

protecting your business from the inside out



the latest in employment law

April 2009

welcome

In this edition

Welcome to the April edition of our newsletter. In this edition we look at disability discrimination and we focus on the case of *Child Support Agency v Truman* where, for the first time, the Employment Appeal Tribunal (“EAT”) has adopted the approach to disability discrimination set out in the landmark House of Lords case of *London Borough of Lewisham v Malcolm* in an employment case. The EAT’s application of *Malcolm* in an employment context is likely to make disability discrimination claims more difficult for employees to bring.

We also keep you up to date with the recent developments in Immigration Law and the further changes to the Points Based System which are being introduced by the Home Office in the light of the current economic climate. These changes will greatly affect the ability of employers to recruit employees from outside the European Economic Area.

The English Patents Court has recently handed down a decision which will be of interest to employers and employees alike. The case of *James Duncan Kelly and Kwok Wai Chiu v GE Healthcare Limited* deals with employee inventions created during the course of employment and is the first occasion in which the courts have awarded employees compensation under the Patents Act 1977.

In our usual “on the case” section we report on the European Court of Justice’s long-awaited decision in the Heyday challenge and look ahead to the next phase of the challenge to be decided by the High Court. We also look at post-termination obligations in relation to transfers under the Transfer of Undertakings (Protection of Employment) Regulations, more commonly known as TUPE.

Events:

Dates for your diary

What: Business Protection Seminars

When: Thursday 23 April 2009
Tuesday 19 May 2009
Tuesday 7 July 2009

5 pm for canapés and refreshments,
presentation 5.30 pm – 7.00 pm

Where: Seebeck House, One Seebeck Place, Knowlhill,
Milton Keynes, MK5 8FR

Topics: Immigration Law – The New Immigration
Rules (23 April 2009)

Investigating Harassment and Bullying
Complaints (19 May 2009)

Flexible Working (7 July 2009)

For details of how to book your place at any of the above seminars, please email carol.cardell@emwph.com



In this edition

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next: ‘Disability Discrimination - approach confirmed’

Disability Discrimination - approach confirmed

The decision of the House of Lords in *London Borough of Lewisham v Malcolm* established a precedent that will make it more difficult for a claimant to bring a claim of disability discrimination. The case related to housing law and there were doubts as to whether the approach would be fully integrated in employment cases.

The Employment Appeal Tribunal (“EAT”) has, however, now confirmed that the approach set out in the *Malcolm* case also applies to discrimination cases in employment law.

The case of *Child Support Agency v Truman* concerned an employee who has been on special leave with full pay since 21 June 2007. Mrs Truman was disabled under the meaning of the Disability Discrimination Act 1995 due to serious back problems

the House of Lords’ decision in London Borough of Lewisham v Malcolm has been applied to an employment law case

which resulted in a number of operations. In 2005 it was agreed that she could work from home for 4 and a half days per week in order to enable her to continue working. Mrs Truman’s employer agreed to supply the necessary aids and equipment to enable her to do so.

The employer’s risk assessment officer attended Mrs Truman’s home in October 2005. At that time Mrs Truman requested a height adjustable desk for her use at home. The risk assessment officer instead recommended the use of a specialist chair. Without the adjustable desk Mrs Truman was forced to work hunched over her cooker, that being the highest surface in her home.

the approach taken by the EAT may discourage employees from bringing similar claims

On 24 February 2006 Mrs Truman waited all day for her desk to be delivered but it was not. She was very angry and telephoned her employer’s accommodation department. She shouted at the employee who answered the telephone and used the word “crap” as part of her remonstrations. On 13 March 2006 a desk was provided to Mrs Truman, but it was not height adjustable. She again spoke to the same employee raising her voice but not using inappropriate language. The employee in question made a formal complaint of bullying and harassment which was upheld on appeal. Mrs Truman was required to attend a mediation meeting with the employee and she was warned that

failure to do so may result in disciplinary action. In 2007 home working ended throughout the organisation and from that point Mrs Truman was placed on special leave.

One of Mrs Truman’s complaints to the Tribunal was that the threatened disciplinary action had caused her a detriment attributable to her disability and that she had been discriminated upon as a result.

The EAT used the approach set out in *Malcolm*. That the relevant comparator should be a person who did not suffer from the disability but abused another employee over the telephone. The EAT found that the relevant comparator would have been treated in the same way, therefore this element of her claim was not upheld.

By following the approach set out in *Malcolm* the EAT has made it more difficult for employees to bring a claim for disability discrimination. Previously, the relevant comparator in this case need not have been in the same or similar circumstances as Mrs Truman which would have made a claim for disability discrimination easier to bring. The outcome of the case may well discourage some employees from bringing similar disability related claims, at least until such time as the relevant legislation is further amended by Parliament.

