

In Brief – UK Employment and HR Newsletter

Talkback

In this issue of our employment and HR newsletter, we focus on the new legislation that lies ahead for 2010. With a general election now predicted to take place in May 2010, it is not clear if Labour will have the chance to continue with its legislative programme or if a Conservative Government will seek to set its own employment law agenda. The Employment Bill may be this year's key legislative change if it receives Royal Assent prior to the general election with some elements of the law coming into force in October 2010. If it doesn't, then it will be up to a Conservative Government to determine if it wishes to proceed with the Bill.

For 2010, bonuses (particularly in the financial sector) continue to be the hot topic but it will also be another busy year in both the employment tribunal and the courts as some significant cases are being appealed in relation to contractual issues, TUPE and discrimination. We will address some of these in our case law update in issue number 2.

The Employment Bill 2009/10

The Bill's explanatory notes set out its two main purposes: to harmonise and to strengthen discrimination law to support progress on equality. The main provisions of the bill are as follows:

- Harmonise key concepts in respect of defining discrimination including direct, indirect, justification, victimization, harassment and introduce a new concept of combined discrimination where an individual has at least two protected characteristics
- Permit employers to discriminate lawfully where there is an occupational requirement defence and extend the concept of positive action
- Redefine the concept of disability discrimination and introduce a new concept of indirect disability discrimination
- Creation of a single equality duty for public sector bodies and a new duty to consider social and economic inequalities when taking strategic decisions
- Encourage greater pay transparency by prohibiting pay secrecy clauses and requiring public sector (and potentially private sector) employers to disclose details of the gender pay gap
- Broader powers for the employment tribunal to make recommendations for the benefit of the entire workforce and not just the claimant if it finds that an employer has discriminated against an employee
- Prohibit age discrimination in relation to goods and services

The Equality and Human Rights Commission has issued three draft statutory Codes of Practice on employment, equal pay and services, and public functions and associations. Consultation on these draft Codes closes on 2 April 2010. The Bill has now completed the Committee stage in the House of Lords and the Report stage is due to take place on 2 March 2010.

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In Brief

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Additional Paternity Leave & Pay

As of 6 April 2010, eligible employees (fathers, partners and civil partners) of children due on or after 3 April 2011 will be entitled to additional paternity leave and pay (“APL&P”). The draft APL&P legislation comprise four sets of regulations which are currently before Parliament. They give a right to a minimum of two weeks’ and a maximum of 26 weeks’ leave to care for a child, if the child’s mother returns to work without exercising their full entitlement to maternity leave. Some of the leave may be paid if it is taken during the mother’s maternity pay period.

Action required & key considerations

The below will require employers to start to review their maternity, paternity and family friendly policies during the course of 2010. Employers who operate an enhanced maternity pay scheme will have to consider if male employees should also be entitled to equally enhanced rights of pay and if not, why not? It will be interesting to see if the cost of providing enhanced benefits for all employees will result in a reduction in benefits or access to enhanced schemes for both men and women. There may also be a debate as to who takes priority if there is a redundancy situation and the employer has only one suitable alternative role but to employees at risk, one employee on additional maternity leave and the other on APL. Further, given the similarities with

the maternity legislation, we will inevitably see employers wrestling with the same problematic issues of pay rises, bonuses and pensions.

Fit Notes

As of 6 April 2010, the “sick note” will become the “fit note”. This forms part of the Government’s health, work and well-being strategy. The aim is that it will reduce sickness absence levels and support a return to work. The Government expects it to benefit the British economy by an estimated £240 million. The Department of Work and Pensions issued its guidance to employers, employees and GPs on 19 February. The employer’s guide is called “Statement of Fitness for Work” which can be found [here](#).

Summary of APL&P Scheme

The APL&P scheme is modeled on the statutory maternity scheme (i.e., for the purposes of calculating pay there will be the same 26 weeks’ length of service requirement and reference period). The main provisions are as follows:

Eligibility

- APL&P will be available to employees 20 weeks from the date of birth up to the child’s first birthday.
- The employee must have 26 weeks’ continuous service by the end of the 15th week before the date of birth.
- It will not have to run back-to-back with the end of the period of maternity.

