

June 2009

Law at work



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Features

Equality Bill – Fairness for all?

When the government published details of the [Equality Bill](#) earlier this year, it stated that "despite considerable progress since 1997, inequality and discrimination still exist which is why the law needs to be strengthened". It also included statistics that in 2009 women are paid on average 23% less per hour than men, disabled people are twice as likely to be out of work and people from ethnic minority backgrounds are nearly a fifth less likely to find work.

What does the Bill seek to achieve?

UNITE views it as "an important landmark in the struggle for equality at work" and the CBI stated on the Bill's publication that while it supports "the clarity and simplification that the Equality Bill achieves", it believes that the publishing of pay statistics "could backfire".

The Government has stated that the Bill has two main purposes: - to harmonise the current discrimination laws and to strengthen the law to support progress on equality. The Bill not only covers employment related changes; it also covers discrimination in the provision of goods and services, public procurement and discrimination in private members' club rules. The scope of this article is the substantive implications for employment law.

The Government expects the Bill to come into force in autumn 2010.

Purpose 1 – Harmonisation

The Bill seeks to harmonise current strands of discrimination legislation developed over the last 30 years into one enactment. It will replace current discrimination laws on equal pay, sex, race, disability, religion or belief, sexual orientation and age and combine them into one single statute.

Discrimination

The general definition of direct discrimination will be less favourable treatment "because of a protected characteristic" which could be interpreted widely as it makes no reference to a particular person. The definition also includes discrimination because of a person's perceived characteristic, so that under the Bill, the perception that a person is of a particular religion or belief, is gay or is of a particular age group, will be a potential ground of unlawful discrimination.

The government plans to reverse the decision in the House of Lords' decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcom* (reported in [July 2008's edition of Law at Work](#)) that reduced the protection against disability related discrimination, and will end the requirement for a comparator in such cases. It also abolishes the list of areas in which a disability must impact (eg. mobility, manual dexterity, memory or ability to learn, concentrate or understand) so that it will make it easier for a claimant to satisfy the definition of "disability". New provisions on associative discrimination will protect carers, giving effect to recent European case law.

The government also launched further consultation (which has recently ended) on whether the Bill should cover "multiple discrimination". This concerns individuals who may be treated less favourably on a combination of grounds, for example where a black woman suffers prejudice not encountered by a black man or a white woman. Depending on the results of the consultation, the Government proposes that protection against multiple discrimination would be implemented in or after April 2011.

Harassment

As with the definition of direct discrimination, harassment by third parties in the course of employment under the Sex Discrimination Act 1975 has now been extended to cover other strands of discrimination. This will put employers under pressure to take steps to prevent such behaviour occurring in the first place, although there is some disquiet that an employer can only be held liable for harassment by a third party (such as a customer or contractor) if harassment has occurred on at least two earlier occasions and the employer has failed to take reasonably practicable steps to stop it.

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Equal pay

There will be a key change that claimants will be permitted to show direct sex discrimination in pay arrangements even if there is an absence of a comparator doing equal work.

Pay secrecy clauses

Under the Bill, "secrecy clauses" in employment contracts that seek to prevent employees discussing their pay with colleagues with a view to finding out if there are any differences that are related to a protected characteristic, such as sex or race, will be rendered unenforceable. Any such discussion would be a protected act for the purpose of victimisation. However, as currently drafted, it would appear that employers could still seek to prevent employees "gossiping" about rates of pay. This would appear to limit the government's aim in ensuring greater transparency and dialogue within workplaces about pay.

Pay audits

The Bill introduces a power to require private sector employers with at least 250 employees to publish information about the differences between pay (expressed as a percentage) for male and female employees. The government has indicated that businesses will initially be asked to provide this information voluntarily but if there is insufficient response, it will make regulations under this power no earlier than 2013. A similar requirement will apply to public sector employers with at least 150 employees with the power to be exercised by April 2011.

While the Government has promised to "shine the spotlight in every workplace on the hidden pay discrimination against women" the CBI is concerned that publication will not tackle the underlying causes of the existing pay gap and may make the problem worse by deterring women from applying to businesses where the gap is greatest. The EEF have commented on the imposition of "unnecessary administrative burdens on business" while others have argued that the proposals are not strong enough and that compulsory pay audits should have been introduced immediately.

Purpose 2 - Strengthen the law to support progress on equality

The second main purpose of the Bill is to strengthen the progress on equality

Socio-economic duty

The Bill introduces a new duty, expected to come into force in 2011, on certain public authorities to consider socio-economic disadvantage in making strategic decisions about how to exercise their functions. Simply, this means tackling persistent inequality in social class and will be a core function of key public service providers.

