

News, Legislation & Future Developments

Equality Bill – the Government has published a first draft of the Equality Bill, which is due to come into effect in 2010. The bill is intended to consolidate existing discrimination legislation (with sex/race/disability/age etc all being referred to as “protected characteristics”), but also includes some new provisions which the Government plans to introduce to strengthen the law and support progress on equality. The main proposals include:

- the definition of direct discrimination is extended to less favourable treatment “because of a protected characteristic”. The effect of this is to prohibit “associative discrimination”, e.g. discrimination against a non-disabled person who is treated less favourably because of their association with a disabled person, say by making derogatory comments about their disabled child.
- the Bill introduces indirect discrimination on the grounds of disability for the first time.
- the current definition of harassment will be widened to include conduct which “relates to” a protected characteristic. In addition, employers will be liable for harassment of their employees by a third party (where such harassment has occurred on two-previous occasions and the employer has failed to take reasonably practicable steps to stop it).
- secrecy clauses in contracts of employment, which seek to prevent colleagues discussing their pay, will be rendered unenforceable. There is also a new power to make Regulations forcing employers with at least 250 employees to publish information about the differences in pay between male and female employees. The Government has stated that it will not use this power before April 2013.

Watch out for future developments as the draft Bill makes its way through Parliament.

Employment Tribunal Statistics – statistics from the Employment Tribunal Service for the year 1 April 2007 to 31 March 2008 show that there were 189,303 claims in 2007/2008, an increase of 43% on the previous year. The average awards of compensation were as follows:

- Unfair dismissal: £8,058
- Sex discrimination: £11,263
- Race discrimination: £14,566
- Age discrimination: £3,334
- Disability discrimination: £19,523
- Discrimination on grounds of sexual orientation: £7,579
- Discrimination on grounds of religion or belief: only two awards made (maximum £5,750)

The increase in claims is thought to be largely due to an increase of claims relating to working time, equal pay and trade union membership, but employers should be aware of the general increase in Tribunal claims over the past few years.

New Law	Action Points
<p>Equal Pay – the Court of Appeal held that the time limit for commencing an equal pay claim did not begin to run when the employees’ original employment contracts were terminated and replaced with new contracts. Because the employees had an uninterrupted succession of contracts, time started to run when the “stable employment” relationship ended rather than when the original contract ended. <i>Slack and others v Cumbria County Council [2009] EWCA Civ 293</i></p>	<p>Employers should be aware that they may be liable for pay inequality under old and replaced contracts. It is only where there has been an end to the “stable employment” relationship that they may be able to argue the employees’ claims are time barred.</p>

Employment Status – the Court of Appeal held that two controlling shareholders were also employees and so could make claims to the National Insurance Fund after the relevant companies became insolvent. Overturning previous cases, the CA held that the possession of a controlling shareholding did not prevent an employment contract existing. Whether a controlling shareholder is also an employee is a question of fact to be determined in each case.

Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and another [2008] EWCA Civ 280

Disciplinary Procedures – the High Court held that a teacher was entitled to be accompanied by a legal representative at an internal disciplinary hearing where, if the allegations were upheld, his employer was obliged to report him to the Secretary of State for Children, Schools and Families who would place him on a register of those unsuitable to work with children. The gravity of the allegations and the impact of Article 6 of the European Convention of Human Rights (“ECHR”) meant that the employee was entitled to legal representation.

R (on the application of G) v The Governors of X School & Anor [2009] EWHC 504

Transfer of Undertakings – the EAT upheld a Tribunal’s decision that no service provision change, and therefore no relevant transfer, had occurred for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006) when a contract was re-assigned from one contractor to a number of contractors. It was not possible to determine to which new contractor the work previously carried out by the employees had been transferred because the services carried out were so fragmented after the transfer.

Clearsprings Management Ltd v (1) Ankers and others (2) Angel Services UK Ltd and others UKEAT/0054/08.

Effective Date of Termination – the Court of Appeal held that the effective date of termination (EDT) can be the date of an act demonstrating a clear intention to terminate employment. In this case, the employer had stopped paying the employee during a period of suspension whilst negotiations regarding a compromise agreement were ongoing. The compromise agreement stated that the termination date would be 31 October, and the employee knew he would not be paid after this date. The negotiations broke down in February and the employer wrote to the employee in early March to confirm that his employment had terminated when he had been removed from the payroll on 31 October.

Kirklees Metropolitan Borough Council v Radecki [2009] EWCA Civ 298

The Court of Appeal set out useful guidance to be used by Tribunals in determining employment status for controlling shareholders. Third party purchasers should be aware of the risk of becoming liable to previous directors who may also be employees.

The High Court stressed that its decision in this case was based on the particular facts, and that it was not intended to have wider implications. In this case, the employee was employed in the public sector and so could rely on the ECHR directly. This case is therefore less applicable in the private sector.

There were a number of distinguishable features in this case, and so the principle established in previous case law, that TUPE 2006 may still apply where activities are divided up and awarded to a number of different contractors, should not be overlooked.

Although the CA decided that the EDT was on 31 October when the employer removed the employee from the payroll, it is unclear whether the same decision would have been reached if the employee had not been aware that he would no longer receive salary after this date. Care should be taken to clearly communicate the EDT in every case. The EDT is important because it is the date from which the 3 month time limit for an unfair dismissal claim runs.