

protecting your business from the inside out



the latest in employment law

February 2009

welcome

In this edition

In this first edition of our Newsletter for 2009 we take a look at some of the developments in Employment Law that the year will bring. Key amongst these changes will be the amendments to the statutory dispute resolution procedures which will come into effect as a result of the Employment Act 2008. As a prelude to our Business Protection Seminar on this topic scheduled for 26 February 2009, we take a look at the main changes to the statutory dispute resolution procedures from 6 April 2009 onwards.

Also in April we will be holding our Immigration Seminar. In this edition of our Newsletter we take a look at the changes brought about at the end of November 2008 when the UK launched Tiers 2 and 5 of the 5 tier points based immigration system.

With the current economic crisis likely to continue throughout 2009, we take a look at companies in administration and how the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply to the sale of assets from a failing business to a new purchaser.

We have our usual "On the Case" section where we look at some recent case law relating to harassment on the grounds of sexual orientation and a crucial decision by the European Court of Justice in relation to the accrual of holidays during periods of long term sick leave.

Events:

Dates for your diary

- What: Business Protection Seminars
When: Thursday 26 February 2009
Thursday 23 April 2009
Tuesday 19 May 2009
Tuesday 14 July 2009
Where: Seebeck House, One Seebeck Place,
Knowlhill, Milton Keynes, MK5 8FR
Topic: Changes to the Statutory Dispute
Resolution Procedures (26 February)
Immigration Law (23 April)



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Changes to the Statutory Dispute Resolution Procedures

The Employment Act 2008, which comes into force on 6 April 2009, contains provisions aimed at simplifying dispute resolution between employers and employees. It specifically repeals the statutory dispute resolution procedures, including the mandatory “3-step” processes, which came into force in October 2004.

A revised ACAS Code of Practice on disciplinary and grievance procedures has been drafted, which will introduce a new framework based on the provisions of the Act. The aim of the Code is to be “concise and principles-based” and as such, it sets out the principles that an employer and employee should adhere to, to achieve a reasonable standard of behaviour.

The changes

The most significant change is that a failure to follow the new procedures will not render a dismissal automatically unfair (as would be the case under the Dispute Resolution Regulations).

However, a Tribunal will be able to adjust any awards by up to 25%. This means that if the Tribunal deems that an employer has unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25%. Conversely, if the Tribunal considers that an employee has unreasonably failed to follow the guidance set out in the Code the award made could be reduced by up to 25%. The Tribunal is given the discretion to adjust awards in this way if it considers it “just and equitable” to do so.

The main general changes that appear in the Code are as follows:

- In misconduct cases, where practicable, different people should carry out the investigation and the disciplinary hearing;
- When the employee is informed of the problem, the notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at the disciplinary meeting. The employee should also be provided with copies of written evidence, such as witness statements;
- The procedure for holding a meeting with an employee is more detailed. For example, there should be an opportunity for witnesses to be called; and
- Employers should make a decision on the evidence available where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause.

Transitional period

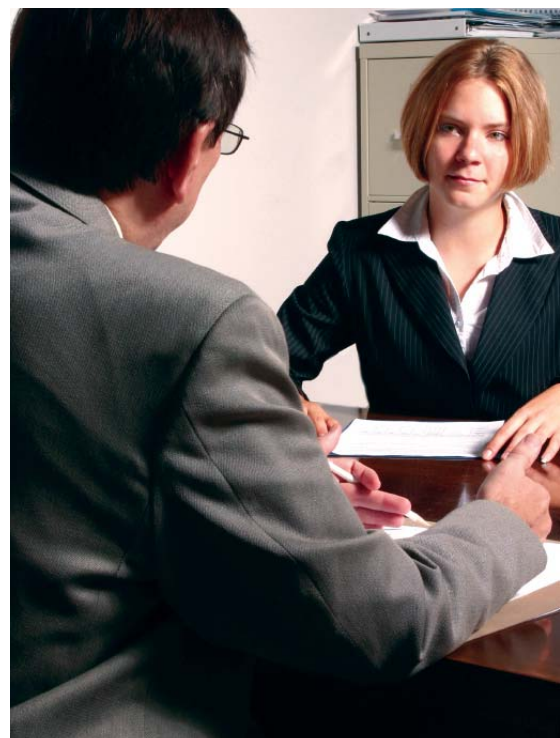
In addition to the changes contained in the Code, employers must also be mindful of the transitional provisions that govern which dispute resolution regime will apply to disciplinary action or grievances that are already underway when the statutory procedures are repealed on 6 April 2009.

In relation to discipline and dismissal matters, the relevant provisions of the Act will not come into effect if the employer has issued a “Step 1” letter or held a “Step 2” meeting; taken any “relevant disciplinary action”; or dismissed the employee before 5 April 2009.

