

INTRODUCTION

New addition to the Parker & Co team
We are delighted to welcome newly qualified solicitor Charlotte Schmidt to the Parker & Co team. Charlotte joined us last month after training at CMS Cameron McKenna, followed by a period at Lewis Silkin.

This quarter's update focuses on smoking in the work place, disability discrimination and changes in family friendly policies. We also look at the use of expired disciplinary warnings and information and consultation obligations.

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.

CONTENTS

SMOKE FREE WORKPLACES

The general position under the *Health Act 2006* is that smoking in places of work is to be prohibited from 1 July 2007. This will apply to premises/areas of premises which are enclosed or substantially enclosed which are used as a place of work by more than one person or where members of the public receive goods or services.

The Smoke-Free (Premises and Enforcement) Regulations 2006 define "enclosed" and "substantially enclosed" as follows:

- "enclosed" – where an area has a roof or ceiling and except for doors, windows and passageways is wholly enclosed; and
- "substantially enclosed" - where an area has a roof or ceiling but there are openings in the walls the aggregate of which is less than half of the area of the walls or other structures that serve the purpose of walls enclosing the area (excluding windows and doors).

Employers will be required to display an A5 sign in a prominent position at the entrance to all smoke-free premises. The sign must show the no smoking symbol and the words "No smoking. It is against the law to smoke in these premises".
It will be an offence:

- to knowingly smoke in a smoke-free area and anyone doing so could face a fine of up to £200 or a penalty notice of £50;
- to fail to display a "no smoking" notice in smoke-free premises. This could result in a fine of up to £1,000 for the owner or manager; and
- owners and managers who fail to ensure premises are smoke-free will be personally liable for a fine of up to £2,500.

Employers will need to assess their current smoking room and outside smoking shelter arrangements and make any necessary changes. Employees will need to be advised of the smoking ban or changes in arrangements for smoking and it may be advisable to implement a smoking policy which explains the disciplinary sanctions. Failure to proactively enforce the ban could have far reaching consequences. For example a grievance from an employee about smoking in the work place could constitute a protected disclosure (whistleblowing).

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IN BRIEF

Sex discrimination law incompatible with EU Directive

The Equal Opportunities Commission was successful in its judicial review proceedings against the government. The EOC argued that the Employment Equality (Sex Discrimination) Regulations 2005 do not fully protect women from harassment and pregnancy discrimination and they lose some existing rights established in case law.

The High Court agreed that the definition of harassment is too narrow and gave as an example the fact that there is no protection against harassment by clients. The Court also held that the Regulations do not make clear that women are protected from sex discrimination where they are denied certain benefits during additional maternity leave, such as being consulted about reorganisational changes or receiving an appraisal.

It was also acknowledged that it is not always appropriate for pregnant women to show that they have been treated less favourably than they would have been had they not become pregnant as pregnancy requires women to have special protection, such as a risk assessment, which they would not have needed had they not become pregnant.

SMOKE FREE WORKPLACES, continued from page 1:

If the employee was to be victimised or suffer a detriment as a result this could give rise to an uncapped claim in the Employment Tribunal. Failure to comply with the legislation might also give rise to constructive unfair dismissal claims on the basis of a breach of trust and confidence between employer and employee.

DEVELOPMENTS IN DISABILITY DISCRIMINATION

Workplace counselling services

Many employers, particularly larger ones, provide workplace counselling for their employees. A recent Court of Appeal decision (*Intel Corporation (UK) Ltd v Da*w) held that providing such counselling does not automatically discharge an employer's duty of care to an employee. Mrs Daw suffered from stress as a result of her workload, unclear reporting lines and conflicting pressures which led to a breakdown. The employer was aware of the employee's previous bouts of depression (albeit post-natal) and the employee had raised her concerns with the employer on numerous occasions. Injury to the employee's health was therefore reasonably foreseeable and the employer failed to take appropriate action. The employer was therefore found to have been negligent, it did not matter that Mrs Daw had chosen not to use the counselling service.

Reasonable adjustments

A recent Tribunal case (*Hay v Surrey County Council*) focused on what constitutes reasonable adjustments. Ms Hay had a degenerative knee condition. Medical advice sought by the Council confirmed that Ms Hay was not capable of continuing in the role of Mobile Library Manager because it involved driving a vehicle with a heavy clutch together with crouching/squatting to reach books.

