

Employment Law Matters

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Case law update

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In this edition we report on two very significant cases in the field of disability discrimination. In *Mayor and Burgess* of the London Borough of Lewisham v *Malcolm* (2008 UKHL 43, Mr Malcolm was a secure tenant of a domestic property who sublet the property without the consent of the landlord, who consequently served notice to quit. Mr Malcolm argued that his action in unlawfully subletting was related to his disability, schizophrenia, since he would not have behaved in such an irresponsible manner if he had not been schizophrenic. The House of Lords concluded that the comparison should be with someone who did not have any disability. In addition, Mr Malcolm did not satisfy the court that the sub-letting was sufficiently linked to the disability. Also, the court held that a respondent cannot be liable for discrimination unless it knows (or ought reasonably to know) of the claimant's disability. This is a key case in the area of disability discrimination and aspects of its conclusions could make it harder for employees to bring claims.

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The basic point in *Coleman v Attridge Law and Steve Law* (ECJ Case C-303/06) is simple but potentially far reaching. Ms Coleman was a legal secretary for Attridge Law and she brought a claim for direct discrimination, disability discrimination and harassment by her former employers on grounds, not of her own disability, but of the disability of her son, for whom she was the

primary carer. The European Court concluded that the EC Equal Treatment Directive (which underpins the UK's disability discrimination laws) means that the prohibition of harassment is not limited only to people who are disabled themselves. If the discrimination or harassment is because of the disability that is enough. 'Associative disability discrimination' claims may now be made (perhaps by employees whose request for flexible working have been turned down), although it is arguable that the UK Disability Discrimination Act must be amended to align it with the European law.

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When gender based pay inequalities were identified at Middlesborough City Council, a national collective agreement was made to create a new pay system, putting both groups of workers into a common pay and grading structure. The Council wanted a resolution that was affordable and the council workers' union wanted both to compensate people for past pay inequalities and to provide a level of protection for those whose pay would be reduced under the new structure. As a result, the union did not maximise claims for past unequal pay. The Court of Appeal concluded that the union had engaged in discriminatory practice, as the disadvantaged group were predominantly women, and the union could not justify its solution. Not only is this certain to make unions reluctant to make settlements on behalf of claimants in this type of case, but it also shows how difficult trying to balance the future pay levels of men against the past claims of women can be. The price of these settlements has just gone up. (*Allen and others v GM, 2008 EWCA Civ 810*).

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British discrimination law generally does not offer protection to an employee employed wholly outside Great Britain. But what happens when an employee moves to London and suffers discrimination, having previously similarly suffered discrimination whilst working in Paris? That is what happened in *Tradition Securities and Futures SA v X and Y* (UKEAT/0202/08/MAA) and the Employment Appeal Tribunal (EAT) held that no complaint could be heard in relation to alleged incidents taking place in Paris, since at the time of the alleged incidents, the employee was employed wholly outside Great Britain. Whilst over the entire period, the employment relationship was partly in Great Britain, the right to bring a discrimination claim has to be addressed by reference to the employee's situation at the time of the alleged discrimination. At that time, there was no connection with Great Britain at all. The situation might be different if the employee is working temporarily abroad, because then a link to Britain may already have been established.

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Case law update - cont'd

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The EAT has, in the context of a voluntary redundancy scheme, set out how tribunals, and therefore employers, should assess the justification of age discrimination. The scheme in question gave employees a severance payment, the amount of which varied (considerably) according to combination of age and length of service. The employer sought to justify this discriminatory policy relying, principally, on the fact that it encouraged and rewarded loyalty, thereby protecting older employees (who could be more vulnerable in the job market), was generous and therefore extremely popular, and resulted in compulsory redundancies being avoided. The EAT confirmed that the burden of proof of establishing justification is on the employer and that the measure must be proportionate, which requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the business. The Tribunal must then make its own assessment of whether the legitimate aims outweigh the discriminatory impact. Here the appraisal was inadequate. (*MacCulloch v Imperial Chemical Industries plc* EAT, 22.7.08 (0119/08)).

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A Belgian employer placed a job advert, but one of its directors told the media that they did not employ immigrants as clients did not like dealing with them. The case found its way to the European Court of Justice for reasons largely related to the manner in which Belgian discrimination laws are enforced. In the course of its ruling, the Court confirmed that the advert and public statement amounted to direct discrimination. (*Centrum voor gelijkheid van Kansen en voor racismebestrijding v Firma Feryn VN*, case C-54/07).

