Parker & Co

Employment Update

June 2006

INTRODUCTION

The introduction of age discrimination legislation is one of the most significant changes to employment law for many years. It will affect all employers and is likely to have resounding effects in the workplace.

Ageism is perhaps not perceived as "discriminatory" in the same way that sex and race discrimination are. Subconscious discrimination on the grounds of age is commonplace. It will take many years for employers and employees to change their mindset regarding decisions and comments based on age. Until that happens, employers face a high risk of claims.

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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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AGE DISCRIMINATION UNLAWFUL FROM 1 OCTOBER

As many of you will know, from 1 October 2006 age discrimination will be unlawful. The Employment Equality (Age) Regulations 2006 will prohibit age-related direct and indirect discrimination, victimisation, harassment and post-employment discrimination.

Direct age discrimination occurs when, on the grounds of B's age or apparent age, A treats B less favourably than A would treat a comparable employee or job applicant.

Indirect age discrimination occurs when (i) A applies a provision, criterion or practice (PCP) equally to B's age group, but (ii) which puts B or would put persons of the same age group as B at a particular disadvantage when compared with other persons and (iii) B suffers that disadvantage. Examples of PCPs could include employers requiring employees to have a specific, recently-introduced qualification which may not be possessed by older workers, or a requirement to have held a driving licence for a certain length of time, which some younger workers are less likely to be able to fulfil.

Justification defence: contrary to all other forms of prohibited discrimination, an employer will be able to justify not only indirect discrimination, but also direct discrimination, if it can show that the treatment or the PCP applied constitutes a "proportionate means of achieving a legitimate aim". There are no examples of "legitimate aims", so it will be for an employer to produce evidence to demonstrate it has a legitimate aim and that the method of achieving that aim is, when objectively viewed, proportionate.

The Regulations also prohibit **age-related victimisation**, which follows the familiar definition in existing discrimination legislation. It will be unlawful to treat an individual less favourably because they have brought or given evidence in relation to proceedings, performed any act under or by reference to the Age Regulations or alleged that someone has acted in contravention of them. Victimisation cannot be justified.

Harassment on the grounds of age will also be unlawful and cannot be justified. Harassment occurs where an individual suffers unwanted conduct that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Ageist banter or jokes will be capable of being harassment.

Compensation: complaints are presented to an Employment Tribunal, which has the power to award the usual discrimination remedies, including awards for injury to feelings and uncapped compensation.

IN BRIEF

Compromise Agreements

The Court of Appeal has recently handed down an important decision dealing with repayment clauses in compromise agreements. It is common for an employer to provide for repayment of settlement monies paid under the terms of a compromise agreement in the event that its terms are subsequently breached by the employee, for example in relation to not making derogatory statements.

In CM*C Group plc v Zhang*, the Court of Appeal decided that the clause in question in Mr Zhang's settlement agreement amounted to an unenforceable penalty clause. The Court held that the settlement monies could not be recovered unless the employer could prove it had actually sustained an equivalent loss arising from the alleged breach by Mr Zhang.

Permission was granted to appeal to the House of Lords and we will update you on any further developments.

AGE DISCRIMINATION IN PRACTICE

The age laws will have substantial effects on all aspects of employment:

Recruitment and promotion decisions based on age will generally be unlawful. A key exception is that recruiting employers may discriminate on age grounds by not selecting candidates older than, or within six months of, the employer's normal retirement age (NRA) (or the age of 65 if there is no NRA). This exception does not apply to internal promotions.

Job advertisements must not be discriminatory on age grounds. Terms such as "young" or "dynamic" infer that the employer is advertising for a certain age group, which will be discriminatory. Context will be all important when judging this, and the same applies to asking for dates of birth in the recruitment process. Employers should consider what motive they have for requiring that information in that context.