The Council sought to redeploy Ms Hay but she refused the position and was therefore dismissed. The Employment Tribunal found that the council had failed in its duty. The Council had failed to consider and make a number of adjustments including engaging an assistant, making adaptations to the vehicle and Ms Hay's pattern of work and allowing Ms Hay's to be the manager of a different mobile library which involved driving a different vehicle. The EAT and Court of Appeal found that this decision was perverse given the medical evidence supporting the Council's position and considered that on the facts of the case the suggested adjustments did not make any sense.

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IN BRIEF

TUPE: changes in terms and conditions Power –v- Regent Security Services

It is a well established principle that TUPE protects an employee's existing terms and conditions of employment upon a transfer and therefore any subsequent changes made in connection with the transfer are void.

The recent EAT decision in *Power v Regent Security Services* suggests that this principle only applies where the changes are to the detriment of the employee. Following the transfer of his employment Mr Power received a letter changing his retirement age from 60 to 65. However, shortly before his 60th birthday he received a letter informing him that his employer intended to retire him at 60. Mr Power relied on the change and claimed that he had been unfairly dismissed.

His employer argued that the change was void since it was connected to the transfer. The EAT held that the purpose of the legislation is to protect an employee's rights, therefore it is not possible to make detrimental changes to an employee's terms and conditions of employment. However, Mr Power was entitled to rely on the more favourable retirement age agreed with his employer.

DEVELOPMENTS IN DISABILITY DISCRIMINATION, continued from page 2:

Is payment of full salary to a disabled employee on long-term sick a reasonable adjustment?

Employers will be relieved to hear that the Employment Appeal Tribunal (in *Fowlet v Waltham Forest*) has confirmed again and the Court of Appeal (in *O'Hanlon v Commissioners for HM Revenue & Customs*) has also confirmed that it will not normally be necessary to pay salary to an employee on long-term sick in order to comply with the duty to make reasonable adjustments under the Disability Discrimination Act as this would not help the employee return to work.

The EAT found that the purpose of reasonable adjustments is to remove any disadvantage relating to the ability to perform a role. Payment of salary would not achieve this. Mr Fowlett had been absent from work by reason of disability related illness for a number of years. Mr Fowlett had suffered a detriment by reason of his disability as a result of not receiving his salary. However this was held to be justifiable given that the purpose of salary is to reward those contributing to the business.

The Court of Appeal held that HM Revenue & Customs was entitled to reduce Mrs O'Hanlon's sick pay following the expiry of her six month entitlement to full pay. The Court considered that payment of full salary would not normally be a reasonable adjustment. While a Tribunal can have regard to financial factors in relation to a single claim it should not replace the management function of the employer where a successful claim would have significant financial and policy implications for the employer. Further the purpose of the legislation is to protect the dignity of disabled employees making adjustments to allow them to play a full part in the work place. The examples of reasonable adjustments given in the legislation, while not exhaustive, do not suggest that a reasonable adjustment would be to simply give the disabled employee more money. Mrs O'Hanlon sought to rely on the Miekle case which held that Mrs Miekle should not have had her sick pay reduced in line with the employer's policy. However, retaining Mrs Meikle on full pay was only a reasonable adjustment because the cause of her absence from work was the employer's failure to make other reasonable adjustments. The Court did not find that the payment of full pay was a reasonable adjustment independently of the other adjustments which ought to have been made and would have resulted in the employee returning to work.

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IN BRIEF

Age Discrimination challenge

As many of you will know Heyday has applied for judicial review of the retirement provisions in the Employment Equality (Age) Regulations which came into force in October 2006. Heyday is challenging the provisions on the basis that any mandatory retirement age is unlawful. This challenge is ongoing but a recent decision by the Advocate General in relation to a similar challenge to Spanish law suggests that Heyday may well be unsuccessful.

The AG was asked to determine whether clauses in Spanish collective agreements providing for the termination of employment once an employee had reached normal retirement age, provided that other conditions relating state pensions had also been met were lawful. The AG held that such clauses are lawful as the Equal Treatment Directive does not apply to national laws governing retirement ages as the preamble to the Directive explains this. The AG went on to say that in any event the setting of a retirement age is justifiable as it serves a legitimate aim in relation to employment and labour market policy promoting for example intergenerational employment.