News Flash

Please note the following changes that are due to come into effect in the month of April:

- 1 April 2009** The minimum entitlement to paid leave for workers increases from 4.8 weeks (24 days for a full time worker) to 5.6 weeks (28 days for a full time worker). Please note that this can be inclusive of bank and public holidays.
- 5 April 2009** The standard rates of Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay will increase to £123.06 per week from £117.18 per week.
- 6 April 2009** Statutory Sick Pay will increase to £79.15 per week from £75.40 per week.
- 6 April 2009** Carers of children under the age of 17 will have the right to request flexible working.
- 6 April 2009** The repeal of the Statutory Dispute Resolution Procedures will take effect, although transitional procedures will remain in place. Employers will need to follow the new ACAS code of practice when dealing with disciplinary and grievance issues.

next: ‘Tough new measures for migrant workers...’

Tough new measures for migrant workers entering the UK

The Home Office have introduced new measures which will make it much more difficult for non-EEA workers to enter the UK under Tiers 1 and 2 of the Points Based System (“PBS”) whilst at the same time providing domestic workers with a greater opportunity of applying first for UK jobs. The measures were taken in response to changing economic circumstances and to help British workers through the hard times as the recession bites deeper.

The Home Secretary, Jacqui Smith, announced 3 significant changes which will take effect from 1 April 2009:

1. The resident labour market test for Tier 2 skilled jobs will be strengthened so that employers must advertise jobs to resident workers through JobCentre Plus before they can bring in a worker from outside Europe;
2. Shortage occupation lists (these lists detail the professions that are in high demand in the UK) will be used to trigger skills reviews that focus on training resident workers for these occupations, which will make the UK less dependent on migration for the future; and

3. The criteria against which highly skilled migrants seeking entry to the UK are assessed under Tier 1 of the Points Based System will be tightened by raising the educational qualifications from a Bachelor’s degree to a Master’s degree and the salary requirements from a minimum £16,000 to £20,000.

What is the likely impact of these changes for migrants and UK companies?

The changes to Tier 1 are likely to affect international businesses with the increase in educational qualifications being the most significant hurdle to overcome. It is anticipated that the new educational requirements will significantly reduce the number of senior managers and professionals eligible to qualify under this category of worker because, although many will have first degrees, those who hold a Master’s degree will be few and far between.

As far as the changes to Tier 2 are concerned, as all Tier 2 jobs must now be advertised through Jobcentre Plus, there will undoubtedly be an

increased number of UK applicants for these positions. This would make it more difficult for migrants to successfully apply for these posts, especially given that to employ a non-EEA national under Tier 2, the employer would need to be a registered sponsor and to demonstrate that no suitably qualified EEA worker has applied for the role.

new educational requirements will significantly reduce the number of senior managers and professionals eligible to qualify under Tier 1

The overall effect is likely to mean fewer jobs for migrant workers and more jobs held by EEA employees.

Are there likely to be any further changes?

The Home Secretary has asked the Migration Advisory Committee (“MAC”) to report on:

- whether there is an economic case for restricting Tier 2 to shortage occupations only;
- the economic contribution made by the dependants of PBS migrants and their role in the labour market; and
- what further changes there should be to the criteria for Tier 1 in 2010-11, given the changing economic circumstances.

If the economy continues in a downward spiral and the MAC report makes further recommendations, there is every possibility that more immigration changes will follow.



next: ‘Employee inventors awarded compensation...’

Employee inventors awarded compensation in unprecedented case

The case of James Duncan Kelly and Kwok Wai Chiu v GE Healthcare Limited saw a landmark decision of the English Patents Court. For the first time since the Patents Act 1977 came into force the Court has awarded employees compensation for inventions developed during their employment.

Dr Kelly and Dr Chiu were research scientists and invented the commercially successful and patented Myoview, a radioactive imaging agent. On the back of Myoview's success their employers went on to win a Queen's award for Technological Achievement, entered into a joint venture agreement and underwent various acquisitions placing them as a global player within the radiopharmaceuticals market. The total sales of Myoview alone were worth approximately £1.3 billion.

Dr Kelly and Dr Chiu brought a claim for compensation against their employer who in turn argued that Dr Kelly and Dr Chiu had already been compensated for their invention by means of wages and benefits received.