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The pay, length of service and seniority of an employee need not be a bar to enforcing non-competition covenants by way of injunction. In *Norbrook Laboratories (GB) Limited and (1) Rebecca Adair (2) Pfizer Limited (2008 EWHC 978 (QB))*, Ms Adair was in a fairly junior role earning £25,000 per annum, but this did not alter the fact that she had access to confidential information and was in a position to establish customer connections. It was acknowledged that a restriction which would have effectively stopped someone earning a living, may be against the public interest, but this was not the effect of the covenants in this case. Amongst other interesting aspects of this case was the fact that information not in the public domain, but which would assist a competitor in targeting a company's sales efforts – such as information relating to discounts, net prices, marketing strategies and product comparisons – would be confidential and could form the basis of a non-competition restriction.

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Contrast the outcome of *Norbrook* with the case of *WRN Limited v Ayris (2008 EWHC 1080 (QB))*. When he left WRN, Mr Ayris took a file containing about 50-80 client business cards. He also emailed his contacts announcing his departure and alluding to his move to a competitor. In addition, he copied the addresses in his work email address book to his home email address book. Non-solicitation covenants prohibiting him from seeking or accepting orders from his WRN's customers were not enforced. The definition of customers in the

covenant extended to ones with whom Mr Ayris had not dealt. Whilst the business cards and addresses advertised on customers' websites were the property of the employer, they were not confidential information and therefore could not be protected by the covenants, which consequently were too wide. Significantly, the court also supported the employee in the argument that the reasonableness of the restrictions had to be considered at the date of the employment contract and not the date of termination. The employee's intervening promotion had to be disregarded.

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Ms Haggerty was a casual worker and, in order to establish her claim for unfair dismissal, she needed to demonstrate that mutual obligations existed between her and her employer in the periods when she was not actually engaged in any particular work and therefore that she had an ongoing 'umbrella' contract of employment. The EAT concluded that, even though there was no duty on her to work any particular or minimum number of shifts, that did not necessarily mean that mutual legal obligations in periods where no work is provided could not exist. There was a sufficient factual pattern to support a finding that such a binding legal obligation has arisen. The length of the relationship and the fact the work was important to the employer and was regular, contributed to this finding. Employers hoping that periods of inactivity between work for regular casuals prevent there being an ongoing employment should look very carefully at those arrangements. (*St Ives Plymouth Limited v Haggerty [2008] UKEAT/0107/08/MAA*).

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Case law update - cont'd

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Another case in the popular area of employment status is *Autoclenz Limited v Belcher and others* (UKEAT/0160/08). Autoclenz, a car valet company, engaged staff under contracts expressly describing them as sub-contractors. There were, as is so often the case, some factors pointing towards employment and some the other way. The Tribunal found that that the staff were employees, relying in part on the fact that the contract term allowing the staff to provide substitutes did not reflect what happened in reality. The EAT disagreed on this point. This substitution clause should only have been disregarded if both parties had intended to misrepresent their true contractual relationship and the contract was a sham. However, the fact that the substitution clause removed a requirement for personal service and mutuality of obligation did not stop the staff meeting the definition of a 'worker' and they were entitled to that level of statutory protection.

