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NEW LEGISLATION

Several employment related legislative initiatives came into force on 6 April 2006. Of particular importance:

The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349). These Regulations require employers to undertake consultation prior to making changes to occupational and personal pension schemes. Initially, the Regulations apply only to those businesses employing more than 150 employees.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) amend the existing TUPE rules. Changes include more comprehensive coverage of contracting-out and similar exercises as well as the imposition of a duty on the transferor to provide certain information to the transferee prior to transfer.

GRIEVANCE PROCEDURES

The EAT has been handing down further decisions as to what amounts to a grievance letter for the purposes of step one of the statutory grievance procedures. In Mark Warner Ltd v Aspland [2006] IRLR 87, the EAT held that a letter from the Claimant's solicitor to the Respondents' solicitor can amount to a grievance letter. There is no requirement that a

written grievance should indicate that the complainant wanted the matter to proceed further to some discussion or resolution: Galaxy Showers Ltd v Wilson [2006] IRLR 83, EAT. Per Langstaff J: “We consider that in any case in which the substance of the complaint has been raised, and in which there has been subsequent discussion between the parties about that complaint, it is likely that the requirements of the Regulations will be fulfilled... this can only be a general statement... (and) must be regarded as guidance and not ratio”. A questionnaire served on the employers under the Equal Pay Act cannot, however, be relied upon as a statement of grievance as reg. 14 of the Dispute Resolution Regulations 2004 provides that such questions shall not constitute such a statement: Holc-Gale v Makers UK Ltd [2006] IRLR 178, EAT. Shergold v Fieldway Medical Centre and Commotion Ltd v Ruddy, précised in the last Newsletter have now been reported at [2006] IRLR 76 and [2006] IRLR 171 respectively. In light of the decisions referred to, it is now clear that a very low threshold has been set for compliance with step one of the statutory grievance procedure.

The EAT has also held that an Employment Tribunal may consider a discrimination complaint where a grievance was submitted more than four months after the act complained of. The Tribunal’s just and equitable discretion to extend time for submitting a discrimination claim is applicable in such circumstances: BUPA Care Homes (BNH) Ltd v Cann; Spillett v Tesco Stores Ltd [2006] IRLR 248, EAT.

TERRITORIAL SCOPE OF THE EMPLOYMENT RIGHTS ACT

An employee posted abroad by a British employer for the purposes of a business carried on in the UK and an expatriate employee of a British employer who operates within an extra-territorial British enclave in a foreign country can bring ERA unfair dismissal claims providing that they can show strong connections with the UK and UK employment law. Peripatetic employees (such as international airline pilots) are entitled to have their base treated as their place of employment. If their base is in the UK than can bring an ERA unfair dismissal claim: Lawson v Serco Ltd; Botham v MoD; Crofts v Veta Ltd [2006] IRLR 289, HL.

HOLIDAY PAY

The system of rolled-up holiday pay is contrary to the Working Time Directive as the Directive requires specific payment for the particular period during which a worker took leave. Payments already made under such systems, however, can be set off against such

specific payment provided that they have been made transparently and comprehensibly: Robinson-Steele v RD Retail Services Ltd and others TLR, 22.3.06, ECJ. A national law which permits workers to receive payment in lieu of annual leave carried over from the previous year's minimum annual leave entitlement is also contrary to the Working Time Directive: Federatie Nederlandse Vakbeweging v Staat der Nederlanden ECJ.

FLEXIBLE WORKING

Aside from the issue of statutory grievance, Commotion Ltd v Ruddy [2006] IRLR 165, EAT is the first reported decision to consider the right to request flexible working under section 80F ERA 1996. An employer is only entitled to refuse such a request on one or more specified grounds. A Tribunal is not entitled to determine the reasonableness of the grounds relied upon but it is entitled to consider evidence to determine whether the decision was based on incorrect facts. The Tribunal is entitled to enquire into what the effect of granting the application would have been. Eg. could the proposed flexible working arrangement have been coped with without disruption, what did other staff feel about it, could they make up the time? In the present case, the Tribunal was entitled to find that the evidence did not support the employer's assertion that allowing the application would have a detrimental effect on performance. The refusal of the application amounted to a breach of the implied term of trust and confidence giving rise a successful constructive dismissal claim.

UNFAIR DISMISSAL

An employee who is unfairly dismissed is not entitled to full pay for the notice period even when unable to work at that time because of sickness: Langley v Burlo TLR, 3.4.06, EAT. It is unreasonable and unfair for an employer to treat a previous warning which had expired as a determining factor in deciding to dismiss an employee for further breaches of safety procedures: Diosynth v Thomson [2006] IRLR 284, Court of Session.

PRACTICE AND PROCEDURE

A Tribunal will misdirect itself if it makes findings of dishonesty against a Claimant in circumstances where that issue was not relied upon by the employer and was not put to the Claimant by the Tribunal during the hearing. If a point is to be made by a Tribunal criticising a party which is not taken by the other party, the party subject to that criticism must have an opportunity to deal with it: Doherty v British Midland Airways Ltd [2006] IRLR 90, EAT.

TRANSFER OF EMPLOYMENT/TIME LIMITS FOR EQUAL PAY CLAIM

Where a female's employment was transferred from one employer to another, any claim in the Tribunal with regard to the operation of an equality clause had to be brought within six months of the date when her employment with the first employer ended: Preston v Wolverhampton Healthcare NHS Trust (No 3) TLR, 13.3.06, HL.

DISCRIMINATION/EQUAL PAY

A pro rata reduction in an employee's annual bonus in respect of the period when she was absent from work on maternity leave is not contrary to the Sex Discrimination Act 1975 as section 6(6) removes claims related to pay from the Act's scope. The issue as to whether the bonus payment should have been reduced could only be considered under equal pay legislation: Hoyland v Asda Stores Ltd Court of Session.

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