Bulletin

Employers' Compliance Update

The pace of change in employment legislation is relentless and every aspect of the employee relationship now demands not only thorough procedural understanding but also a strong appreciation of what is and is not reasonable.

Employers cannot afford to ignore their 'people' responsibilities, if they wish to avoid the disruptive, time-consuming and often financially painful consequences, of employees becoming increasingly aware of their statutory rights and entitlements.

The following provides a brief round-up of some of the latest legislation and case law affecting all employers.

Age Discrimination Legislation

Although the Government launched a non-statutory Code of Practice in June 1999, legal protection against age discrimination has always seemed to be a concern for the future. However, formal legislation is now just around the corner and employers have less than a year to ensure they are prepared for it!

In July 2005, the DTI published the Employment Equality (Age) Regulations which will become law on 1 October 2006. Age is regularly used as a criterion for making decisions throughout the employment process, from recruitment through to retirement and therefore compliance with this new legislation will require a comprehensive review of employers' attitudes and practices.

The proposed legal framework will be similar to existing discrimination laws in respect of direct and indirect discrimination although one distinction for employers is that they will be able to justify direct discrimination if it is 'a proportionate means of achieving a legitimate aim'. An example of this might be the fixing of a minimum age to qualify for certain employment benefits in order to recruit or retain older people.

There will also be direct protection against harassment. So a mature trainee teacher tormented on the grounds of age during teaching experience will have recourse to the legislation if no action is taken by the school.

The regulations will have important implications in respect of the whole of the recruitment process and in particular advertising. It will no longer be possible to target certain age groups; for example a retailer of trendy fashion items will not be able to advertise for young shop assistants purely on the basis of targeting young buyers.

Protection will also apply to selection processes. So it may not be directly discriminatory to require all applicants to pass a health and fitness test for recruitment but it might be indirect age discrimination if people of certain ages were less likely to pass the test. This is more likely to be the case if the vacancy is for an administrative position which does not require certain levels of fitness, in contrast to a health instructor vacancy in a sports centre.

Employers will also need to think carefully about selection criteria for example requiring a courier to have held a driving licence for five years may be indirectly discriminatory as a higher proportion of those aged say 40 and above will have fulfilled this criteria than those aged 25!

Businesses need to review their processes very carefully before next year to ensure they don't fall into further traps when trying to recruit in what is already a highly competitive market place.

Other key aspects of the legislation include:

- a default retirement age of 65
- employees will have the right to request to work beyond 65
- employers will have a duty to consider such requests
- employers must give their employees between six and 12 months notice of their due retirement date and also advise them of their right to request to continue working beyond that date
- the upper age limit for unfair dismissal and redundancy will be removed.

Disability and Reasonable Adjustments

Since the introduction of the Disability Discrimination Act (DDA) in 1996 the law has continued to evolve. Not only have the original provisions of the Act been subject to judicial interpretation, but major changes have been made to the legislation itself.

In October 2004 the Act was extended significantly and now all employers irrespective of size must not discriminate directly or indirectly against disabled persons and must also ensure they make all reasonable adjustments that will enable those with disabilities to do their job. But with disabled people still twice as likely to be out of work and likely to earn less than able-bodied colleagues there is still a long way to go to remove discrimination.

The scope of disability however is becoming more far reaching. The definition of a disabled person is someone who has a physical or mental impairment which has an effect on their ability to carry out normal day-to-day activities. The effect must be substantial, adverse and long-term. Until recently it has been necessary for less visible conditions to be 'clinically well recognised' for example mental illness or mental health problems. However, it is likely from the end of 2005 that a clinical definition will no longer be required, just evidence that the condition prevents the individual from carrying out normal day-to-day activities.

In all circumstances, employers must consider reasonable adjustments if they know or could reasonably be expected to know that an employee has a disability. The latter would be the case if an employee who sometimes cries at work suffers from depression. If the employer makes no attempt to find out if the employee is disabled and even disciplines them without giving any opportunity to explain that the problem arises from a disability, the employer may be in breach of a duty to make reasonable adjustments.

In a recent case an employee suffering from diabetes was found to be discriminated against when he was placed on poor attendance procedures for being absent from work with a number of viral infections, as the employer didn't take into account that diabetes sufferers are more prone to general viruses and infections. In another case a fork lift truck driver won an unfair dismissal case on the basis of disability discrimination because his employer did not make reasonable adjustments for his 'borderline learning difficulties'.