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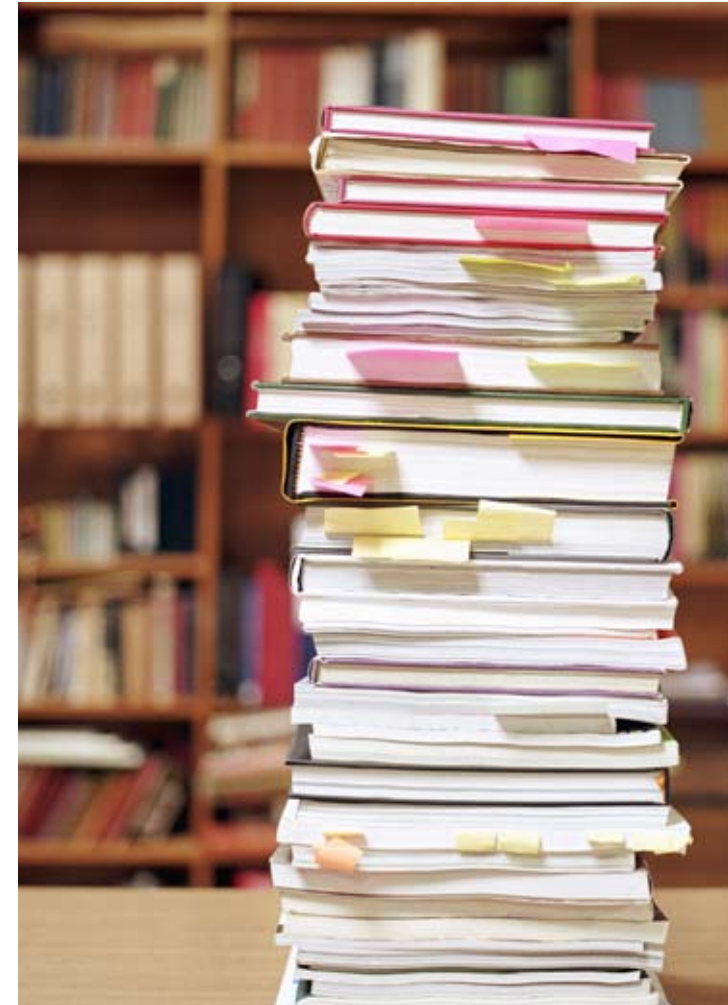
It is not possible for the parties involved in a TUPE transfer to attempt to agree any transfer or termination date other than the date that results from the effect of TUPE, as the operation of law will override any such arrangement. This helpful reminder is provided by *Capita Health Solutions v BBC and McLean* (2008 UKEAT 0034/07/0105). The fact that the arrangement was put in place to help the employee work out her notice with the transferor did not matter.

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A letter can act as a formal grievance under the (soon to be terminated) statutory grievance procedures even if it was not intended to act as such. The employee had said he had wanted his letter to be treated as an informal indication of his complaints and would lodge a statutory grievance if he was not satisfied with the outcome of those complaints. When he later submitted a Tribunal claim without a further written grievance, the original letter was enough to meet the statutory rules. So until April 2009, the apparently pragmatic and sensible approach of asking an employee if he/she intends a written complaint to be a formal grievance seems risky and the totally safe course is always to treat it as such. (*Procek v Oakford Farms Ltd*[2008 UKEAT 0049/08/0207]).

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In *Rainbow v Milton Keynes Council* (1200104/2007), the council advertised for candidates in 'the first five years of their career' to apply for a teaching vacancy. A 61 year old teacher who applied for the post but was rejected without the same assessment as younger candidates claimed age discrimination. An employment tribunal held that the advert potentially disadvantaged someone of that age as it was likely that they would have more than five years teaching experience. In the absence of any objective justification, the advert constituted indirect age discrimination.



News update

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From 1 October 2008, national minimum wage rates have increased. The rate for workers aged 22 or over is now £5.73 per hour, the rate for workers aged between 18 and 21 is now £4.77 per hour and for workers aged 16 and 17 £3.53 per hour.

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28 February 2008 – Applications opened for employers to sponsor Tier 2 skilled workers with a job offer.

29 February 2008 – Employers may apply for a sponsor licence to enable them to bring in Tier 2 and Tier 5 migrant workers.

29 June 2008 – Former immigration category closed for highly skilled migrant programme, business persons and investors.

28 July 2008 – Applications opened for employers to sponsor Tier 4 students and Tier 5 temporary workers and youth mobility schemes.

November 2008 – Former immigration category closed for most skilled workers with a job offer and temporary workers, both needing a work permit. To replace these categories, migrant applications opened for Tier 2 skilled workers with a job offer and Tier 5 temporary workers and youth mobility schemes.

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Various provisions of the Companies Act 2006 having a significant effect on directors, came into force on 1 October 2008. Further information on the most significant ones is covered in the article on this subject in this edition.

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5 October 2008 was a material date regarding the extension of maternity laws, as outlined in the previous edition of *Employment Law Matters*. Any woman whose expected week of childbirth falls after that date benefits from the increased rights under the new rules.

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The Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations 2008 come into force on 27 October 2008. These regulations entitle agency workers on a contract for less than three months to statutory sick pay.

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The European Advocate-General has given his opinion in the so-called ‘Heyday’ case, concerning whether national laws can specify compulsory retirement ages. His conclusion is that a national government, the UK’s in this case, is permitted to operate a compulsory retirement age as long as it can justify it under national laws, on the basis of objectivity and reasonableness and in light of employment policy and the labour market. The European Court of Justice usually, but not always, follows the Advocate-General’s opinion.