Single equality duty on public authorities

Applying more to their function as an employer, the Bill creates a single public sector equality duty, which is extended to age, religion or belief, sexual orientation as well as pregnancy, maternity and gender reassignment. This duty requires public authorities, in the course of exercising their functions, to have regard to the need to eliminate discrimination and to advance equality of opportunity and foster good relations between people who share a relevant protected characteristic and those who do not. The practical effect will be that listed public authorities will have to consider how their policies, programmes and service delivery affect people with protected characteristics.

Positive action

The Bill seeks to influence recruitment and promotion in favour of disadvantaged groups by allowing employers to take into account under representation of minorities in the work force. Positive action will be permissible, and entirely voluntary, when employers are faced with candidates who are otherwise equally qualified but where one holds a protected characteristic such as being from an ethnic minority or female. Positive discrimination ie. employing someone because of particular characteristic regardless of merit will remain unlawful.

Using positive action measures in practice might be difficult for employers. An unsuccessful candidate could require an employer to produce statistical evidence to support its decision and could become an area of litigation. Communicating how positive action works to employees may also prove difficult.

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Enforcement and remedies

Following a finding of unlawful discrimination, employment tribunals will have a new power to make recommendations in respect of an employer's entire workforce, not just in relation to a particular claimant (who may have already left the organisation concerned) as at present.

Progress of the Bill

The Bill will no doubt be amended during its course through Parliament before coming into force in October 2010 (at the earliest). We shall, in future editions, continue to monitor the Bill's progress and focus on the practical implications for employers prior to its introduction.

Kathryn Clapp

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Case law update

Long-term sickness – The next chapter

Her Majesty's Revenue and Customs v Stringer and others [2009] UKHL31

As we reported in [February 2009's edition of Law at Work](#), the European Court of Justice (ECJ) decided earlier this year in *Stringer and others v HM Revenue and Customs (ECJ C-520/06)* that workers on long-term sickness absence are entitled to accrue paid holiday and to take this, or be paid for it, at a later date – even in a subsequent leave year. The ECJ had been asked to consider the question by the House of Lords and, it having done so, the case then returned to the UK courts. The House of Lords' decision did not revisit this particular issue because after the ECJ's decision the parties in the case agreed that this was the case.

Last week, the House of Lords issued its judgment in *Stringer*, and in doing so approved the Employment Appeal Tribunal's decision in the case (when it was known as *Commissioners of the Inland Revenue v Ainsworth and others*), which involved five employees on long term sick leave who brought different claims for holiday pay, although they had exhausted their right to sick pay.

The House of Lords found for the employees in the case. They held that a payment in lieu of annual leave due under the Working Time Regulations 1998 (WTR) fell within the definition of "wages" in the Employment Rights Act 1996 (ERA). This means that an employee can make a claim for unpaid holiday within three months of the last of a series of deductions (as an unfair deductions from wages claim under the ERA), rather than only within three months of each failure to pay holiday (under the WTR). The effect of this is that employee claims for unpaid leave can in theory go back years, resulting in higher costs for employers.

Some outstanding issues

- whether workers on sick leave will lose their entitlement to annual leave if it is not taken during the leave year as the WTR currently state;
- clarity for employees on PHI benefits as to whether they have entitlement to paid holiday;
- when the date on which an unpaid entitlement to holiday in effect becomes due for those who have not requested holiday (for example, because they thought they would not receive it); and
- whether the position of accrual of holiday on maternity leave has changed in any way.

What now for employers?

Gemma Parker's article in [April 2009's edition of Law at Work](#) gave guidance to employers whilst the House of Lords' decision was awaited.

Whilst the definitive answer to these problems will have to await future guidance from the courts, it now seems that as employees are entitled to holiday whilst on sick leave, potentially accruing for years, employers should now inform absent employees of their entitlement to take holiday whilst on sick leave. Employers should also, if possible, calculate the amount owing to those absent on long-term leave for holiday for the current leave year, and consider payment to create a break in any claim for a series of deductions and limiting the scope of this decision.

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Length of service criterion in a redundancy selection matrix was justified

Rolls -Royce PLC v UNITE the Union [2009] EWCA Civ 387

Why care?

Ever since the Employment Equality (Age) Regulations 2006 (the "Regulations") came into force, a certain amount of head scratching has gone on over whether or not company redundancy schemes that contain length of service provisions are lawful.

The case

The Regulations only touch on one aspect of this issue, in that there is a limited dispensation in regulation 33 for enhanced redundancy payment schemes that mirror the statutory formula of awarding half a week, one week or one and a half weeks' pay (or multiples thereof) depending on the age of the employee. In this case, the point at issue was not about payments, but rather whether a provision in a redundancy selection matrix which had been agreed with the trade union and which awarded additional points for length of service, was indirectly discriminatory and could not be justified. According to the rules of the scheme, employees with more than 10 years' service were at an advantage compared with employees with less service.

