

JMA

Providing HR and employment law support
HR & LEGAL

Our final newsletter of 2010 and we would like to wish you a very happy Christmas and a successful New Year!

What to expect in 2011

The following is a summary of the employment law changes that we can expect over the next 12 months. Don't forget to review internal policies and procedures to ensure they are kept up to date.

1 February 2011

Increase to Compensation Limits

- the amount of a week's pay for the purposes of calculating, among other things, statutory redundancy payments and the basic award for unfair dismissal will increase from £380 to £400;
- the maximum compensatory award for unfair dismissal rises from £65,300 to £68,400; and
- the minimum basic award in cases where the dismissal was unfair by virtue of health and safety, employee representative, trade union, or occupational pension trustee reasons will increase from £4,700 to £5,000.

April 2011

Flexible Working Rights Extended

The right to request flexible working will be extended to parents of children under 18 years from April 2011.

The Government's 'Equality Strategy - Building a Fairer Britain'

The provision in S.159 of the Equality Act 2010 regarding positive action in recruitment and promotion comes into force in April 2011. Employers will be allowed "to apply voluntary positive action in recruitment and promotion processes when faced with two or more candidates of equal merit, to address under-representation in the workforce".

The Government also plans to develop a voluntary scheme for gender pay reporting for all private and voluntary sector businesses. However, no news yet on the introduction of the concept of 'combined discrimination' provided for in the Equality Act.

The Bribery Act 2010

This new Act is due to come into force in April 2011. It will introduce a new corporate offence of failing to prevent bribery by individuals acting on behalf of an organisation. The only statutory defence being if employers can show that they have "adequate procedures" in place to prevent bribery and corruption. The Ministry of Justice is consulting on its guidance on the procedures that commercial organisations should put in place to prevent breaches of the Act.

3 April 2011

Additional Paternity Leave

Fathers will be entitled to Additional Paternity Leave (ADL) in respect of children due on or after 3 April 2011. There will be the right to up to 26 weeks' leave to care for a child, if the child's mother or (in the case of adoptions) the primary adopter returns to work without exercising their full entitlement to maternity or adoption leave. Employers should consider whether and how they will extend any enhanced contractual rights applying to women on Additional Maternity Leave to fathers taking APL after a recent ECJ ruling.

6 April 2011

Right to Request Time off for Training

Although still under review by the Government, all employers should assume that the "right to request" procedure will apply to them from 6 April 2011. It already applies to those with 250 employees or more.

Transitional Arrangements: The Default Retirement Age

Despite the CBI's plea to the Government to delay its proposals to abolish the default retirement age (DRA) of 65 on 1 October 2011 until it has provided practical guidance for employers, pending the outcome of its recent consultation, the transitional arrangements are still planned to commence on 6 April 2011 when employers giving notice of retirement after 6 April 2011 will no longer be able to rely on the DRA.

11 April 2011

Increase to Statutory Payment Rates

Increases expected from 11 April 2011:

- Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay: £124.88 to £128.73, with the weekly earnings threshold rising from £97 to £102.
- Statutory Sick Pay: £79.15 to £81.60, with the weekly earnings threshold also rising from £97 to £102.
- Maternity allowance: £124.88 to £128.73, with the earnings threshold remaining at £30.

1 October 2011

Agency Worker Regulations 2010

The Government has announced that it will not be amending the Regulations before they come into force in 1 October 2011. We will report on the Regulations in more detail in a future newsletter.

No Bonus where PILON Invoked

The Court of Appeal has upheld a decision in the case of *Locke v Candy & Candy* that, where a bonus clause stated that an employee had to be "employed by the company in order to receive the bonus", he was not entitled to any bonus when summarily dismissed under the terms of a PILON (payment in lieu of notice) clause 10 days before it became due.

The PILON clause in his contract did not mention the employee's right to an annual bonus, which in this case was for a guaranteed sum of £160,000 and only became payable after 12 months employment. The Court held that the contract had to be constructed 'holistically'. Accordingly, as the PILON clause dealt only with termination and not quantification, the bonus clause (and its restricted operation) had to be applied when calculating the value of the payment.