EXPIRED DISCIPLINARY WARNINGS

In a significant decision (*Airbus UK Ltd v Mr M G Webb*) the EAT has held that an expired disciplinary warning should not have been taken into account in deciding to dismiss an employee.

Mr Webb was employed as an aircraft lifter. In July 2004 he was summarily dismissed for gross misconduct after he was found to have fraudulently misused company time and equipment. He had been washing his car when he should have been working. On appeal the sanction was reduced to a final written warning. The warning made clear that any further misconduct was likely to lead to dismissal and that the warning would remain on his personnel file for 12 months.

On 20 September 2005 Mr Webb was found with other members of staff assembled in the locker area where they appeared to be watching television, although Mr Webb contended that he was reading a newspaper. The employees were not on a legitimate break period and were found to be guilty of gross misconduct. Mr Webb was dismissed. The employer decided not to show leniency to Mr Webb because of his previous disciplinary record. The other employees were shown leniency and given final written warnings because they had clean disciplinary records.

The EAT agreed with the Tribunal's finding that Mr Webb's expired disciplinary warning should not have been taken into account in deciding whether to exercise leniency. Mr Webb had a legitimate expectation that the final written warning given to him in July 2004 would be removed from his file after 12 months. The dismissal was unfair as a result of the inconsistent treatment.

Employers might be tempted to take into account an employee's previous warnings even if they are expired if the misconduct is the same or if it is part of a pattern of behaviour. Warnings should be tailored to the specific circumstances of the employee as this gives the employer more flexibility. For example the warning given to Mr Webb in 2004 might have stated that whilst the warning would remain on his personnel file for 12 months it may still be taken into account in exceptional circumstances (e.g. where the misconduct is very similar in nature) following the expiration of that period. However the disciplinary rules and implications of particular disciplinary action must be clear to the employee.

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STATUTORY DISCIPLINARY AND GRIEVANCE PROCEDURES

The DTI has published an independent review of the statutory disciplinary and grievance procedures led by Michael Gibbons. Many of you will be aware of the difficulties these procedures have created both for employer and employee. The review has recommended that the procedures be repealed and replaced with clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace, for employers and employees.

Other recommendations include maintaining and expanding the Employment Tribunal's discretion to take into account reasonableness of behaviour and procedure when making awards and cost orders. The review also favours the use of alternative mechanisms for resolving disputes without the need to go to the Employment Tribunal and for employment law in general to be simplified as its current complexity causes uncertainty for both employers and employees.

INFORMING AND CONSULTING EMPLOYEES

When the Information and Consultation of Employees Regulations ("ICE") were initially introduced they only affected employers with 150 or more employees. Employers should be aware that ICE now also applies to employers with 100 or more employees. A brief summary of an employer's obligations under ICE was contained in our Employment alerter last month. The Central Arbitration Committee (CAC) is responsible for hearing complaints relating to breaches of ICE and below is a summary of a recent decision which serves to remind employers to take their obligations under ICE seriously. The CAC was critical of the employer's failure to respond in a clear and coherent way given its size and resources.

Amicus v Macmillan Publishers Ltd

The union complained to the CAC that Macmillan Publishers Ltd had not arranged for a ballot for the election of information and consultation representatives. The employer was notified by the CAC on 6 April 2006 that a request to negotiate an information and consultation agreement had been made. As the employer had failed to establish a negotiating body within the six month time limit, the default standard information and consultation provisions applied and the employer should have held a ballot to elect the information and consultation representatives.

The employer argued that it had a longstanding consultative committee system of elected representatives, one for each of its sites and that pre-existing voluntary agreement had been reached with 80% of the UK workforce. Yet confusingly it also admitted that the default standard information and consultation provisions applied.

In order for there to be a pre-existing agreement the agreement must:

- have been made prior to the employee request;
- be in writing;
- apply to all the employees (or where there is more than one pre-existing agreement, the combined agreements must cover all employees);
- set out the appointment procedures for representatives;
- set out arrangements as to how the employer will inform and consult with employees; and
- be approved by the employees (that is, usually 50% or more of employees should confirm they support it or a majority of the representatives can approve it if they have authority to do so).

The CAC held that the employer did not have a pre-existing agreement. Only one of its voluntary agreements was in place before 6 April and it did not apply to all of the employees.