The case also involved a consideration of regulation 32, which states that benefits based on length of service are lawful up to a threshold of five years. To be lawful after this threshold, the employer needs to show that it reasonably appears to him that any length of service criterion of more than five years allowing employees access to benefits fulfils a business need of the employer's undertaking.

Rolls-Royce ("RR") took the step of asking the High Court to determine whether or not the length of service criterion was unlawful.

The High Court found in favour of Unite. RR decided to appeal even though, as pointed out by Unite, RR's professed reason for pursuing this course of action in the first place was simply to obtain clarification of the law, which the High Court judgment had now provided. After some debate about whether it could consider the issue at all, the Court of Appeal agreed to hear the matter.

The specific points considered by the Court of Appeal were: whether or not the service criterion was indirectly discriminatory and, if so, whether or not it was a proportionate means of achieving a legitimate aim (ie. justifiable); and also whether or not the criterion could be described as a "benefit" pursuant to regulation 32 and, if so, whether the use of the length of service criterion fulfilled a business need of the company's undertaking. The Court reminded itself that this was an exercise in construing the meaning of the legislation, rather than hearing an appeal on a point of law from the Employment Appeals Tribunal.

The Court of Appeal found that, although the service criterion was indirectly discriminatory, it was a proportionate means of achieving a legitimate aim. The judges were heavily influenced by the fact that it was not the sole criterion in the matrix and was not determinative of whether or not somebody was made redundant. Wall LJ was also influenced by the fact that the collective agreements had the stated aim of achieving a correct balance of manpower levels with workload and cost requirements, which he found was intended to produce a fair selection process.

Wall LJ went on to say that the legitimate aim of the criterion was "the reward of loyalty and the overall desirability of achieving a stable workforce in the context of a fair process of redundancy selection". He said that the proportionate means was demonstrated "by the fact that the length of service criterion is only one of a substantial number of criteria for measuring employee suitability for redundancy, and that it is by no means determinative". He also found that it was consistent "with the overarching concept of fairness".

Although he felt that it might not be necessary to consider regulation 32, Wall LJ did so nonetheless. He emphasised that the important word in the context of section 32 was "reasonably" and went on to find that having a service criterion of more than five years to gain access to the enhanced protection given by the selection criteria to longer serving employees did reasonably fulfil a business need of the company which was, once again, the need to have a loyal and stable workforce. He went on to say that the length of service criterion was a "benefit" in the context of regulation 32. Aikens LJ elaborated on this by saying that the benefit conferred was that a longer-serving employee may get more points overall in any redundancy exercise and would, as a result, be less likely to be made redundant (Aikens LJ was only prepared to make a declaration as to the meaning of the word "benefit").

What to take away

Where does that leave us? Employers putting redundancy matrices together can continue to use length of service as one criterion for selection, provided that it is not the only or determinative criterion. However, in many industries a length of service criterion may not serve an employer's purposes, so this decision is only likely to have an impact in a limited number of businesses. This decision does indicate though, that redundancy selection exercises that rely on "LIFO" as the sole criterion are likely to be deemed indirectly discriminatory and not capable of justification.

This decision concerned the criteria for selection for redundancy rather than the extent to which enhanced redundancy payment schemes that do not mirror the statutory redundancy payments formula are lawful. While the factors being considered are ostensibly similar, presumably issues such as the desirability of encouraging a loyal and stable workforce will not apply once you have got to the stage of considering how much to pay departing employees.

A similar version of this summary by Naomi Branston first appeared in Complanet, June 2009

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Older worker wins substantial compensation for age discrimination

Killa v Electronic Motor Systems Limited – ET1605121/2008

Why care?

An Employment Tribunal will award a just and equitable amount of compensation to an employee who is found to have been unfairly dismissed or discriminated against on grounds of age, subject to the employee's duty to mitigate his or her loss.

The case

Mr Killa, who was 59 years old at the time of his dismissal, was employed as an electrical engineer by EMS for eight years until he was made redundant at his first consultation meeting, with no evidence of any objective selection criteria being applied. He was not offered any suitable alternative employment although it was available. He brought a grievance, which was not heard in accordance with the statutory procedures, and then a tribunal claim. His employer was found to have discriminated against him on grounds of his age and unfairly dismissed him. Mr Killa attempted to mitigate his loss by applying for other jobs and retraining as an electrician, but was unsuccessful in finding a new job or self-employed work. The Tribunal commented that it would be difficult for him to find work in his local area or to travel to areas where he might be more successful. The Employment Tribunal commented that "the reality is that age discrimination exists and is likely to be highly influential in limiting his opportunities... It is not, unfortunately, the case that someone aged 59, 60 or over competes on a level playing field with younger people". In total, Mr Killa was awarded £90,361 compensation. At the time of his dismissal, his gross pay was £34,259. This amount was calculated to reflect the unlikelihood of him finding alternative work at a similar pay level in the five years to his anticipated retirement at 65. Despite the high level of compensation awarded, only £2,500 related to injury to feelings: a very low sum. The Tribunal referred to the Vento guidelines but saw the dismissal as a one-off act of discrimination, despite acknowledging the effect on Mr Killa who suffered "a substantial shock".