Notice & process

- The employee will be required to give a minimum of eight weeks’ notice of their intention to take additional paternity leave (“APL”) and provide a written leave notice, an employee declaration and a mother’s declaration.
- The employer may ask for additional evidence within 28 days of receiving a request and, subject to this request for additional evidence, an employer will be required to confirm an employee’s entitlement to APL within 28 days of the date of the employee’s notification of their wish to take it.
- The employee will be entitled to return to work early by giving six weeks’ notice.

Pay & benefits

- If the employee is eligible for additional paternity pay (“APP”), it will be at the lower statutory rate of £124.88 per week and payable during the mother’s statutory maternity pay or maternity allowance period.
- The employee is entitled to all terms and conditions during the APL period save for remuneration.
- The employee will be able to work for up to 10 days during the APL period without bringing the APL to an end. It is for the parties to agree if this is paid.

Protections

- It will be unlawful to subject the employee to a detriment because of APL or dismiss the employee if the reason/principal reason was that his employer believed that he was going to take, he asked to take or took APL.
- If the employee is at risk of redundancy during the APL period, he has the right to be offered suitable alternative employment in preference to other employees who are in the workplace.

Similar provisions apply to those who are adopting a child.

Employers will be able to recover 92% of APP or 104% if the employer qualifies for small employer relief. Commentators suggest that the Conservative party supports the increased entitlements and that it may even extend the provisions to allow both parents to be off at the same time.

In Brief

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The new look “fit note” will require a GP to complete the below:

I advise you that:

- you are fit for work
- you may be fit for work taking account of the following advice:

If available, and with your employer’s agreement, you may benefit from:

- a phased return to work
- amended duties
- altered hours
- workplace adaptations

Comments, including functional effects of your condition(s):

The guidance provides that the GP will tick the relevant boxes and then state on the fit note the period of time their advice is for. It states that if an employer cannot make the adaptations or adjustments, it should explain the reasons for it to the employee and then treat the fit note as if the GP had advised that the employee was not fit for work.

Most employers would probably welcome the reform of the sick note certificate as the current ‘sick note’ form often does not give employers sufficient information. Certainly, it may assist employers if an employee has been absent for a long period or if s/he may be disabled within the meaning of the Disability Discrimination Act 1995 (the “Act”). However, it potentially extends the duty to make reasonable adjustments to those who are not ‘disabled’ with the meaning of the Act, it is not clear what happens if there is a failure by the employer to explore a ticked suggestion or if a failure to implement a ticked suggestion must be reasonable, it does not obviate the need for an employer to carry out a risk assessment on the individual’s return to work, obtain specialist medical

advice or engage occupational health and it could even delay a full return to work whilst the employer takes the individual through each of the suggested options. A copy of the regulations can be found [here](#).

Also, from 1 April 2010, the Government’s occupational health advice line pilots will be extended to cover every employer with up to 249 employees in Britain. Further information can be found [here](#).

Action required & key considerations

Employers will need to review their sickness absence policies and procedures prior to 6 April. Where a conditional fit note is received, the employer will need to consider any suggestions made by the GP and how and if these can be accommodated. Care will also need to be taken around why any such suggestions are not appropriate and the employer should retain evidence to substantiate its reasoning. Finally, consideration will need to be given to the inter-play with the provision of any insured benefits such as permanent health insurance and employer’s liability insurance.

More Power To The Whistleblower?

More box ticking but this time in relation to complaints made to the employment tribunal where the claimant believes that s/he has suffered a detriment at work or has been dismissed for making a protected disclosure under the Public Interest Disclosure Act 1998 (a “whistleblowing claim”). Last year there were 1,700 whistleblowing claims. As of 6 April 2010, the claimant will be asked to tick a box on the employment tribunal claim form to state if the claim includes a whistleblowing claim and if s/he wishes the employment tribunal to refer the allegations to the relevant regulator. If so, the tribunal will send either the claim form or extracts from it. The regulator will then assess the information and investigate if appropriate. Both parties will then be contacted by the

tribunal to inform them that a relevant authority has been contacted. Given that a significant number of claim forms include personal information about third parties, the tribunal service will have to ensure that any information provided to the regulator is in compliance with its data protection obligations.