In relation to grievances raised by employees, the Act will not come into effect if the action on which the grievance is based occurs wholly before 6 April 2009; or the action

On 6 April 2009 the mandatory “3-step” processes, which came into force in October 2004, will be repealed

begins on or before 5 April 2009 and continues beyond that date. In the later scenario, the employee must present a complaint to a Tribunal or submit a valid grievance on or before 4 July 2009 for claims with a 3-month time limit, or before 4 October 2009 for claims with a 6-month time limit.



next: ‘Employing migrant workers’

Companies must now be licensed to employ all migrant workers

Any UK based company wishing to employ full time or temporary migrant workers must obtain a licence and become a “registered sponsor”.

These changes were implemented through the introduction of tiers 2 and 5 of the new 5 tier point system in November 2008. Tier 1, the entry route for highly skilled migrants was implemented earlier in the year.

Tier 2 Covers the employment of general skilled migrants and replaces the UK work permit scheme.

Tier 5 Covers temporary employment for: sporting professionals, performers, charity workers, religious workers, government-authorized exchange workers, and international agreement workers. Tier 5 also covers a youth mobility scheme (working holiday makers) which has different requirements.

How to obtain a sponsorship licence

Employers are required to supply specified documentation to the UK Border Agency (UKBA), allocate certain responsibilities to members of its staff and have their systems and record keeping checked by a compliance officer of the UKBA.

Once this has been successfully completed a licence will be granted to the employer allowing them to act as sponsors for potential migrant workers, and to assign certificates to migrants who wish to work for the employer in the United Kingdom.

Care is needed when applying “Sponsorship” places a huge onus on businesses to both understand the responsibilities and to comply with

all Government rules. Serious breaches of the rules may lead to sponsors being removed from the register and prevented from employing migrant workers. Employers need to understand the points system to enable them to show that the migrant worker has the correct points criteria for the relevant tier, category or sub-category under which the sponsor wants to employ them. Sponsors will be expected to inform the UKBA if a sponsored migrant fails to turn up for work or if the migrant is leaving their employment.

Make sure you don't fall at the first hurdle...

An application may be refused if an employer is found to have poor historic compliance with record-keeping requirements in the past. Likewise employees named and designated as “key personnel” must be so! Employers can face up to 2 years in prison if a breach is discovered.

From November 2008, foreign nationals in the United Kingdom from outside the European Economic Area (EEA) who successfully apply for an extension to stay on the basis of marriage, civil partnership, as a student or dependant will be issued an identity card. This is the first stage of the National Identity Scheme roll-out. The identity cards provide a simple secure means of proving to businesses

and educational institutions that a foreign national has the right to work and study in the UK and will clamp down on identity fraud, illegal working and immigration which, considering the enormous responsibility on businesses and educational establishments to comply with their sponsorship duties, will be welcomed by all.

For further information on any of the above, please contact Sylvja Matthews on 0874 074 2371 or email sylvja.matthews@emwph.com



next: 'Transfer of employees from companies in administration'

Transfer of employees from companies in administration under TUPE

In *Oakland v Wellswood Ltd* the Employment Appeal Tribunal (“EAT”) has considered whether the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) apply when an administrator sells the assets of a failing business (“Oldco”) to a new purchaser (“Newco”).

Facts

For a number of years Mr Oakland was a manager at Oldco before it went into administration. The administrators entered into what is known as a “pre-pack” which is a pre-packaged sale arrangement to sell part of the business and assets of Oldco to Newco before the administrator is appointed. The administrator then effects the sale to Newco immediately after appointment. Shortly after the transfer Mr Oakland was dismissed by Newco and he brought a claim against them for unfair dismissal.

Dispute

Newco argued that Mr Oakland’s claim should be dismissed because he did not have the requisite 1 year’s continuous service with Newco necessary to bring a claim for unfair dismissal. Ordinarily upon the sale of a business the employees would have automatically transferred under the provisions of TUPE along with their continuity of service. However,

a number of changes were made to TUPE in 2006 to facilitate the rescue of failing businesses to attempt to make them more attractive to prospective purchasers. The amendments to TUPE that were of relevance in this case were:

1. Regulation 8(7) - Where Oldco is subject to insolvency proceedings which have been instituted with a view to liquidation, the employees will not automatically transfer to Newco and any dismissals by reason of the transfer are not automatically unfair; and
2. Regulation 8(6) - Where Oldco is subject to insolvency proceedings which have not been instituted with a view to the liquidation of the assets of Oldco, the employees will transfer to Newco (albeit that there is greater scope to vary their terms and certain payments owed to employees i.e. redundancy will be paid by the Secretary of State).

The primary purpose of administration is to rescue the company as a going concern. If this is not possible the administrator’s secondary aim is to achieve a better result for creditors than would be likely if the company were wound up without first being in administration.

