BBi Alternative Solutions
Health & Safety : Human Resources : Training : Risk Management

Human Resources - April 2008

RECURRING DISABILITY

The Court of Appeal has addressed the question of whether a claimant qualifies as disabled if their symptoms have ceased but are likely to recur, by ruling that a tribunal cannot take subsequent events into account.

Richmond Adult Community College v McDougall concerned a woman whose job offer was withdrawn when it emerged that she suffered from a persistent delusional disorder, even though she had not had an episode for three years.

She suffered a relapse soon after the job offer was withdrawn, and the EAT held that the Employment Tribunal should have considered this when deciding if her symptoms were likely to recur. The Court of Appeal has now ruled that this approach is not permissible - a likely recurrence must be judged at the time of the discriminatory act without considering subsequent events.

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DISABILITY DISCRIMINATION

The Employment Appeal Tribunal has stated that an employer who fails to make reasonable adjustments under the Disability Discrimination Act, simply by failing to consult a disabled employee over alternatives to dismissal or conduct a risk assessment, will not automatically be liable. Rather, the employee must establish precisely what adjustments should have been made so that they can stay in the employer's workplace, and prove that it would have been reasonable for the employer to implement them.

AGE DISCRIMINATION

The current loophole will be closed so that, as in other discrimination cases, e.g. sex and race, the use of the questionnaire procedure will extend the time for an applicant to lodge a complaint with an Employment Tribunal.

HUMAN RESOURCES - SUPPORTING YOUR BUSINESS

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INJURY & ILLNESS TOLL

A total of 241 people were killed at work and 274,000 were injured, according to the Health and Safety Executive's statistics for 2006-07. A further 2.2 million were suffering from an illness they believed was caused or exacerbated by work, 30 million days were lost due to work-related ill-health and six million due to workplace injury.

INCREASE OF SSP, SMP ETC

There has been increases in statutory sick pay from £72.55 to £75.40, and the prescribed rate of statutory maternity pay, statutory paternity pay and statutory adoption pay increased from £112.75 to £117.18.

EXTENSION OF INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS TO EMPLOYERS WITH 50 OR MORE EMPLOYEES

Just over 3 years ago, the Information and Consultation of Employees Regulations 2004 came into force. At that time, the Regulations only applied to "undertakings" with 150 or more employees. The net was widened on 6th April 2007 to cover undertakings with 100 or more employees. On 6th April 2008 it was widened further to cover undertakings with 50 or more employees.

NATIONAL INSURANCE CONTRIBUTION LIMITS

The lower earnings limit for NIC's will increase to £90 and the upper earning limit to £770. The primary and secondary thresholds will increase to £105.

MATERNITY PAY DELAY

Plans to extend Statutory Maternity Pay, Maternity Allowance and Statutory Adoption Pay from 39 weeks to 52 weeks and introduce Additional Paternity Leave and Pay have been put back.

The Government had indicated that they would be introduced before the end of the current Parliament, but now says the move has been postponed until at least April 2010.

CORPORATE MANSLAUGHTER

The Corporate Manslaughter and Corporate Homicide Act 2007 will come into force and with it a new criminal offence of corporate manslaughter ("corporate homicide" in Scotland). The new offence will replace the common law "offence" of manslaughter by gross negligence for companies and other organisations. Whilst the new offence does not apply to individuals (including company directors and managers), individuals will continue to be potentially liable under the common law of manslaughter and existing health and safety legislation. Trial will be by jury in the Crown court and penalties for those found guilty include unlimited fines, "remedial orders" and "publicity orders".

REDUNDANCY CONSULTATION

The EAT has reaffirmed in Evans & others v Permacell Finesse Ltd that an award of 90 days' pay should normally be awarded to each employee where the employer has failed to engage in collective consultation over prospective redundancies. Minimum consultation periods are 30 days where between 20 and 99 employees are being made redundant, and 90 days where over 100 employees are being made redundant, but the potential protective award of 90 days' pay applies regardless of the minimum length of consultation.

AGE BIAS RULING

European Union member states are allowed to introduce mandatory retirement ages, the European Court of Justice has ruled in a landmark case.

The decision makes it significantly less likely that Heyday - the campaigning arm of Age Concern - will succeed in its ECJ challenge against the UK's default retirement age of 65, when employees can be dismissed simply on grounds of their age. However, until the Heyday case is concluded (probably in 2009), the courts are putting cases where retired employees bring claims alleging that retirement ages are illegal on hold.

DISMISSAL PROCEDURES

A Step 1 letter need not state that the employer is considering dismissal, the Employment Appeal Tribunal has ruled in a case where an employee caught red-handed in an act of gross misconduct was sent a letter inviting him to a 'formal disciplinary hearing for breach of contractual obligations'. It was implicit in the letter that the employer was contemplating dismissing the employee or taking some other disciplinary action and this was sufficient. It should be noted that compliance with the statutory procedure does not by any means guarantee that a dismissal will be 'fair' and we would always recommend that employers make it very clear where dismissal is a potential outcome.

TRIBUNAL LIMITS

The maximum compensatory award for unfair dismissal is increased to £63,000 from £60,600, and a week's pay for basic awards, redundancy payments, etc, went up from £310 to £330. The new limits apply to dismissals which occur on or after 1 February 2008.

TUPE GOES ABROAD...

The TUPE 2006 regulations have the potential to cover the transfer of businesses outside the UK and even beyond the European Union, the Employment Appeal Tribunal has decided in a case concerning the relocation of work from a factory in England to a new base in Israel. The requirement under TUPE that the business originally be based in the UK was sufficient to give the UK courts jurisdiction over the transfer even though the enforcement of tribunal awards might prove difficult.