Comment

This change in the law may be small but it could be important. Claims of this nature usually involve serious allegations of fraud, financial irregularities or health & safety issues which could cause reputational damage even if unfounded. Therefore, the risk of a costly and time-consuming investigation by a regulator could increase the willingness of employers to settle whistleblowing claims early and at a premium.

Right To Time Off For Representatives & Requesting Time For Training

On 1 January 2010, ACAS’s Code of Practice 3 on Time Off for Trade Union Duties and Activities came into effect. ACAS has also published two guides to complement the Code on managing time off for union and non-union representatives. These provide, amongst other things, that TUPE and collective redundancy non-union representatives have a statutory right to paid time off to carry out their duties, paid time off for training, the provision of facilities to help them perform their duties and protection against dismissal and detriment. All these documents can be found [here](#).

As of 6 April 2010, eligible employees will have the right to apply for time off without pay to participate in work-related training. It will apply from 6 April to employers with 250 or more employees, and will be extended to apply to all employers from April 2011. The right will work in a similar way to the current right to request flexible working.

The Employment Tribunal Service's Annual Report for 2008/09 shows that the number of single employment tribunal claims received in the last quarter of 2008/09 was up by 28% when compared with the same period in the previous year. This would appear to reflect the impact of the recession.

Type of Claim	Median	Maximum
Unfair Dismissal	£4,269	£84,005 (inclusive of basic award)
Disability Discrimination	£7,226	£388,612
Sex Discrimination	£7,000	£113,106
Race Discrimination	£5,172	£1,353,432
Religious Discrimination	£4,291	£24,876
Sexual Orientation Discrimination	£15,351	£63,222
Age Discrimination	£3,000	£90,031

Know Your New Limits

As of 1 February 2010, the following limits now apply...

Type of Claim	Amount/Award
One week's pay (where capped)	£380
Compensatory award for Unfair Dismissal*	£65,300
Redundancy payment	£11,400
Discrimination	No limit
Breach of contract in employment tribunal	£25,000
Failure to inform/consult in redundancy	90 days' actual pay (no cap)
Failure to inform/consult in TUPE transfer	13 weeks' actual pay (no cap)
Failure to provide employee liability information on TUPE transfer	£500 minimum for each employee (no maximum)

*Compensatory awards for Unfair Dismissal claims where dismissal for health & safety or for making a protected disclosure are unlimited. This figure is a down from last year due to the lower retail prices index.

Other Current Rates

Statutory Payment	Amount
Statutory Maternity, Adoption & Paternity Pay	£123.06 per week rising to £124.88 per week as of 4 April 2010
Statutory Sick Pay	£79.15 per week
National Minimum Wage	£5.80 for workers 22 years and over, £4.83 for workers aged 18 to 21 years

On the Horizon

5 April 2011: *European Works Council ("EWC") Directive* – Member states have until 5 April to give effect to a 'recast' Directive.

6 April 2011: *Workplace childcare schemes* – Reduced tax relief for higher/additional rate taxpayer employees.

1 October 2011: *Agency Workers* – Final version of the Agency Workers Regulations 2010 have now been published and will come into force in 1 October 2011 providing

for the right to equal treatment in relation to holidays, hours, breaks and pay if agency workers satisfy the 12-week qualifying period. There are also rights of equal access to facilities and to be informed of vacancies for which there is no qualifying period. Claims will be heard by the employment tribunal within three months.

Stop Press

Maternity Pay: The proposal to increase statutory maternity pay from 39 to 52 weeks has been postponed indefinitely.

However, the European Commission is proposing to amend the Pregnant Workers Directive (92/85/EC); one of the proposals is that member states will have to give pregnant workers 20 weeks' full pay. It is estimated that this would cost the UK £2 billion pounds a year. The Government is lobbying hard against it. The 20-week full-pay proposal will go before the full European Parliament in early March and any new laws would not come into effect for approximately 18 months to 2 years. ■