Newco submitted that the transfer fell within Reg 8(7) and contended that the administration of Oldco had

been instituted with a view to its liquidation. If Reg 8(7) applied, Mr Oakland’s employment would not have automatically transferred to Newco and he would not be able to bring a claim for unfair dismissal because he would not have 1 year’s continuous service.

Mr Oakland argued that, as the primary purpose of administration is to rescue a company, Reg 8(6) applied and his employment would have automatically transferred to Newco thus giving him the requisite length of service necessary to bring an unfair dismissal claim.

Decision

Mr Oakland’s claim was rejected by the EAT who found that Oldco was subject to insolvency proceedings which were instituted with a view to liquidation and therefore fell under Reg 8(7). Accordingly, Mr Oakland’s employment had not automatically transferred to Newco and he did not have the necessary period of service to bring an unfair dismissal claim.

This decision is at odds with Government guidance providing that a transfer in the context of administration would fall within regulation 8(6) and not 8(7) as the main purpose of administration is to rescue the company. The decision is likely to be welcomed by businesses and should encourage the rescue of more failing businesses as potential purchasers are often put off by the prospect of inheriting an expensive salary bill. A note of caution should be recommended, however, as the issue is likely to be litigated again. One factor which may have swayed the Judge in this case was that at the time the administrator was appointed it was anticipated that Oldco would move from administration to a creditors’ voluntary liquidation.



On the case - *information about the latest employment rulings*

Homophobic Banter

In *English v Thomas Sanderson Limited* the Court of Appeal ("COA") considered whether an individual who was neither gay nor perceived to be so, but who was subject to "homophobic banter" at the hands of colleagues, was protected against harassment by regulation 5(1) of the Employment Equality (Sexual Orientation) Regulations 2003 ("the Regulations").

In November 2005, Mr English brought a claim complaining that he had been harassed contrary to the Regulations. He claimed that his colleagues had subjected him to harassment (calling him names such as "faggot") because he had attended boarding school and lived in Brighton.

The Tribunal held that Mr English was not protected by the Regulations because the treatment he received was not "on grounds of" anyone's actual or perceived sexual orientation. The Tribunal formed this view because (a) Mr English was not gay, (b) his tormentors did not believe him to be gay, and (c) Mr English accepted his tormentors did not believe him to be gay. The Employment Appeal Tribunal upheld the Tribunal's decision.

By a majority, the COA allowed Mr English's appeal and found that such conduct falls within the Regulations. 2 of the 3 Lord Justices who heard the case took the view that unwanted homophobic banter is "on the grounds of sexual orientation", regardless of whether the victim is

gay or whether his tormentors believe him to be.

Lord Justice Sedley considered that "the calculated insult to his dignity, which depended not at all on his actual sexuality, and the consequently intolerable working environment were sufficient to bring his case both within Regulation 5 and within the...Directive."

The COA's decision could significantly affect UK discrimination law. The definition of "harassment" in the Regulations is similar to the definitions contained in the race, religion or belief and age legislation. This decision could therefore open the door for similar claims in other areas.

Workers on long-term sick leave are entitled to paid holidays...

The European Court of Justice ("ECJ") has ruled that all workers remain entitled to paid annual leave under the EC Working Time Directive ("Directive") even whilst on sick leave.

The Judgement was handed down in the case of *Stringer v HMRC* and is a decision that clarifies the law after years of confusion. The ECJ has stated that it is for national courts to decide whether paid holiday leave can be taken during the period of sick leave or whether it should be carried over into the following year.

The case of *Stringer v HMRC* involved a group of employees who brought claims under the Working Time

Regulations 1998 ("WTR"), which implements the Directive. Although successful in the Employment Tribunal and Employment Appeal Tribunal, the employees lost in the Court of Appeal. They appealed to the House of Lords ("HOL"), who asked the ECJ to consider 2 questions. Firstly, whether the Directive entitles a worker on sick leave to accrue annual leave while absent and/or to take that annual leave while absent. The second question was whether an absent worker is entitled to a payment in lieu of untaken annual leave upon termination of employment.

The ECJ concluded that a worker acquires rights to leave from the very first day of employment and does not lose them by virtue of being incapable of work through illness and must be compensated for any untaken annual leave. The HOL will now have to decide whether the leave may be taken whilst off sick or whether it should be carried forward to when the employee returns to work. Until the HOL reaches its conclusion, employers should hold off taking any action with regard to employees on long term sick leave.

The result of this decision could be very expensive for employers in as much as long-term sick workers could potentially earn themselves months of holiday upon their return to work (or accrue a tidy sum for pay in lieu of holiday on termination if they resign or their employment is terminated having been unable to take their full complement of paid leave).

contact us

The information contained in this update is for general information purposes only and should not be relied on in isolation without seeking further legal advice that is specifically applicable to your circumstances. For such advice please contact Jon Taylor on 0845 074 2374 or email jon.taylor@emwph.com

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