

HR Legal Briefing

January 2003

EMPLOYMENT LAW CHANGES IN 2003

This is going to be a challenging year for UK employers. Having just about come to terms with the recent amendments to maternity rights, and the introduction of parental leave, employers are going to have to re-write their maternity policies again to reflect greatly extended maternity rights, and to introduce new policies/procedures to accommodate paternity and adoption leave. New dispute resolution procedures being implemented under the Employment Act 2002 will very likely result in some fundamental developments in the law relating to both unfair and wrongful dismissal. Towards the end of the year, we will also see a significant extension to anti-discrimination legislation in the UK, to include sexual orientation and religion/belief among the prohibited grounds.

In light of all these developments, we thought it would be helpful to produce a longer Briefing this month, which is intended to provide an "at a glance" guide to the new legislation being introduced and the dates upon which it will come into effect.

A. Employment Act 2002

The Employment Act 2002 ('the Act') received Royal Assent in July 2002 and will come into force, on a staggered basis, throughout 2003. The Act implements a series of separate regulations some of which have not yet been finalised by the Government and the detail of which may yet change. However, the essential focus of the Act is clear, and covers the following areas:

- Family friendly rights: amendments to maternity, paternity, adoption, and flexible working rights;
- Amendments to the dispute resolution procedure, including the introduction of statutory disciplinary and grievance procedures;
- Changes to employment tribunal procedures;
- Implementation of the fixed term work directive;
- Right to issue questionnaires in equal pay cases.

1. Family Friendly Rights (effective from 6 April 2003)

1.1 Maternity Rights

Ordinary maternity leave (OML) is to be extended from 18 to 26 weeks and additional maternity leave (AML) is to be extended to a further 26 weeks. There is no minimum period of qualifying service for OML. In order to qualify for statutory maternity pay, however, the

employee must have completed 26 weeks continuous service at the 15th week before the expected week of childbirth.

Statutory Maternity Pay ('SMP') and Maternity Allowance will both increase to £100 per week.

1.2 **Paternity Rights**

Fathers whose babies were expected to be born, or were born, after 6 April 2003 will have a right to two weeks' paid paternity leave at £100 per week. Leave will be available only in one block (of either one or two weeks) 'for the purpose of caring for the child or supporting the mother'.

To be eligible fathers must have been continuously employed for a period of not less than 26 weeks, ending with the week immediately preceding the fourteenth week before the expected week of childbirth. The right to paid paternity leave will be additional to the existing right to take 13 weeks' unpaid parental leave.

1.3 **Adoption Leave**

The Act provides a new right to adoption leave for 26 weeks, paid at the same rate as SMP, and also to additional unpaid adoption leave for a further 26 weeks.

An employee who has been continuously employed for a period of not less than 26 weeks, ending with the week in which the child/adopter is notified of being matched with the child, will be entitled to claim this benefit.

1.4 **Flexible working**

The Act creates a right for employees to request flexible working hours. Employers do not need to grant such a request if there are good business reasons for not doing so. A separate Briefing on flexible working is available on request.

Employees with at least 26 weeks' continuous service who are the parent or guardian of a child with responsibility for bringing up the child are entitled to make a request, where the purpose of the request is to care for the child. The child must be under six years old, or under 18 if disabled.

2. **Dispute Resolution in the Workplace (effective from a date late in 2003 yet to be announced)**

The Act aims to encourage parties to avoid litigation and to create greater uniformity and certainty with regard to in-house disciplinary and grievance procedures. To this end, the Act introduces mandatory minimum procedural standards to be implied into the contracts of all employees.

There are two types of statutory procedures; Statutory Disciplinary Procedures (SDP) and Statutory Grievance Procedures (SGP). Regulations have yet to be introduced to clarify the circumstances triggering the use of the following procedures.

SDP

There are two forms of SDP:

- Standard Procedure. This is to be used before any disciplinary penalty is issued.
- Modified Procedure. This is an abbreviated procedure which is apparently intended to be used in cases of summary dismissal (e.g. on grounds of gross misconduct).

Steps under the standard procedure

- (a) Statement of grounds. The employer must provide a written statement of grounds for action which sets out the employee's alleged misconduct. The statement must include an invitation to a meeting to discuss the matter;
- (b) Meeting. A meeting between the employer and employee must take place before action is taken, unless the action consists of suspension. The employee must have a reasonable time to consider his/her response to the grounds for action before the meeting takes place. After the meeting the employer must inform the employee of its decision and notify him of his/her right to appeal;
- (c) Appeal. If the employee chooses to appeal, the employer must invite the employee to a further meeting. The employer must inform the employee of the final decision after the appeal meeting.

Steps under the modified procedure

- (a) Statement of grounds. The employer must set out in writing the alleged action which has led to the dismissal and the reasons for thinking the employee was guilty. The statement must notify the employee of his/her right to appeal;
- (b) Appeal. As in the standard procedure.

The circumstances in which an SDP may be triggered appear to be wide. The grounds are described in the Act as 'the employee's alleged conduct or characteristics, or other circumstances, which lead [the employer] to contemplate dismissing or taking disciplinary action'. This seems to include performance concerns as well as issues of conduct.