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The UK Government has agreed a 12 week qualifying period before agency workers acquire equal treatment rights in certain areas (including pay, maternity pay and maternity leave) with permanent employees at the site where they work. The resulting amended proposal will be returned to the European Parliament by the end of this year and could become law in the UK by 2010.

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The EU Employment Council has announced that it will allow the UK to continue permitting employees to opt out of the 48 hour maximum working week.

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The Department for Business, Enterprise and Regulatory Reform has published the Walsh Review on the right to request flexible working. The report recommends that the right to request flexible working be extended to those with parental responsibility for children up to the age of 16. It also proposed that the extension of the right should be implemented in one go, rather than phased in. These recommendations have been accepted by the Government, which has now started consultation on the best ways to implement the proposals, including methods of making it easier for employers to deal with requests. For more information visit www.berr.gov.uk.

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The Government has published a consultation paper on amendments to certain aspects of dispute resolution, including whether the definition of a ‘relevant adviser’ for the purpose of compromise agreements should change and whether certain claims could be dealt with by the tribunal without a hearing. For more information visit www.berr.gov.uk.

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News update - cont'd

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The Information Commissioner's Office has published new guidance and recommended good practice on complying with the Data Protection Act in situations in which a transferor in a TUPE situation discloses personal data on employees to the transferee. For more information visit www.ico.gov.uk.

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The Department for Business Enterprise and Regulatory Reform has issued a consultation paper on the European Commission's proposals to alter the EC European Works Councils Directive. The main aims are to improve consultation with employees in existing councils, increase the number of councils and make the process for setting them up easier. For more information visit www.berr.gov.uk.



Employers: are you protected?

Key messages

- Recent case-law demonstrates that courts are willing to protect business from being disadvantaged when a group of employees leave. Consequently any business taking on groups of employees should understand any restrictions the employees are subject to from their previous employment.
- Employers may be successful in obtaining substantial damages and injunctive relief against employees who leave and join a competitor, even when restrictions are implied, rather than expressed.
- To ensure the enforceability of post-termination restrictions and to protect the business, it is important for employers to carefully draft the restrictions so that they only protect the legitimate business interests of the employer.

Recent cases have highlighted a court's willingness to protect an employer from a group of departing employees damaging the business, for example, as a result of their joining a competitor or attempting to solicit clients.

In *Kynixa Limited v Hines 2008 EWHC 1495s*, three key employees (one of whom was a director) left Kynixa to join a competitor. None of the three employees had any restrictive covenants in their contracts of employment but the director was party to a shareholders agreement which did contain restrictive covenants. The High Court found all three employees had breached their duty of fidelity to the employer and two of the employees (the director and a senior employee who was key to the business) had breached their fiduciary duties. Key to the decision of finding in favour of the employer was the fact that each of the employees had misled Kynixa as to their intentions following the termination of their employment.

The case of *UBS Wealth Management (UK) Limited v Vestra Wealth LLP 2008 EWHC 1974 (QB)* also concerned a group of employees leaving their employer, UBS, to join a competitor, Vestra. One of the defendants, Mr Scott, resigned from UBS in May 2007 but was bound by restrictive covenants until 1 September 2008. He persuaded 52 employees to join him from UBS at Vestra in May 2008 with 23 subsequently joining. Although Mr Scott's

restrictive covenants had elapsed, UBS contended that the departing employees had acted together and the High Court considered that UBS could establish the move had involved breaches of the employees' implied duties of fidelity and potential conspiracy.

For this reason, the High Court granted a 'springboard' injunction which prevented the departing employees soliciting any further staff (already 75 employees had resigned from UBS to join Vestra) or clients. The springboard injunction was also granted to prevent Vestra and other defendants from making use of their earlier wrong doing to gain a head start in competition with UBS.

Some employers are nervous about taking the leap into formal court action to enforce restrictions against departed employees, regarding the fear factor as the main weapon. These cases demonstrate that employers should not automatically assume there is nothing they can do.

That can even be the case where there are no non-competition clauses in the contract of employment (see our case law update). Neither need the pay, length of service or seniority of an employee be a barrier, as the decision in *Norbrook Laboratories (GB) Limited and (1) Rebecca Adair (2) Pfizer Limited (2008 EWHC 978 (QB))*, reported in our case update section, shows. If the employee had access to confidential information and was in a position to

establish customer connections, that can be enough to justify an injunction.

