

Review of the Year 2006



The past year has witnessed a range of important developments in employment law, including the introduction of the much publicised Regulations outlawing age discrimination which came into force in October. In this update, we review some of the major legislative changes of the past twelve months and also look at some of the key decisions of courts and tribunals in the employment law field in 2006.

Revised Family Friendly Rights

Although the Paternity and Parental Leave and the Paternity and Adoption Leave (Amendment) Regulations 2006 came into force in October, they only apply to employees whose expected week of child birth is on or after 1 April 2007 or to employees who expect to have a child placed for adoption on or after that date. The key change is that the service requirement for additional maternity leave is removed, meaning that all pregnant employees become entitled to a combined period of ordinary maternity leave and additional maternity leave totalling 52 weeks. In addition, the period in respect of which statutory maternity pay/statutory adoption pay is payable is extended to 39 weeks. The notice provisions for early return from maternity or

adoption leave have been extended to eight weeks and employees and employers are now able to agree that an employee can work for up to ten days whilst on maternity or adoption leave without the leave period coming to an end. It is to be a matter of agreement between employee and employer whether these “keeping in touch” days are taken, when they are taken and how much pay will be provided.

TUPE 2006

April 2006 saw the introduction of the new TUPE Regulations which provided a certain amount of clarity as to the circumstances in which TUPE applies in outsourcing situations. However, as stated in previous updates, some aspects of the new Regulations could potentially generate even more litigation. The new Regulations clarified that changing terms and conditions after a transfer, a common issue when dealing with harmonisation, is only allowable where the changes are unconnected to the transfer or where, if the reason is connected to the transfer, it is for an “economic, technical or organisational” reason entailing changes in the workforce. This means that an employer can only successfully produce standardisation of terms and conditions across the workforce post-transfer where there is to be a change in the overall number or functions of the employees.

A welcome change in the new Regulations was to the notification rules which now require the old employer to provide specific information to the new employer relating to the identities of the employees and their terms and conditions of employment.

Code of Practice on Disability

From 1 May 2006, revised Guidance on matters to be taken into account in determining questions relating to the definition of disability came into force. This reflected disability discrimination case law over the past few years and the new definition of “mental impairment” which came into effect in December 2005, in terms of which a claimant need not now show that a mental impairment is a clinically well recognised illness. The Guidance was also updated to reflect the fact that people with certain progressive conditions are now automatically deemed “disabled” from the point of diagnosis, and these include, HIV, cancer and Multiple Sclerosis.

Age Discrimination

There is no doubt that the most fundamental addition to the UK's equal opportunities regime, and perhaps to employment law since the introduction of unfair dismissal, is age discrimination. The age discrimination legislation is in many ways similar to the legislation on other types of discrimination such as sex, race and religious belief which employers have become well used to. However, there are certain exceptions relating to retirement and service related benefits which are specific to age discrimination. Age discrimination is also distinguished by the fact that direct discrimination on age grounds can be justified (unlike other types of discrimination). However, the hurdle of justification is set very high requiring employers to produce evidence that it was necessary and proportionate for them to discriminate on age grounds in the circumstances. Service related benefits have been given the all clear where the service requirement is up to 5 years but beyond this, the employer must show that it reasonably considered that the service related benefit will achieve its aim, for example by rewarding loyalty.

A statutory default retirement age of 65 was retained at which an employer may lawfully and fairly retire an employee provided that it goes through the correct retirement procedure. This includes advance notification of the employee's impending retirement date and the opportunity for the employee to request working beyond 65. There is however no obligation to agree to such requests to continue working beyond 65.

From 5 October 2006, the upper age limit on unfair dismissal and redundancy claims was removed as well as the lower age limit for redundancy payments.

Case Law Developments

In addition to these legislative developments, 2006 has also seen a range of important decisions from higher courts and tribunals on key employment law issues.

In January, the House of Lords considered the important issue of the territorial scope of unfair dismissal law in the case of *Lawson v. Serco*. The House of Lords noted that the right to claim unfair dismissal is limited to those who are "working in Great Britain". However, it acknowledged that difficult issues will arise in the case of those individuals who require to perform their duties in different countries. It was also acknowledged that the case of an employee who has been working in Great Britain for many years but is then posted abroad could also be problematic. The House of Lords stressed that in each case, Employment Tribunals must examine the conduct of the parties and the way in which they have been operating the contract in order to decide whether or not there is a sufficiently strong connection with Great Britain to allow the employee to claim unfair dismissal before the UK Employment Tribunals.

Another fundamental question was addressed by the Court of Appeal in the case of *Cable & Wireless v. Muscat*, in which Mr Muscat was supplied to Cable & Wireless via an employment agency. Notwithstanding this, the Court of Appeal decided that, based on the facts of the case, Mr Muscat was an employee of the end-user, Cable and Wireless, and was therefore entitled to lodge a claim for unfair dismissal against them. This was despite the fact that his "Contract for Services" was with the employment agency and his invoices were also paid by them.

The Employment Appeal Tribunal has also spent much of 2006 attempting to get to grips with the statutory dismissal and grievance procedures which were introduced by the Government in 2004. Many of the cases have examined the issue of what exactly constitutes "a grievance". This is often an important issue because, if an employer fails to adequately respond to a grievance, then an individual's compensation can be increased by up to 50% if the issue which was raised in the grievance subsequently comes before an Employment Tribunal. The lesson from the cases decided in 2006 seems to be that the threshold which an employee needs to satisfy is very low. There is no requirement for the employee to state that their complaint is a grievance or to follow the company's grievance procedure (*Shergold v. Fieldway Medical Centre*) and it is perfectly possible for either a letter of resignation (*Galaxy Showers v. Wilson*) or a solicitor's (threatening) letter (*Mark Warner Ltd. v. Aspland*) to constitute a grievance. The result of this is that employers must carefully consider any complaint or communication received from employees, whether directly or through a representative, in order to assess whether it would be deemed to constitute a grievance and whether a grievance procedure ought to therefore be followed.

If you require further information on any of the statutory or case law developments outlined above, please contact any of the following members of our Employment Law Division:-

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