The Act also provides that:

- the procedures must be taken without unreasonable delay;
- the timing and location of meetings must be reasonable;
- meetings must be conducted in a manner which enables employer and employee to explain their cases; and in the case of appeal meetings which are not the first meeting, the employer should be represented by a more senior manager than attended the first meeting, unless the most senior manager attended that meeting.

SGP

Similarly, there are two forms of SGP:

- Standard Procedure. To be used for grievances where the employee remains in employment.
- Modified Procedure.

The steps under the standard and modified SGP are almost identical to those for the SDP. The first stage is the provision by the employee of a written statement of grievance to the employer. The meeting and appeal requirements then substantially follow those outlined above.

Sanctions

New sanctions are introduced by the Act in the event of a breach of the statutory procedures, either by employer or employee. These sanctions can be either financial or procedural.

If the employee fails to lodge a grievance under the SGP he/she is prevented from bringing an employment claim in a tribunal. This includes discrimination claims, unfair dismissal, and breach of equal pay claims.

If the employer fails to follow the SDP the dismissal will be automatically unfair. However, the fact that the employer complies with the SDP does not make the dismissal automatically fair. The test of reasonableness will still apply.

Failure to observe the SDP or SGP can also lead to a change in the compensation awarded. The employment tribunal will look at whether the failure to observe the statutory procedure was wholly or mainly attributable to the failure of either party. If it makes such a finding, then it will adjust any award it makes to the employee by 10%. Thus, it will increase the award by 10% if the failure is by the employer and reduce it by 10% if the failure is by the employee. There is discretion to adjust it by a further percentage up to a maximum of 50%. However, compensation payable for unfair dismissal is still subject to the statutory cap, currently £52,600 (increasing to £53,500 as from 1 February).

3. Employment Tribunal reform provisions

From a date in 2003, which has yet to be announced, the following tribunal reform provisions will be implemented by the Act:

- tribunal hearings will be postponed until a fixed period of conciliation with ACAS has occurred;
- tribunals will be able to award costs for parties' time in the preparation of claims where the other party has 'behaved unreasonably in some way'; and
- tribunals will be able to allow costs awards against a party's representative because of the way the representative has conducted proceedings.

4. Implementation of Fixed Term Work Directive

The Act implements the European Fixed Term Work Directive and the Secretary of State exercised the powers under the Act to introduce Regulations which came into effect in October 2002. The Directive aims to prevent fixed term employees (i.e. employees employed under a fixed term contract) from being treated less favourably than similar permanent employees, and to limit the use of successive fixed term contracts.

Less favourable treatment may be assessed in one of two ways. Either each of the fixed term employees' *terms and conditions* of employment should not be less favourable than the equivalent treatment given to a comparable employee, or the fixed term employees' *overall package* should not be less favourable. Any less favourable treatment must be justified on objective grounds.

A fixed term employee has the right to ask an employer for a written statement setting out the reasons for less favourable treatment if he/she believes this may have occurred. The employer must provide the statement within 21 days.

The use of successive fixed term contracts is limited to four years, unless the use of further fixed term contracts is justified on objective grounds.

5. Equal Pay questionnaires

The Act amends the Equal Pay Act 1970 to permit equal pay questionnaires. Such questionnaires have been available for years for use in claims of sex, race and disability discrimination. From a date in early 2003, which is yet to be announced, applicants will be able to use such questionnaires in equal pay claims.

The questionnaires will be used before the beginning of a claim to trigger disclosure by the employers of relevant information. There is no need for a tribunal claim to be formally initiated. Claimants can thus ascertain the strength of a claim at an early stage. The questions and replies will be admissible evidence before the tribunal.

B. Discrimination

The European Employment Directive establishes a general framework for equal treatment in employment, vocational training and occupation. It requires the UK to put in place legislation in those areas on the grounds of religion and belief, disability, age and sexual orientation. Regulations have been published, except in relation to age discrimination, and will become effective from December 2003.

The new regulations make unlawful direct discrimination, indirect discrimination, and victimisation on the basis of religion, belief, and sexual orientation. Employers are allowed to treat job applicants differently only if there is a genuine occupational requirement. Specific points of interest are:

- Discrimination can occur even if based on an incorrect perception of a person's sexual orientation or religion/belief.
- It will not be necessary for a claimant to disclose their sexual orientation in bringing a claim.
- Religion or belief is defined as any 'religion, religious belief or similar philosophical belief'. This will not include any philosophical or political belief unless the belief is similar to a religious belief. Courts and tribunals may consider a number of factors when deciding what is a 'religion or belief', such as collective worship, a clear belief system, and a profound belief affecting way of life or view of the world.

The Government must also implement the European Race Discrimination Directive from July 2003. This will introduce a wider definition of indirect discrimination and also a new definition of harassment under the Race Relations Act 1976. It also will require the abolition of laws and regulations that are contrary to the principle of equal treatment, for example in individual contracts and internal company rules.

Conclusion

Needless to say, employers will need this year to review their policies on "family" leave and discrimination. It would also be advisable to review practices concerning requests for part-time working or job-sharing in light of the flexible work regulations to ensure that any inflexibility can be justified.

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