Another case in our case update section, *WRN Limited v Ayris (2008 EWHC 1080 (QB))*, demonstrates that careful thought should be given to what protection is needed in a restriction. Prohibiting the poaching of any customers of the employer may be too broad a restraint if customer identity is in the public domain. If it is in fact the employee's influence over customers he has dealt with, rather than knowledge of ones he may not have, which is the protectable interest, the covenant must be drafted to reflect that.

Many employers do not devote attention to the precise wording of restrictions and adopt standard language without thought. Being clear about what the real competitive threat is and what restrictions guard against that threat improves the prospect of enforcement.

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How will Government pension proposals affect your business?

Key points

- The powers of the Pensions Regulator have been extended to prevent non-insured buy-outs of defined pension schemes.
- The Government will further consult on the proposals to ensure the powers do not affect normal corporate activity.
- Companies with defined benefit pension schemes should monitor developments to limit any corporate or personal exposure they may have to the Regulator's powers.

The Government has announced a major extension to the powers of the Pensions Regulator, primarily aimed at stopping non-insured buy-outs of defined benefit pension schemes, effective since 13 April 2008.

Non-insured buy-out is shorthand for severing the pension scheme's link to its employer. This means the scheme would no longer be able to call on the employer to make good any deficit. The employer is replaced by a new organisation which will, if the pension scheme winds-up, make a profit but will not provide an annuity from a regulated insurance business, for example, Goldman Sachs took on the Rank pension scheme. The Government and the Pensions Regulator have become concerned about some of these non-insured buy-outs, both in terms of the strength of the new organisation and how it will provide support.

Although aimed at non-insured buy-outs, the initial proposals for the powers would have affected many corporate transactions, restructurings and even debt repayments. The original proposal was for the Regulator to be able to make anyone involved in an act that could be detrimental to the pension scheme make good the scheme's deficit – often millions of pounds. As the Regulator can look back six years, many felt this would mean increased risk for directors and companies that did not seek clearance for their actions, with the additional cost of mitigation provided to the pension scheme.

After intensive lobbying, the Government agreed to consult further with a view to ensuring the powers would not affect normal corporate activity. The final proposals will therefore appear in the Pension Bill when it is next before Parliament.

Companies with a defined benefit pension scheme should watch carefully for the updated proposals and ensure that they have neither corporate nor personal exposure to the Regulator's powers.

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Illegal working and the points based system

Key points

- Employees need to understand, and prepare for, the new rules on illegal working in order to avoid significant financial penalties and risk to their immigration licence sponsorship status.
- Companies should have a policy on illegal working which is linked to other HR policies and procedures including recruitment and disciplinary.
- Employment documentation should also be amended to reflect an employer's additional record keeping obligations.

There is currently a huge amount of publicity for the new immigration points based system (PBS). Less understood is the link between the PBS and the rules on illegal working introduced on 29 February 2008.

The main points of the illegal working regime are as follows:

- There is a civil penalty for employing workers illegally. This penalty is up to £10,000 per worker.
- It remains a criminal offence to employ an illegal worker knowingly.
- Breaches of the rules on illegal working may lead to employers having their sponsorship licences downgraded or revoked. In this instance, the organisation will no longer be able to continue engaging Tier 2 migrant workers (Tier 2 replaces the work permit scheme). Furthermore, if the UK Border Agency (UKBA) discovers evidence of illegal working when an application for a licence is made, this will seriously prejudice the application.

So what should HR be doing to deal with these rules? It is vital that organisations develop a strategy on illegal working as a matter of priority. That strategy should take into account the other obligations of a sponsor – failure to comply with these will lead to the risk of loss of sponsor status.

It is also important to bear in mind that a single, stand alone illegal working policy is probably insufficient. The strategy must be incorporated into other internal HR policies and employee facing procedures.

The main elements of the strategy should include the following:

- Clear and defined documentation checks prior to the start of employment to ensure that the employee has the right to work in the UK. These documents must comprise those listed in regulations. Employers have faced difficulties with establishing the right to work from these documents and the proposed introduction of an identity card scheme should go some way to alleviate this. A procedure that allows employees to provide the specified documents post-commencement involves significant risk. To minimise the risk of race discrimination claims, the process must be applied at the same time for all candidates and the hiring decision must not be influenced by the type of document produced. A candidate should be allowed to produce any permitted combination of documents from those specified by regulations and not, for example, asked just to produce a passport.