Equality Act New Code of Practice and Guidance Awaited

The Equality and Human Rights Commission has now published the final version of the Statutory Code of Practice on Employment which it is intended to aid understanding of the employment-related aspects of the Equality Act 2010 alongside the Code of Practice on Equal Pay. It replaces the various existing codes on different aspects of discrimination law. The Code now simply needs to complete its final stage in the parliamentary process.

We are also awaiting the outcome of the Office for Disability Issues' consultation on its proposed changes to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. It takes into account the changes introduced by the Equality Act 2010 on 1 October 2010, including the removal of the list of "capacities" and the introduction of the concept of "protected characteristics". It has also been updated to reflect recent case law. The Guidance is expected to be in force in April 2011. In the meantime, the 2006 Guidance continues to apply.

Bumping Should you or Not?

The EAT has looked again at the issue of "bumping" – when a potentially redundant employee is given another employee's job, resulting in the other employee being dismissed for redundancy in their place.

The case, *Fulrum Pharma (Europe) Ltd v Bonassera*, concerned an HR Manager and her HR Executive. The employer had decided that it no longer needed an HR Manager and regarded her as being in a stand alone role and so there was no need to pool her with her assistant. The employer sought to argue that Mrs Bonassera would not have wanted to carry out the more junior role, which attracted less pay. However, it did not ask her about this to know for certain, and had even noted the question in its script for the consultation meeting with her, together with a note to that effect, that if she did express an interest in the junior role they recognised there was a need to pool both employees for the redundancy exercise.

What the case highlights in particular is the need to consider redundancy pools carefully and not to make any assumptions about the roles that employees at risk of redundancy may be prepared to do in order to avoid dismissal. It does not mean that employers should always consider more junior employees in the redundancy pool when considering making employee(s) at a higher level within the organisation redundant. However, employers should at least consider the point when starting the redundancy exercise and factors to consider may include: how different the two jobs are; the difference in level of remuneration; the qualifications of the employees involved; and their length of service. Where it is proposed that the more senior employee is made redundant, "bumping" may be more appropriate, especially where the senior employee has longer service and is better qualified. Certainly, employers should consider seeking the senior employee's views about whether they would be interested in carrying out the more junior role at a reduced salary.

Bad Weather Policy

With all the bad weather we have been having, many employers will want to consider their approach when employees are unable to get to work. Policies could also include absence caused by other travel problems caused by other situations such as public transport strikes. Matters to consider are whether employees should be paid or entitled to time off in lieu if they cannot make it into work.

Serial Litigant Faces Costs Order

The Employment Appeal Tribunal has dismissed four appeals by an alleged serial litigant. The Claimant, John Berry, has a history of seeking out opportunities in the recruitment process and lodging claims in the Tribunal with a view to achieving settlement with the potential employer for a few thousand pounds. The Judge concluded that, in general, those who seek to exploit discrimination legislation for financial gain are liable to find themselves facing a liability for costs. Employer's will want to refer to this case when facing claims from employees who appear to be serial litigants.

Compromising Claims under the Equality Act

As many of you may be aware, there has been doubt raised about the use and effectiveness of compromise agreements made under the Equality Act 2010 due to the drafting of section 147 of the Act which sets out the requirements that must be fulfilled in order to have a qualifying compromise contract to settle claims arising under the Act. Most importantly, the complainant must receive advice from an 'independent adviser' about its terms and effect. The way this section is currently drafted suggests that a solicitor who was instructed by the employee prior to the production of the final agreement for consideration will be precluded from acting any further.

The Government Equalities Office has stated that 'the situation that existed prior to passage of the Act' remains unchanged and, by implication, a solicitor who had advised a client in respect of an action would also be able to provide advice on a compromise agreement.

