

**DISCUSSION PAPER - EMPLOYMENT LAW UPDATE****Introduction**

2012 was a highly unusual year as far as employment law was concerned. This is because while some significant and interesting cases were decided in the courts, apart from the Protection of Freedoms Act 2012 which changed the system of criminal record checks, there was little new legislation that was either passed by Parliament or that came into effect. Several highly significant consultation exercises on wide reaching reforms that are being planned for the next few years were however launched. In addition draft regulations were brought forward and further sets of proposals announced which has meant resulting legislative changes for 2013 and beyond. The start of 2013 has also seen further consultations announced and the receiving of Royal Assent by the Enterprise and Regulatory Reform Act and the Growth and Infrastructure Act.

The paragraphs below set out the major areas where changes have occurred or are proposed.

**Unfair dismissal**

A simple, but major, change in unfair dismissal law was introduced in April 2012. From this date the qualifying period went up from one year to two years, meaning that until an employee has completed a continuous period of two years in their employment, they will not be able to bring a case of unfair dismissal. The change was not retrospective and only applies to employees whose contracts commenced on or after 6<sup>th</sup> April 2012. Those employed prior to this date continue to qualify for unfair dismissal rights after a single year of continuous service.

The justification for the change back to two years relates to encouraging job creation by removing disincentives that may deter employers from taking on new staff, but the move was hugely controversial as it involved removing fundamental employment rights from hundreds of thousands of people. There is also a potential issue over its legality under EU law, given that more women than men will be affected.

From June 2013 no qualifying period of service will be required for those bringing a claim for unfair dismissal if the reason for the dismissal is political beliefs or affiliations.

**Employment Tribunal Reforms**

Changes to employment tribunal procedures came into force on April 2012 which included: employment judges hearing some cases without lay panel members, increases in costs awards and deposit orders, and witness statements being taken as read.

From summer 2013 more changes are planned which will include the right to levy fines of up to £5,000 on employers who lose cases and have been found to have acted unreasonably in defending a claim and the introduction of a sliding scale of fees when a claimant submits an Employment Tribunal claim form and a further fee prior to any hearing taking place. Additional fees would be payable if an employer wanted to counter-claim, when appeals are taken to the EAT and when applications are made to tribunals to set aside default judgements or to dismiss claims. Losing respondents will then be required to reimburse victorious claimants in addition to paying any other compensation required by the tribunal, although this will be a matter for the tribunal to decide. It will not happen automatically.

A salary-based cap on compensatory reward for unfair dismissal is also expected to be introduced in summer 2013 which will mean the maximum award for most will become 12 months pay. In addition a new Statutory Code of Practice is to be drawn up by ACAS on reaching settlements with dismissed employees ahead of tribunal proceedings.

### **Retirement Age**

In July 2012 the European Court of Justice, in the case of *Hornfeldt v Posten Meddelande AB*, determined that a mandatory retirement policy does not breach European age discrimination law. In this Swedish company, employees were dismissed at age 67. Justifications advanced included providing employment opportunities for young people and avoiding difficult dismissal proceedings involving older workers whose capacities were declining.

Following a run of similar cases it is likely that justifying the continuation of mandatory retirement policies is not going to be difficult as far as EU age discrimination law is concerned. There still remains a question mark over its lawfulness under UK unfair dismissal law however and until we have a test case in the UK courts we cannot be certain.

The Government also plans to simplify the rules for accessing the state pension and state second pension and making the system more accessible to people who take periods out of the workforce for the purposes of raising families and caring for elderly dependants. Additional financial incentives will also be introduced to encourage more people to work beyond the state pension age.

The state pension age will rise to 66 between October 2018 and October 2020 and to 67 between 2026 and 2028.

### **Disclosure and Barring Service**

From September 2012 the Criminal Records Bureau was replaced by the Disclosure and Barring Service and it is expected that from early summer 2013 there will be the facility for criminal record checks to be verified on line using an new Update Service which will remove the need for new checks to be carried out in certain situations where an employee changes jobs within the Council or joins the Council with a check from a similar organisation.

### **Pensions Reforms**

From October 2012 pensions auto-enrolment commenced with larger employers required to automatically enrol all eligible employees who are not already part of a workplace pension scheme into a qualifying workplace pension or the National Employment Savings Trust pension scheme and make minimum contributions. Compliance is being phased in later for medium and small employers and it is expected that NHDC will need to ensure compliance by January 2014.

### **Sick Absence**

#### *Sickness and Holiday Entitlement*

In 2012 there were a number of cases regarding holiday entitlement under the Working Time Regulations when employees are off sick. These rulings, which are binding across the EU, confirmed that if an individual falls sick shortly before they are due to go on holiday, or whilst on holiday, they should be permitted to reschedule the holiday so they do not lose out on the right to take four weeks annual leave from work while fit and healthy. In the Court's view it would defeat the whole purpose of the working time directive if workers in effect 'lost' a portion of their annual leave due to being sick.