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Illegal working and the points based system - cont'd

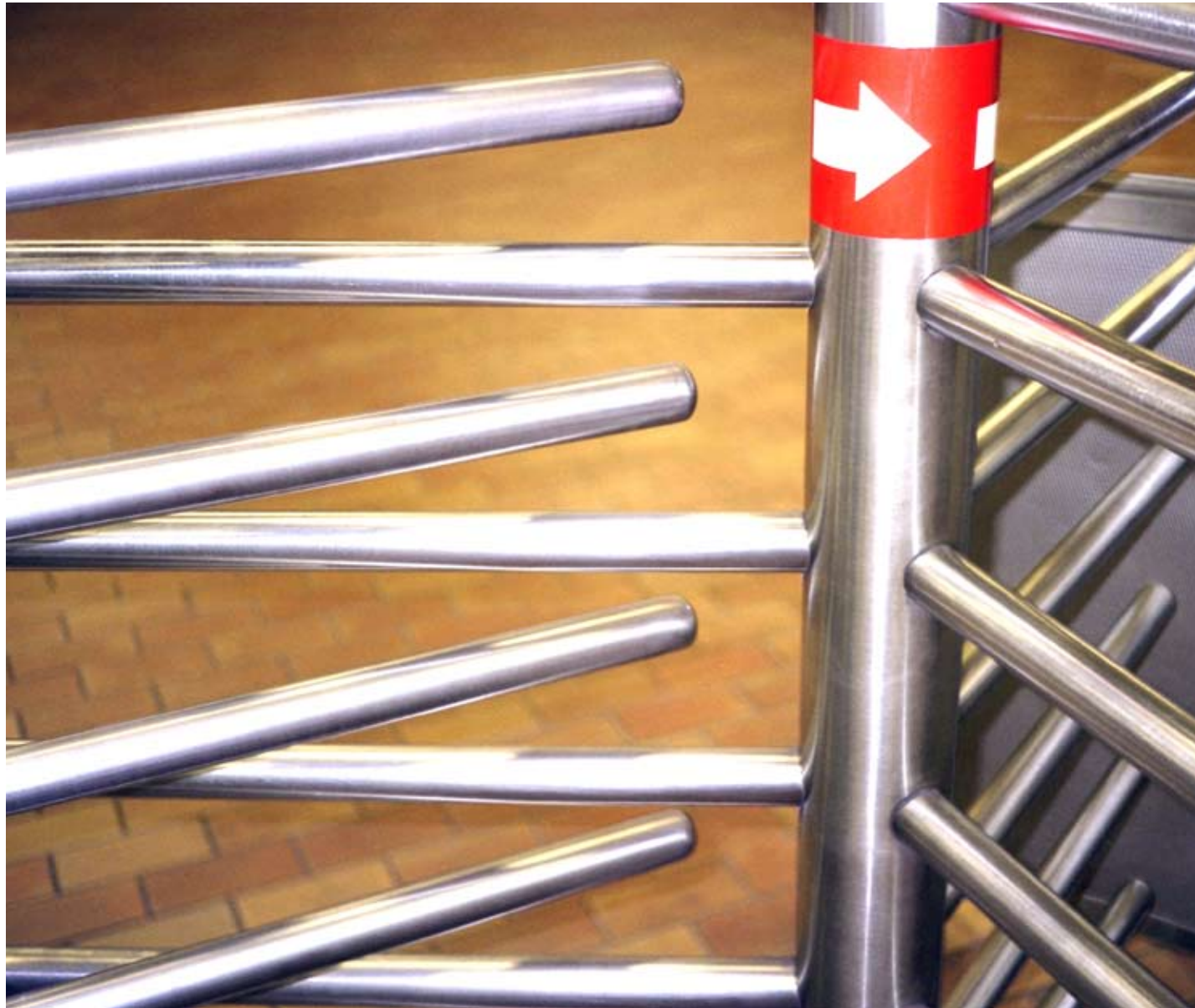
- Employees with temporary or limited right to work in the UK should now be subject to checks every 12 months. This is a significant change from the current system. To enable the employer to comply with this requirement, employees must be notified of their obligation to provide the relevant documentation. That obligation should be backed up by a reference to the disciplinary process in the event of a failure to comply.
- The organisation should consider what steps it will take if it identifies an illegal worker, including whilst it is preparing to lodge its sponsorship application or during subsequent right to work checks. Those steps should take into account potential unfair dismissal and race discrimination claims.