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INFORMING AND CONSULTING EMPLOYEES, continued from page 5:

In any event the employer had not taken the necessary steps following receipt of a valid employee request had there been a pre-existing agreement. The CAC also explored the possibility that the employer may have reached a negotiated agreement under the regulations. However, the employer had failed to appoint negotiating representatives and did not approve the resulting agreement in the prescribed way and again the agreement did not cover all of the employees. The CAC found that the standard information and consultation provisions should have applied from 5 October and the employer had failed to hold a ballot to elect the information and consultation representatives as it had been required to do. The CAC ordered that elections take place.

CHANGES TO FAMILY FRIENDLY POLICIES

In our March Employment alerter we highlighted a number of changes to maternity and adoption leave and the extension of the right to request flexible working which came into force at the beginning of April. In this section we examine those changes in more detail.

The qualifying period for maternity leave

Women will now be entitled to a maximum of 52 weeks maternity leave regardless of length of service. This brings maternity leave in line with adoption leave. Previously women with less than 26 weeks' continuous service were only entitled to ordinary maternity leave (OML) of 26 weeks. However the distinction between OML and additional maternity leave (AML) will remain as a result of the distinction between:

(a) the contractual entitlements during the two periods. During OML the employee remains entitled to all contractual entitlements with the exception of wages or salary. During AML the contractual entitlements are more limited. Employees continue to benefit from, for example, the implied duty of trust and confidence, termination provisions and redundancy entitlements. However they will not be entitled to benefits such as pension contributions; and

(b) the distinction between the right to return to the same job after OML and the right to return to the same or similar job on terms and conditions no less favourable than she would have received had she not been absent following AML

Notice of return to work

Previously an employee wishing to return to work before the end of their maternity or adoption leave entitlement was required to give 28 days notice. This has been increased to 8 weeks to give employers greater ability to plan for an employee's return to work.

Keeping in touch days

"Keeping in touch days" (KIT days) allow an employee to do up to 10 days' work during maternity or adoption leave as long as both the employee and employer agree on what work is to be done and the remuneration for that work. An employee's entitlement to maternity/adoption pay will not be affected. KIT days allow the employee and employer to be in contact during leave and will hopefully assist with the employee's return to work. Employers should also note that they are permitted to have reasonable contact with an employee during their leave which is distinct from KIT days. Such contact might relate to updating the employee on promotion opportunities or providing the employee with information relating to the job that they would ordinarily be doing.

Small employer exemption

Prior to April 2007 employers with five or less employees could prevent an employee from returning to the same or similar work following AML or adoption leave where it is not reasonably practicable to allow them do so. This exemption has now been removed.

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WHAT'S COMING UP?

30 April 2007: It will be unlawful to discriminate on the grounds of religion, belief or sexual orientation in the provision of goods and services.

30 April 2007: Discrimination on the grounds of philosophical beliefs which are not similar to religious beliefs will be unlawful.

1 October 2007: The statutory minimum holiday entitlement will be increased from 20 days to 24 days (including bank holidays).

1 October 2007: The Commission for Equality & Human Rights (CEHR) will replace existing bodies such as the Equal Opportunities Commission and the Commission for Racial Equality. The CEHR will cover all forms of discrimination.

6 April 2008: Employers with between 50 and 99 employees will become subject to the Information and Consultation Regulations.

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

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See our website for details of the employment and business immigration services we offer

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CHANGES TO FAMILY FRIENDLY ENTITLEMENTS, continued from page 6:

Maternity and adoption pay

The maternity and adoption pay period has increased from 6 months to 9 months and the statutory rate of pay has increased to £112.75 per week. Eventually the maternity and adoption pay period will be increased to 12 months in line with the leave period. An employee's statutory pay period can now commence on any day of the week rather than on the Sunday following the start of the leave period as was previously the case.

Flexible working

Prior to April 2007 only parents of children under the age of 6 (or if disabled under 18) had the right to make a flexible working request. This right has now been extended to include those who are carers of certain adults. The carer must be or expect to be caring for a spouse, partner, civil partner or relative or someone living at the same address. Employers must consider the request and can only reject a request on one of a number of specified grounds. These include additional costs, detrimental effect on ability to meet customer demand, inability to re-organise work among existing staff or planned structural changes.