However, the Law Society has received advice from counsel which disagrees with this view. The advice indicates that a court or tribunal could construe section 147(5)(d) as meaning that a solicitor who was instructed by the employee prior to the production of the final contract for consideration; or who has acted in any way for the employee during the course of his complaint – even in a supporting role to the lead adviser perhaps as holiday cover – will be precluded from acting any further as an independent legal adviser in that compromise contract. The advice from counsel also indicates that a solicitor to whom the client was referred solely for the purpose of advising on the agreement would not be able to provide such advice. The effect of this is that there is no way in which compromise agreements under the Equality Act can be made enforceable. Separate advice from leading counsel is less pessimistic but the uncertainty remains.

The Law Society has requested an urgent meeting with the Government Equalities Office to consider how this question can be resolved as well as notifying the Home Secretary of its concerns. In the meantime, employers are advised to consider involving ACAS in achieving a settlement so that a COT3 (an ACAS agreement) can be used as this is binding on the parties.

Tribunal Region is the Judges Choice

Employees are required to lodge their claims with the Tribunal office which governs the area in which their place of work was located. However, the EAT has held that there is no right for a Claimant in the Employment Tribunal to have his or her case managed in that Tribunal region. It is for the Tribunal Judges to decide whether it is appropriate to transfer a case to another region and in doing so they may take account of any special expertise that a particular Tribunal region may have as long as the transfer does not give rise to any injustice.

Date of Dismissal Determined by Employee

The Supreme Court has handed down its judgment in *Gisada Syf v Barratt*, dismissing the appeal from the Court of Appeal's decision. Mrs Syf was dismissed by letter which was delivered to her by recorded delivery and signed for by her son on 30th November 2006. She was expecting the decision letter to arrive, but was away at the time it was signed for. Consequently, she did not open the letter and learn about the decision until 4th December. She presented an unfair dismissal claim on 2nd March and the employer argued that her claim was out of time. The question was when the effective date of termination arose.

The Supreme Court held that it was on 4th December, when the employee actually read the letter. It held that she should not be criticised for wanting the letter to remain at home unopened, instead of asking her son to read to her, as its contents were private. As she did not know of the decision until 4th December and nor had she deliberately failed to open the letter or gone away to avoid reading it, the effective date of termination would be the date she actually learned of the decision to dismiss. Accordingly, Mrs Syf's claim was presented within time.

ACAS Settlements

The Employment Appeal Tribunal has decided in the case of *Allma Construction v Bonnering* that when a settlement has been concluded through ACAS, it is irrelevant whether the ACAS officer believes that a settlement has been reached or whether there are terms which have not been agreed that would normally be included in a COT3 agreement. It is only necessary for the essentials of a contract to be agreed and this may consist of no more than an agreement that a sum of money be paid to bring litigation to an end.

Employers should therefore be clear about any detailed terms and conditions that they wish to make part of a settlement when confirming their agreement to it with ACAS. It is advisable to communicate any agreement in writing with the full settlement terms attached for complete clarity.

The Need to be Clear in Dismissal Proceedings

The Employment Appeal Tribunal's decision in the case of *Celebi v Compass* has emphasised the need to be clear about the nature of the disciplinary action being taken against an employee. The employee was believed to have stolen £3,000. However, the allegation put to her was that she was guilty of causing a 'loss of £3,000'. The employee understood that the accusation was actually one of theft and following a disciplinary hearing she was dismissed.

The EAT held that the lack of precision in the charge meant the dismissal was unfair under 'ordinary' unfair dismissal principles. The case was then remitted back to the Tribunal to consider the award of compensation due to the employee, taking into account any reduction for contributory fault and on Polkey grounds.

ACAS Mediation Guide

ACAS and the CIPD have published a new guide which assists employers in deciding in what circumstances mediation is suitable as a means of resolving workplace disputes. The Guide is available here: <http://www.acas.org.uk/CHttpHandler.ashx?id=949&p=0>

If you would like further information or advice about the topics covered in this newsletter, or any other HR or employment matter, please contact:

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