A consequence of the judgements is that people who are away from work for a long time due to sickness must continue to accrue their statutory holiday entitlement and can take it after they are fit to return to work. Under European law individuals have the right to carry forward leave into the next year regardless of the employer's policy on carry over of annual leave if they have not been able to take outstanding leave due to sickness.

As a result of recent cases the Government is currently consulting on this whole area of law with a view to ensuring that UK regulations are compliant with existing European case law.

### *New Fit Note Guidance*

The Government has issued new guidance for employers, employees and doctors on using Fit Notes which put the emphasis on what a person can do rather than what they can't. HR has distilled the many pages of this guidance into notes for managers and staff published on the intranet.

### **Equal Opportunities**

#### *Religious discrimination*

Four Christian people who claimed in different ways to have been unlawfully discriminated against because of their religious beliefs brought their cases to the European Court of Human Rights in 2012, receiving judgements early in 2013.

Of the four only Mrs Eweida, a member of British Airways ground staff won her claim. She had been required to remove the crucifix she wore round her neck when at work and had been dismissed for refusing to comply with the company's dress code. She lost her claim in the UK courts on the grounds that wearing a crucifix was not a requirement of her faith, but merely a personal choice. Mrs Eweida's victory in Strasbourg was on the grounds that in wearing her crucifix she was causing no offence to anyone else and, indeed, causing no harm to anyone at all. Her decision to manifest her religion by wearing it should therefore have been protected in law.

The other three claimants all lost their cases, essentially because in each case their employers were able to advance good reasons in justification for their treatment.

Mrs Chaplin's case also concerned the right to wear a crucifix at work. Her case was different from Mrs Eweida's in that she was a nurse and there were genuine health and safety concerns that underpinned the hospital's dress code. Moreover, her employers had also asked employees of other faiths to remove jewellery too, and had not therefore discriminated against her on grounds of her Christianity.

Mr McFarlane was employed to provide psycho-sexual counselling to couples whose relationships were under strain. He had been disciplined because, as a Christian, he felt unable to provide his services to same-sex couples.

Mrs Ladele, employed as a registrar by Islington Council, was in a similar position. She had been dismissed for refusing to officiate at same-sex civil partnership ceremonies. In both cases the European Court of Human Rights decided that the UK courts had acted 'within the margins of appreciation' in rejecting their cases. A balance had to be struck between the rights of people of faith and those of same sex couples, and no disproportionate judgement had been made in either case.

These judgements suggest that employers should only discriminate against someone on any kind of religious grounds if they have a reasonable and genuine reason for doing so.

#### *Bullying and Harassment*

In the very sad case of *Vaickuviene and others v J Sainsbury plc*, the Scottish Court of Session held that Sainsbury's were vicariously liable for the 'harassment' of one worker by another, the case having been brought by the harassee's family following his murder on Sainsbury premises by his harasser. This shows the crucial importance of ensuring any complaint of harassment is swiftly and thoroughly investigated by an employer. In this case the harassee had made a complaint which was not immediately investigated. His harasser stabbed him to death at work the next day.

### **Family Friendly Initiatives**

From March 2013 unpaid parental leave increased to 18 weeks to comply with the EU Parental Leave Directive. Further changes are expected as a result of the Children and Families Bill which introduces a new shared parental leave system and statutory shared parental pay, a right to time off for antenatal care, and extends the right to request flexible working to all employees. If passed, many of these changes are expected to be introduced in 2014-15.

## **The rest of 2013 and beyond**

Other proposals not mentioned above are briefly summarised below.

### *TUPE*

Changes to the TUPE Regulations may be announced depending on the outcome of the Governments consultations.

### *Employee Shareholder Status*

The Growth and Infrastructure Act 2013 will allow employers to offer employees between £2,000 and £50,000 worth of shares in their company, free of capital gains tax, in return for employees agreeing to give up rights in respect of unfair dismissal, redundancy, flexible working and time off for training and to provide 16 weeks notice of the confirmed date of return from maternity or adoption leave instead of the usual 8 weeks.

Existing employees will not be compelled to sign up to the scheme if they do not want to, but employers will be permitted to make joining a condition of employment for new starters.

### *Long Term Sickness Absence*

From 2014 the Government will introduce a health and work assessment and advisory service. This will provide a state funded assessment by occupational health professionals for employees who are off sick for four weeks or more, case management for employees with complex needs who require ongoing support to facilitate their return to work and advice on overcoming the barriers that prevent employees from returning to work. This service is already available to NHDC employees by our OH provider SERCO.

### *Reserve Forces*

Following the decision to greatly increase the number of trained reservists, a White Paper is expected on developing a new relationship between reservists, employers and the government.

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