What to take away?

All decisions and procedures should be not only fair and undiscriminatory, but seen to be as such. Without objective justification, the selection of older employees for redundancy may well result in very large awards where, as here, age discrimination was felt to reduce the employee's chances of obtaining new employment.

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This case can be contrasted with the recent case of *Sturdy v Leeds Teaching Hospital NHS Trust ET 1803960/2007* in which Mrs Sturdy alleged that she lost out on being promoted to a key position after she told the Trust that she was 56 years old, and four years away from retirement. She also claimed that, despite having 38 years' experience in the field, she was passed over in favour of a colleague who was 13 years younger and only had three years' experience. The tribunal held that she had been unlawfully discriminated against on the grounds of age. The NHS managers were unable to explain why they had not given her the new position even though she was better qualified and more experienced. The ET decided on the facts that there was 100% chance that Mrs Sturdy would have been appointed to the new post and worked in it until her 60th birthday. In this case it awarded compensation of £33,500 for injury to feelings (a much higher band in the Vento guidelines) and a further £5,700 for aggravated damages. These awards were inclusive of interest and a statutory uplift of 25% for failing to adequately respond to her grievances. In awarding the damages the Employment Judge said that the injury to Mrs Sturdy's feelings was "about as serious as it gets". Compensation for loss of earnings has yet to be determined.

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Hot topics

A new medical "fit note" unveiled

The Department for Work and Pensions (DWP) has recently announced details of a new medical "fit note" to replace the current "sick note". The emphasis is on assisting people staying in work rather than drifting into long term sickness, by enabling people to get the best possible advice about staying in work. Currently the DWP claim that this will mean that if they can't work, this will include what their employer can do to help them return to work sooner. There is a 12-week consultation period on the design of the fit notes which GPs complete. The current plan is that doctors will be able to indicate that someone 'May be fit for some work now', rather than simply indicating whether a patient is or is not fit for work. The form will also allow doctors to record information about any potential changes to the employee's work environment or job role, which could facilitate a return to work. However, it will be up to employers to consider all the circumstances in order to determine if they accept that their employee is not capable of work. The "fit notes" are due to be used in spring 2010. Further details are available from the DWP website, please click [here](#) and [here](#) to view.

New CIPD guidance on managing workplace stress

The Chartered Institute of Personnel and Development (CIPD) has been working on a project with the Health and Safety Executive (HSE) and Investors in People (IIP) to develop practical help for HR and line managers to tackle the issue of stress at work. First published in 2007, this latest guidance, tailored to HR managers and line managers, provides guidance on the management of workplace stress. The guidance, "Line Management Behaviour and Stress at Work", is presented as three separate leaflets. It follows predictions that the current recession will lead to a sharp increase in stress. The guidance highlights four main management competencies which aim to help employers save on both human and business costs. Please click [here](#) for further information.

Statutory redundancy pay (SRP) is to rise to £380 on 1 October 2009

Further to our update last month, the Government has now confirmed that the increase in the weekly limit used to calculate SRP, from £350 to £380, will take place on 1 October 2009. It has also stated that the limit will not rise again in February 2010, as it would usually do, instead remaining at £380 until February 2011. It appears that the rise in the weekly limit will also apply to calculating certain other types of payment, such as the basic award for unfair dismissal.

Contacts

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Taylor Wessing employment specialists

For further details on any of the topics raised in this update, please contact your usual employment contact at Taylor Wessing or one of the practice leaders below, who will be pleased to answer your queries.

Practice leaders:

Employment

Sean Nesbitt +44 (0)20 7300 4294 s.nesbitt@taylorwessing.com

Pensions

Carolyn Saunders +44 (0)20 7300 4752 c.saunders@taylorwessing.com

Employee incentives

Ann Casey +44 (0)20 7300 4750 a.casey@taylorwessing.com

Immigration

Charlie Pring +44 (0)20 7300 4256 c.pring@taylorwessing.com

Vikki Wiberg +44 (0)20 7300 4738 v.wiberg@taylorwessing.com

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www.taylorwessing.com

For events and seminars, please contact:

Lucy Hall +44 (0)20 7300 4082 events@taylorwessing.com

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