Benefits (both pay and non-pay) related to age (i.e., awarded according to length of service) are permitted where they apply to less than five years' length of service (either at a particular level or total service for the employer). The length of service requirement must be justified where it applies to service in excess of five years, for example by demonstrating that the benefits are granted in recognition of and to reward loyalty, experience and to motivate staff, rather than on age grounds. The age limits for statutory benefits (sick, maternity, adoption and paternity pay) will all be removed and many age-based rules in occupational pension schemes will be exempt from the new law.

Retirement dismissals will not be unlawful if the employee is aged 65 or over and if the statutory procedure in Schedule 6 to the Regulations is followed. Note that this does not apply to retiring partners, agency workers and office holders, all of whose retirement dismissals at any age must be objectively justified. The Schedule 6 procedure includes a requirement to serve notice between six and 12 months prior to termination and also permits employees to make requests to work beyond the NRA. Employers will have to objectively justify retirement ages under 65, which will be difficult. Note that there are complex transitional provisions that will apply to retirements arising between 1 October 2006 and 31 March 2007.

Unfair dismissal claims and redundancy payment rights will no longer have an upper age limit, so older workers will have the same rights to claim unfair dismissal or to receive a redundancy payment as younger workers, unless there is a genuine retirement. There will also no longer be limits on the upper and lower ages for redundancy payments, although the current age-banded system will remain (i.e., employees over 41 will receive higher payments).

Compromise agreements, contracts of employment and policies should all be reviewed to ensure they refer to and cover age discrimination issues as appropriate.

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IN BRIEF

Bank Holiday Mondays

The EAT has recently considered whether part-time employees who do not work on Mondays are entitled to additional time off in respect of Bank Holidays which fall on that day.

The Claimant worked on Wednesdays, Thursdays and Fridays. The employer operated seven days a week. At first instance, the Tribunal held that the Claimant did suffer a detriment when compared to full time-time workers. However, the Tribunal found the reason was not related to his part-time worker status but because the Claimant did not actually work on Mondays.

The EAT upheld this decision, placing importance on the nature of the employer's business and the fact that full-time staff not working on Mondays did not receive additional time off.

It may not be the case that the same principle would apply to an employer who operated on a five day week where all full-time staff are allowed bank holidays off work.

In addition, the DTI has recently confirmed that the Government plans to fulfill its commitment to make time equivalent to bank holidays additional to annual holiday entitlement.

WORLD CUP WORRIES

Obviously many people's biggest worries concern Wayne Rooney's foot and Sven's tactics when making substitutions. However, there are many employment issues that may arise during the World Cup. Many of these concern unauthorised absences. In reality the scheduling of England's games (even in the later stages) means that it should not be necessary for most employees to miss work (or more than half an hour of work) to watch England games. It is more difficult where your employees work irregular hours or at weekends.

If an employee calls in sick on the day of the game (or the day after) and the employer suspects that the sickness absence is not genuine there is unfortunately not a lot that can be done without some evidence to support that suspicion. Employers who suffer from employees having high levels of intermittent absences handle them in various ways. This may involve the returning employee having an interview with the line manager or HR representative on every occasion of absence, which may act as a deterrent. It may also allow any patterns of absences to be seen - for example the taking of Fridays and Mondays. Some employers operate a strict system of warnings when a certain level of absence is exceeded in any year, for example a warning is given if more than 5 days are taken in any period of 12 months. Alternatively some employers offer incentives, such as an attendance bonus.

Some employers are allowing employees to watch games at work. A note of warning to such benevolent employers, who should remember that not all their employees will be English; employees of other nationalities may demand that they are allowed to watch games involving their teams. Although it is hard to imagine it happening, it would be possible for an employee to bring a race discrimination claim on the basis of nationality if employees were allowed time off for England games but not for games of that employee's nationality. They may also find that this sets a precedent for other major sporting events.

Another problem may arise from drinking during the working day. If an employer allows employees time off to watch the game but expects them to return to work, the employer may need to remind them of any policies it operates on the consumption of alcohol during working hours.