Legislation

For patents filed before 1 January 2005, section 40 of the Patents Act 1977 ("PA 1977") allows the Court to award compensation to an employee who:

1. Has made an invention belonging to the employer for which a patent has been granted;
2. That the patent is (having regard among other things to the size and nature of the employer's undertaking) of outstanding benefit to the employer; and

3. By reason of those facts it is just that the employee should be awarded compensation to be paid by the employer.

the outcome of this case and the less burdensome test contained in the Patents Act 2004 could lead to an increase in successful claims

If the court decides compensation is to be awarded, section 41 PA 1977 provides that the compensation granted should 'secure for the employee a fair share of the benefit which the employer has derived'. The factors to be considered include the nature of the employee's duties, his remuneration, and his skill and effort in making the invention.

The decision

The PA 1977 does not define what is meant by 'outstanding benefit'. Mr Justice Floyd in this case interpreted 'outstanding' to mean 'something special or out of the ordinary, which is more than substantial, significant or good'. He then went on to state that the benefit had to be something more than one would normally expect to arise from the duties for which the employee was paid. In addition, the patent must be a cause of the benefit, but not necessarily the sole cause.

Mr Justice Floyd concluded that the patents were of outstanding benefit. The Court stated that the benefits went beyond what was expected from the work carried out by Dr Kelly and Dr Chiu and awarded the employees compensation. Mr Justice Floyd gave a somewhat conservative

conclusion deeming a 3% share to the employer's benefit as a just and fair award to Dr Kelly (£1 million for his apportioned benefit of 2%) and Dr Chiu (£500,000 for his apportioned benefit of 1%).

Employers should note that the equivalent test contained in the Patents Act 2004, which covers patents filed from 1 January 2005, is considered to be easier to satisfy than PA 1977. As a consequence of this lowered hurdle the English Patents Court could see an increase in successful claims. Businesses that are heavily dependant on research and development should consider reviewing or implementing compensatory schemes in the light of this decision.



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

TUPE: Collective agreements obligations after transfer

In *Alemo-Herron and Others v Parkwood Leisure Ltd* the Employment Appeal Tribunal ("EAT") considered the effect of the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE") where the transferring employees' contracts incorporated a collective agreement.

The employees were employed by the London Borough of Lewisham on a standard contract under which they were entitled to pay in accordance with collective agreements negotiated from time to time with the National Joint Council for Local Government Service ("NJC"). In 2002 the employees' contracts were transferred under TUPE to a private sector employer and the employees continued to receive pay increases as per the NJC agreement. In May 2004 the employees were transferred to another private sector employer, Parkwood Leisure Ltd ("Parkwood") and, following the transfer, a new collective agreement was negotiated with NJC covering new rates of pay from 1 April 2004. Parkwood was not party to those negotiations and did not recognise the new pay increases. Accordingly the employees claimed that Parkwood had made unauthorised deductions from their appropriate rate of pay.

The Tribunal found that the second collective agreement was a new agreement and therefore the

employees were no longer entitled to the new negotiated rates of pay. On appeal the EAT held that the employees were entitled to benefit from changes to the agreement following the transfer. The EAT confirmed that where a collective agreement which is incorporated into the employees' contracts provides for pay to be determined by negotiation with the relevant union from time to time the employees are entitled to the benefit of any post-TUPE transfer improvement in terms negotiated in accordance with that agreement. Leave has been granted for Parkwood to appeal the decision to the Court of Appeal.

Heyday – The Case Continues

The European Court of Justice ("ECJ") has given its decision in the Heyday challenge. As expected, the ECJ has followed the Opinion given by the European Advocate General and has confirmed that the default retirement age of 65 set out in the Employment Equality (Age) Regulations 2006 falls within the scope of European Law so long as it is a proportionate means of achieving a legitimate aim relating to employment policy and the labour market.

This decision will not bring an end to the challenge, as the High Court will now decide whether the provisions are a proportionate means of achieving a legitimate aim. The Government is likely to argue that the current economic climate

and the high levels of unemployment in particular legitimise the need for a compulsory retirement age to be set.

A number of claims have been stayed pending the outcome of Heyday following the decision of the Employment Appeal Tribunal in *Johns v Solent SD*. These claims will remain on hold until such time as the High Court has made its decision.

Under current provisions employees may request to work beyond 65 but employers do not need to give reasons if they choose not to grant this request, although it is advisable for employers to do so pending the final outcome of the Heyday challenge. The Government has promised to review the default retirement age in 2011 but those involved in bringing the Heyday challenge are calling for the default retirement age to be scrapped immediately.

In practical terms, the ECJ's decision has done little to change the position since the Advocate General's Opinion. Things remain very much "on hold" until the High Court gives its decision. Employers should therefore continue to treat the Age Regulations as "good law" and abide by the terms set out therein.

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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