...AND TUPE OBJECTIONS

Employees with valid grounds can object to a TUPE transfer even when it has taken place, the Chancery Division has ruled in a case where five employees discovered their new employers' identity two days after the transfer and did not want to work for them. The employers argued that the employees could only exercise their right to object before the transfer and sought interim injunctions to enforce restrictive covenant clauses which had transferred across. However, the court ruled that it is valid for an employee to object promptly after discovering the new employer's identity and this then has retrospective effect, so preventing the TUPE transfer. In this case, the benefit of the restrictive covenants did not transfer and interim relief was accordingly refused.

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SEX DISCRIMINATION AND HARASSMENT

In 2007, the Equal Opportunities Commission's successfully argued in the High Court that the Employment Equality (Sex Discrimination) Regulations 2005, which amended the Sex Discrimination Act 1975 (the Act), did not adequately implement the Equal Treatment Directive (76/207/EEC), as amended (the Directive). The Government was ordered to make further amendments to the provisions on harassment, discrimination on grounds of pregnancy or maternity, and the rights of women on maternity leave. Therefore, we now have The Sex Discrimination Act 1975 (Amendment) Regulations 2008.

HARASSMENT - DEFINITION CHANGE

Under the Act, a person harasses a woman where, "on the ground of her sex, he engages in unwanted conduct that has the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her". The new Regulations amend the definition to include "unwanted conduct related to her sex or the sex of another person" that has the necessary purpose or effect. The Explanatory Memorandum to the new Regulations gives the following interesting explanation: "Use of the phrase "related to sex" instead of "on the ground of her sex" will also facilitate claims of sex harassment by witnesses because the person who considers that their dignity has been violated or the conduct creates an offensive and degrading environment for them need not be the primary recipient of that conduct. An example of this would be where a male manager calls a female employee a floozy or airhead and this is witnessed by another female colleague, who considers that her dignity is violated thereby or considers that it creates an intimidating, hostile, degrading, humiliating or offensive environment. Moreover, because the definition of sex harassment (and sexual harassment) is to be read as applying equally to the harassment of men and women with such modifications as are necessary..., the witness does not have to be of the same sex as the primary recipient of the conduct in question.
The witness would however have to show that all the elements of the test of harassment have been satisfied.

HARASSMENT BY THIRD PARTIES:

The new Regulations impose liability on employers for harassment of an employee by a third party (defined as someone who is not the employer or another employee). The employer is only liable where:

- "A third party subjects the woman to harassment in the course of her employment";
- "the employer has failed to take such steps as would have been reasonably practicable to prevent the third party from doing so";

AND

- "the employer knows that the woman has been subject to harassment in the course of her employment on at least two other occasions by a third party".

This third requirement is likely to be the subject of some controversy. It even reads oddly. The effect would seem to be that the victim has no remedy until they have been harassed at least three times.

PREGNANCY DISCRIMINATION - DEFINITION CHANGE:

There is no need for a comparator of the opposite sex when a woman is seeking to show direct discrimination on grounds related to pregnancy or maternity leave since the position of a woman who is pregnant or on maternity leave cannot be directly compared with that of a man. Therefore, in pregnancy or maternity cases, the comparison is always hypothetical, and the comparator is the woman herself. The woman's treatment must be compared with the treatment that she would have received if she had not been pregnant, or exercised or sought to exercise her statutory rights to maternity leave. The new Regulations remove the need for there to be any form of comparator in pregnancy or maternity - related discrimination cases.

EXTENSION OF MATERNITY LEAVE RIGHTS FROM 5TH OCTOBER 2008:

Regulation 5 of the new Regulations narrows the extent to which it is not discriminatory to deprive a woman of the benefit of her terms and condition of employment during maternity leave.

The amendment facilitates claims for discrimination in relation to eligibility for remuneration by way of bonus while on compulsory maternity leave. In addition, it enables claims for discrimination in relation to terms and conditions of employment in relation to periods of additional maternity leave to the same extent to which they are available in relation to periods of ordinary maternity leave. The amendments apply where a woman's expected week of childbirth begins on or after 5th October 2008.

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TACKLING ILLEGAL WORKERS

Employers face a fine of up to £10,000 for every illegal migrant they employ under new measures that came into force on 29 February.

The fine forms part of a new civil system created under the Immigration, Asylum and Nationality Act 2006 which also puts in place a new criminal offence of knowingly using illegal migrant labour. This carries a maximum two-year jail sentence and/or unlimited fine.

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EMPLOYMENT BILL PUBLISHED

The Employment Bill 2007-2008, which had its first reading on 6 December 2007, makes a number of changes to existing legislation. Among key provisions are:

- repealing the statutory disciplinary and grievance procedures.
- giving tribunals the discretion to increase awards by up to 25 per cent where an employer unreasonably fails to comply with a statutory code of practice.
- removing the fixed conciliation period and extending Acas's conciliation role.
- clarifying enforcement of the National Minimum Wage.
- strengthening the enforcement regime for employment agencies.
- amending trade union law to allow trade unions to deny membership to people who have belonged to a particular political party.

Over the last couple of years the number of cases reaching Tribunal has hugely increased, it is thought to be by more than 50%. Many of you may have experienced this for yourselves, the increases being driven by disputes about equal pay, unfair dismissal, age, sex, race and disability discrimination.

With this being high on the agenda, we are able to offer our clients with not only hands on consultancy but also, an insured/legal expenses cover of up to £75,000 per claim.

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