All of the above must apply to the whole of the employee population, not just migrant employees brought to the UK as assignees.

In addition to ensuring compliance with the rules on illegal working, HR policies should also be amended to reflect the fact that a sponsoring employer has duties of record keeping and notification to the UK BA. For example, mobile telephone numbers must be recorded and the UK BA notified if the sponsored employee fails to attend on the first day of work. All these duties must be captured in the HR documentation issued to employees.

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The end of ambiguity? The repeal of the statutory dispute resolution procedures



Key points

- The current statutory dispute resolution procedures will be repealed in their entirety, including the automatic unfair dismissal provision.
- The way in which breaches of procedure will be dealt with in unfair dismissal cases will revert, to some degree, to the pre-October 2004 law, although a degree of additional financial penalty for procedural failure will still apply.
- The Advisory, Conciliation and Arbitration Service (ACAS) code of practice for resolving disputes will be used as a guide in determining whether a fair procedure has been followed.

The Employment Bill 2007 will repeal the statutory dispute resolution procedures and related provisions about procedural unfairness in dismissal cases. This may go some way to resolving current uncertainty and costs involved in resolving workplace disputes. It is the result of an independent review, commissioned by the Government, which recommended that the current procedures are inappropriately inflexible and have an unnecessarily high administrative burden. Employers (and their advisers) would not disagree with this conclusion.

Currently, these procedures form the basis for employers managing grievances, disciplinary matters and dismissals. They apply to all employers regardless of their size. If an employer has not followed the statutory procedures in a dismissal case, the dismissal will be automatically unfair. In addition, employers who terminate the employment of their employees without following the statutory procedures risk a tribunal increasing any compensation awarded by up to 50%.

The Bill will, to some degree, return the law of unfair dismissal to the pre-October 2004 position, meaning that procedural flaws will normally render a dismissal unfair, but compensation can be reduced if the tribunal finds that following the correct procedure would have made no difference to the outcome.

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The end of ambiguity? The repeal of the statutory dispute resolution procedures - cont'd

There remains a desire though, to put the onus on employers to follow internal procedures in the hope that this encourages them to exercise more reasonable judgements, resolve disputes internally and avoid tribunal litigation. Employers and employees will therefore be expected to comply with the ACAS code of practice on discipline and grievance, which will be re-issued when the Bill comes into force. The code will not be legally binding, unlike the statutory procedures, but it can still be taken into account by a tribunal when considering if a fair procedure was followed by an employer in cases of dismissal. Under the Bill, tribunals will be given the power to increase compensation by up to 25% for an unreasonable failure by the employer to follow the code.

A draft of the revised code has been circulated for consultation. It is intended that the code will be supported by supplementary guidance on handling workplace disciplinary and grievance issues.

Some elements outlined in the draft code which should be applied by an employer when following a formal disciplinary or grievance procedure include:

- dealing with issues promptly;
- acting consistently in all cases to ensure that similar cases are treated on a comparable basis;
- an investigation should establish the facts of the case;
- grievance or disciplinary meetings should be

conducted by a manager who is not involved in the disputed matter;

- if the employee is raising a performance problem the immediate manager should be involved;
- employees should be informed of the basis of any problems and have an opportunity to respond before any decisions are made;
- employees have the right to be accompanied at any disciplinary or grievance meeting;
- employees should be allowed to appeal against any formal decision that is made; and
- written records should be kept during disciplinary and grievance cases and a written record of the outcome maintained.

It is not known what the supplementary guidance will contain and the extent to which the tribunals may rely on it when determining whether or not the code has been adhered to in practice.

The Bill will also establish a new fast-track procedure to settle monetary disputes in certain cases. ACAS officers will also be given more responsibility to conciliate in pre-tribunal disputes and existing fixed conciliation periods will be removed. Tribunals will also be given powers to award compensation for financial loss (for example, bank charges and interest) arising from any unlawful deduction of wages or non-payment of redundancy awards.

It is anticipated that the Bill will come into effect in April 2009.

Some employers may have inadvertently incorporated the statutory dispute resolution procedures in their employees' employment contracts to comply with current law. To prepare for the anticipated changes of the Employment Bill 2007, it is recommended that employers review their existing employment contracts, staff handbooks, policies and procedures to ensure that they expressly provide that the statutory dispute resolution procedures do not form part of the employees' contracts and only apply where legally required to do so. In this way, the current statutory dispute resolution procedures will not bind employers contractually after they have been repealed.