An even more significant case concerned a road sweeper who injured her back whilst working for the Fife Council and applied unsuccessfully for a number of office positions. In line with the policy that all jobs were advertised on a competitive basis the tribunal, in this instance, ruled that a reasonable adjustment would have been to recruit her to one of the roles even though she may not have been the best candidate.

Employers need to ensure that their managers are given proper training in disability discrimination so they are able to deal effectively with disability issues to the benefit of the business.

Harassment and the Law

In the case of Majrowski v Guy's & St Thomas's NHS Trust, the Court of Appeal held that under the Prevention of Harassment Act 1970 an employer may be held vicariously liable for harassment committed by one of its employees in the course of his/her employment. This means there is now a further source of protection from harassment outside of discrimination legislation.

The Claimant, Mr Majrowski, was employed by Guy's & St Thomas's NHS Trust and during his employment was bullied, intimidated and harassed by his line manager.

Until now, the Prevention of Harassment Act only allowed claims to be made against the 'harasser' but, following this judgment, employees can now potentially sue their employer as well. Importantly, they do not have to prove they have suffered personal injury, simply demonstrate that unreasonable harassment or bullying has taken place on at least two occasions. A rich source for harassment claims in the future!

Maternity Considerations

Important developments in case law mean that employers must be aware of the following considerations.

- Annual leave continues to accrue whilst on maternity leave and whilst the Working Time Directive does not confer the right to carry forward annual leave from one holiday year to the next, as a result of a recent case at the European Court of Justice, employers should allow holidays to be carried forward if maternity spans more than one holiday year.

- Traditionally the statutory maternity pay (SMP) rate has been determined by the employee's average weekly pay during the reference period, ie the eight-week period to the end of the qualifying week (15 weeks before the baby is due). New regulations oblige employers to recalculate the level of SMP if a pay rise takes effect at any time between the reference period and the end of the maternity leave. This could result in low paid women qualifying for SMP for the first time or a new weekly rate of SMP for someone already on maternity leave.

- The case of *Athis v Blue Coat School* sends an important message to employers to keep employees on maternity leave fully informed about their contractual terms. In this case, an employee on maternity leave had not been granted a pay award because the school had failed to make her aware of a notice displayed in the school staff room outlining the employees' right to make representations to the Head about a pay review.

- The well publicised case of *Starmer v British Airways* highlights the importance of taking requests for flexible working seriously upon return from maternity leave. In this case the employer was found to have indirectly discriminated against Starmer who was an airline pilot by refusing to allow her to work 50% of her usual hours. Their rule that pilots had to fly at least 2,000 hours per year operated to the detriment of more women than men and was deemed to be indirect sexual discrimination. So whilst requests for flexible working may be declined for business reasons, they will not be accepted without challenge and employers should ensure they have a clear and objective justification for saying no that will stand up to examination.

Race Discrimination and BNP Activities

Can someone be racially discriminated against for their political beliefs?

Mr Redfearn was a postal delivery driver for the West Yorkshire Transport Service and was a 'perfectly satisfactory employee'. However when it was discovered that he stood for and was elected as a local authority councillor representing the BNP he was dismissed. The reason given for his dismissal was 'fear of violence in the workforce flowing from his political beliefs'. The Employment Appeal Tribunal however held that the phrase 'on racial grounds' must be interpreted widely and concluded that the decision to dismiss was significantly influenced by questions of race. Mr Redfearn was entitled to protection from race discrimination.

Fire Safety

The government has announced the biggest single reform of fire safety legislation in over 30 years which will come into force in April 2006, consolidating existing fire safety law currently scattered across 70 pieces of legislation.

The aim is to simplify the law for businesses and key points include:

- responsibility for fire safety will lie with the employer or 'responsible person' for the building or premises
- the responsible person will be required to assess the risks of fire and take steps to reduce or remove them
- businesses will no longer need a fire certificate and these will cease to have legal status
- fire and rescue authorities will continue to inspect premises and ensure adequate fire precautions are in place.

These will inevitably add to the financial burden on many employers as they will either have to assume these responsibilities themselves or employ fire consultants to undertake audits and implement appropriate safety measures for them.

As you can see, employers simply cannot afford to ignore their 'people' responsibilities! If you would like to discuss any of the matters raised above in more detail please contact us.

Issued Winter 05