

Legislation & Future Developments

Maternity & Adoption – the final draft of the Maternity and Parental Leave etc and the Paternity and Adoption Leave (Amendment) Regulations 2008 has been published. The Regulations came into force on 23 July 2008 and apply to employees who are due to give birth or adopt on or after 5 October 2008, and extend the rights afforded to such employees on Ordinary Maternity or Adoption Leave to Additional Maternity or Adoption Leave.

Be aware that employees who are affected by these Regulations will now have the same rights during the whole of their maternity as they would have if they were at work (with the exception of remuneration).

National Minimum Wage - the Government has announced plans for a consultation to change the law so that tips, gratuities and service charges can no longer be taken into account when deciding if a worker has received the National Minimum Wage. See also the case of Commissioners for Her Majesty's Revenue and Customs v Annabel's (Berkeley Square Ltd) and ors UKEAT/0562/07 below.

It is proposed that these changes will come into force in 2009. However, current systems for payment of tips and the National Minimum Wage should be reviewed in anticipation of these changes.

New Law

Disability Discrimination – ECJ held that the Equal Treatment Framework Directive is intended to cover discrimination by association in the context of direct discrimination and harassment. The claim was brought by a non-disabled woman who alleged discrimination by reason of her association with her disabled son. The case has been remitted to the Employment Tribunal who will have to determine whether the Disability Discrimination Act 1995 can be interpreted in such a way as to give effect to the Directive. *Coleman v Attridge Law and Law C-303/06*

The decision suggests that discrimination by association should also be covered in respect of other forms of unlawful discrimination. Be aware of the potential for such claims, and watch out for future amendments to the legislation

Dismissal Procedures – Court of Appeal held that unreasonable delay in completing the statutory dismissal procedures did not make the dismissal automatically unfair. Despite the delay, the procedures were actually completed, and so the claim could not come within the provisions of the Employment Rights Act 1996 providing for automatically unfair dismissal for non-completion of the statutory procedure. The employer in this case had taken four months to deal with an appeal against the dismissal. *Selvarajan v Wilmot and others [2008] EWCA Civ 862*

Although delay may not make the dismissal automatically unfair, it may be a contributing factor to the overall fairness of the dismissal. Therefore, dismissal and grievance procedures should be dealt with promptly and without delay.

Grievance Procedure – EAT held that a grievance which expressly stated that it was an informal grievance, and referred to an intention to file a formal statutory grievance, still constituted a valid statutory grievance under the Employment Act 2002.
Procek v Oakford Farms Ltd UKEAT /0049/08

Ensure that all written complaints received from employees are dealt with in accordance with the grievance procedure.

Retirement – the Employment Tribunal held that an employer who compulsorily retired an employee the day before his 65th birthday could not rely upon the default retirement exemption in Regulation 30 of the Employment Equality (Age) Regulations 2006. The exemption only allows for fair retirement of employees who are over and above the age of 65. The dismissal was therefore unfair and discriminatory. *Plewes v Adams Pork Produce Limited 2600842/07*

Ensure that steps taken to retire employees are undertaken in accordance with the legislation.

Pay – EAT held that tips collected by the employer and then distributed to employees to 'top up' their basic pay to the National Minimum Wage did not constitute wages for the purposes of the National Minimum Wage. *Commissioners for Her Majesty's Revenue and Customs v Annabel's (Berkeley Square Ltd) and ors UKEAT/0562/07*

Changes to the law involving tips, service charges and gratuities have been proposed by the Government (see above). Review current practices in anticipation of these proposed changes.

Equal Pay – pay protection arrangements following a job evaluation scheme which directly or indirectly treat women less favourably than men are discriminatory regardless of the employer's knowledge and intentions when putting such arrangements in place. Any discriminatory pay protection arrangements must be objectively justified and an employer's knowledge and intentions are relevant when considering justification but not when considering the preliminary question of whether arrangements are discriminatory. *Redcar v Cleveland BC; Surtees v Middlesborough BC [2008] EWCA Civ 885*

Ensure that pay protection arrangements are not discriminatory or can be objectively justified.