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Sustainable HR

Key points

- Demographic changes affecting the people agenda are important in sustaining a strong workforce.
- HR directors need to consider creative ways of addressing retention issues, such as flexible working or secondments, so they can avoid skills shortages when the downturn ends.
- Good employers keep in touch with alumni, as well as potential recruits.

Sustainability usually brings climate change to mind, but demographic changes affecting the people agenda are equally important in sustaining a strong workforce, and in this respect HR plays a vital role. In the current economic climate in particular, many organisations are looking at sustaining their talent base in order to avoid crippling skills shortages when the downturn ends.

HR directors need to address retention issues, without over-populating work forces with people who have little to do. Some employers are offering reduced working hours or redundancies, while others are curbing pay rises and imposing recruitment freezes, but retraining or redeploying have also become popular alternatives. Where this is the case, it is important to consider what the individual will gain from the experience, whether it be new skills or a better work-life balance.

One sector that has been very successful in redeployment is financial services. As business shrivels in London and New York, organisations keen to retain their best talent in anticipation of better times are transferring them to the newer financial centres in the Asian emerging economies. This has a dual benefit for international institutions who keep hold of their best workers while filling skills gaps in other regions.

Employees who do need to be released from their contract, however, need not be lost forever. Creating or maintaining an alumni system can be an important tool. Keeping in touch with people and reinforcing how much they are valued can lead them to consider

rejoining the organisation at a later date. Many science and technology companies have been investing similar initiatives to attract maternity leavers back into the workplace. These approaches can equally be adapted for people who have been made redundant, to address the issues of maintaining sustainable talent pools.

For organisations keen to attract the brightest new talents, but unable to recruit during the downturn, there is the option of establishing relationship management programmes to keep candidates warm and give them general news about the organisation. By staying in touch in a positive way, with regular emails for example, candidates are likely to still feel good about the organisation when it is in a position to recruit again.

In the current economic environment, it is more important than ever for HR and management to work together to sustain their teams and avoid unhappy redundancies, while being open and honest enough about the business to keep existing staff motivated and committed.

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The new conflicts rules – what next for directors?

Key points

- Provisions now in force under the Companies Act 2006 place greater obligations on company directors to disclose and avoid actual and potential conflict situations.
- Articles of association should be reviewed in light of these new requirements.
- Directors should be fully briefed on the requirements and may need to make additional disclosures.
- HR departments should play their part in ensuring this occurs, for example when executives are seconded overseas to take up senior level positions.

The final four general statutory duties under the Companies Act 2006 which affect company directors, came into force on 1 October 2008. They are among the most significant aspects of the Act. In summary these duties are the following:

- a duty to avoid conflicts of interest ('situational conflicts') unless authorised;
- a duty not to accept benefits from third parties;
- a duty to disclose any interest in a proposed transaction or arrangement with the company; and
- a separate and independent duty to disclose any interest in an existing transaction or arrangement with the company.

Any interests disclosed by a director in a proposed or existing transaction or arrangement with the company can be referred to as 'transactional conflicts'. Transactional conflicts are not the same as situational conflicts and different rules apply to each.

Duty to disclose any interest in a proposed or existing transaction or arrangement with the company (transactional conflicts)

These duties are broadly similar to those previously contained in s317 of the Companies Act 1985 dealing with disclosure of interests. Directors will continue to have a duty to declare any interest in a proposed or existing transaction, however the nature and extent of

such interest is now required to be disclosed.

Duty to avoid conflicts of interest (situational conflicts)

A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or may possibly conflict, with the interests of the company. This applies in particular to the exploitation of any property, information or opportunity.

A new statutory power has been introduced by the Act which enables the board of directors to authorise situational conflicts in advance. The boards of public companies and existing private companies must be authorised to deal with conflicts before independent directors can approve them.

...cont'd

The new conflicts rules – what next for directors? - cont'd

What should companies do?

The practical implications to companies of the new conflicts of interest provisions are far reaching and will be specific to each company. As a minimum, companies should ensure that the following occur as soon as possible:

- the board is able to authorise conflicts by, for example, arranging for the amendment of the articles of association of the company to insert the relevant authorisation provisions;
- all directors are briefed on their new statutory duties and are aware of the new provisions relating to conflicts of interest;
- directors make a full disclosure of all potential or existing, conflicts of interest of connected persons such as spouses and children; and
- a procedure to record conflict authorisations is put in place.

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