Issues concerning damage to an employer's reputation have occurred in previous tournaments where employees were arrested and deported for violence. Newspaper reports concerning the incidents publicised the employee's place of work. It is unlikely that many of you will encounter this problem, but if you do any dismissal should follow the employer's own disciplinary procedures and the new statutory procedures for it not to be automatically unfair. Also, the occurrence of the incident will not necessarily justify a decision to dismiss. All will depend on the nature of the role, any previous disciplinary warnings and the length of any resulting prison sentence. Of course, the real risk is most likely to arise from demotivation of employees following an early exit by England!

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IN BRIEF

Discrimination – manager's personal liability

A recent sex discrimination case, *Miles v Gilbank*, has held a manager personally liable to a pregnant employee in relation to bullying and discrimination by co-workers.

Ms Miles managed a hair salon. After Ms Gilbank told her she was pregnant, there followed what was described as an "inhumane and sustained campaign of bullying and discrimination" conducted by Ms Miles and other employees, which was "targeted, deliberate, repeated and consciously inflicted".

Ms Gilbank named her manager as a respondent to her claim. While her employer was held vicariously liable, Ms Miles was held personally liable for her own discriminatory acts and those of other employees. This was partly because she encouraged a working environment in which other managers were not reprimanded for discriminatory treatment, signalling that their behaviour was acceptable.

The Court of Appeal adopted different reasoning in their individual judgements, but all upheld the principle that Ms Miles could be held personally liable for the acts of her staff. In the circumstances, an injury to feelings award of £25,000 was upheld.

SURVEY ON NEW STATUTORY PROCEDURES AND TRIBUNAL RULES

As you will be aware minimum statutory disciplinary, dismissal and grievance procedures were introduced in October 2004 to encourage resolution of disputes in the workplace. The Government also wanted to increase the efficiency and cost effectiveness of the Employment Tribunal system by introducing prescribed claim and response forms and fixed conciliation periods during which the parties are able to try to resolve their dispute through ACAS (Advisory, Conciliation and Arbitration Service), although once the applicable fixed conciliation period lapses the parties lose this opportunity. Stronger case management powers were given to Tribunals and a more powerful costs regime was introduced.

The Employment Lawyers Association recently undertook a survey of Employment law practitioners to assess whether they felt that these changes had achieved the Government's aims.

Statutory disciplinary, dismissal and grievance procedures

71% of those responding thought that the statutory grievance procedure had made no difference to the number of claims being resolved before a claim is issued or at an early stage in proceedings. 99% of practitioners representing mainly respondents felt that the procedures are more costly in terms of time and money and 92% of those representing mainly claimants agreed.

ACAS – fixed conciliation periods

81% of practitioners responding felt that the fixed conciliation periods were not encouraging conciliation. Most felt that the parties simply used this period as a lull in proceedings.

Case Management Powers

85% of those who responded felt that increased case management powers had been helpful, particularly in relation to complex cases. However, it was felt by just over half of those responding that this had led to an increase in costs.

Costs Rules – orders for costs against losing parties

Whilst 52% felt that Tribunals were more willing to make such orders, most felt that this did not deter employees from bringing claims and employers from defending claims. The possibility of bringing the Employment Tribunal costs rules in line with High Court rules where adverse costs orders are routinely made against losing parties was raised. 64% of those responding believed that this should not happen.

It is evident that the changes have largely been unsuccessful and that the Government will need to re-examine them. It is hoped that the DTI will reassess the legislation in its forthcoming review.

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Parker & Co

Client Seminar 5.

WHAT'S COMING UP?

27 September 2006

Parker & Co Client Seminar

1 October 2006

Introduction of age discrimination legislation.

PARKER & CO CLIENT SEMINAR

We will be holding our annual seminar on 27 September 2006, followed by a drinks reception.

During the seminar we are planning to cover age discrimination, the new TUPE legislation, the statutory dismissal, disciplinary and grievance procedures, a case law round-up and a business immigration topic. However, if you would like to suggest a particular topic, please feel free to let us know.

Full details and invitations will be sent in due course, but please note the date in your diaries.

DISCLAIMER

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

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