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Employment Law Update

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# Employment Law Update

Developments in the employment field have continued at great pace since our previous issue and recent months have seen the Government making plans for a raft of new legislation that will have significant effects on employers.

Amongst the case law developments, there has been an important decision on disability discrimination that is beneficial to employers, for now at least. The decision involves a substantial rewrite of disability discrimination law by the House of Lords so we'll start with this.

## Disability discrimination rights curtailed significantly by the House of Lords

The case of *Mayor and Burgess of the London Borough of Lewisham v Malcolm* actually related to a housing issue, but still impacts on the rights of employees who want to bring employment related disability claims.

Mr Malcolm suffered from schizophrenia. He was a secure tenant of a property owned by Lewisham Council. During his tenancy, he sub-let the property in breach of his tenancy agreement. As a result, the Council terminated his tenancy. Mr Malcolm argued that he would not have acted in breach of his tenancy agreement if it were not for his disability, and that the Council had discriminated against him by terminating his tenancy.

The Court of Appeal found that there had been a causal connection between Mr Malcolm's disability and the treatment complained of (the termination of the

tenancy). Therefore, his claim for disability discrimination succeeded.

However, the House of Lords disagreed and decided there had been no disability discrimination. In coming to this decision, they considered the meaning of the relevant sections of the Disability Discrimination Act 1995 (DDA).

Under the DDA, discrimination can occur if someone is treated less favourably:

1. **on the grounds of** disability (known as direct disability discrimination); or
2. **for a reason which related to** disability (known as disability related discrimination).

Direct disability discrimination is usually very hard to demonstrate. It is an exceptional case where an employer decides expressly to dismiss an employee due to the fact that they have a particular disability. Instead, it is usually a disability related reason that triggers dismissal, such as a high level of absence or unpredictable behaviour caused by the disability. Dismissal for a disability related reason is still discriminatory but, crucially, such discrimination can be justified. The majority of disability discrimination cases involve disability related discrimination and whether it can be justified.

The House of Lords made the following findings in the Malcolm case:

### 1. Is the discrimination for a reason related to disability?

For many years now, it has been relatively easy for employees to demonstrate a disability related reason for the less favourable treatment they have suffered.

However, the House of Lords has held that this question should be construed narrowly and that the disability must have played some part in the decision making process. In Mr Malcolm's case, they held that the reason for his eviction was the sub-letting and so was not related to his disability.

### 2. Has the individual been treated less favourably than others?

The House of Lords also considered the established authority (since the famous case of *Clark v Novacold* in 1999) that the correct comparator is a person to whom "that reason" (i.e. the reason for the claimant's treatment) does not apply. So, for example, if a disabled person is dismissed from employment due to an unacceptable level of absence from work, the correct comparator has always been a person who has not been absent from work. Such a person would not be dismissed and, therefore, the disabled person has been treated less favourably by being dismissed and has had a claim of discrimination (subject to justification).

However, the House of Lords changed this test. Now, the correct comparator is a person who was not disabled, but in similar circumstances. So, using the

previous example of absence, the comparator is a person who **was** absent from work, but not due to a disability. If the employer would have dismissed that person, there is no less favourable treatment or discrimination.

Looking at the present case, the correct comparator previously was a person who had not sub-let the property. Presumably, the Council would not have evicted such a person and, therefore, a finding that Mr Malcolm's eviction was discriminatory would have been expected. The correct comparator now is a person who had sublet his property, but was not disabled. Therefore, on the basis that the Council would have evicted the comparator, there is no discrimination.

### 3. Knowledge of disability required?

Traditionally, an employer's knowledge of disability has been held to be irrelevant, so a person could discriminate against another even if he did not know that the other person was disabled. The House of Lords also overruled this. Therefore, now, in order to discriminate, a person must know (or reasonably ought to know) of the disability.

So what does this all mean for employers?

It is now much more difficult for a claimant to show that they were subject to disability related discrimination, as they must show that the disability itself is the reason for the less favourable treatment. Therefore, many disability discrimination claims that would previously have succeeded are likely now to fail.

Instead, claimants may well now seek to rely more heavily on the argument that the employer has failed to make reasonable adjustments (for example, an employee dismissed due to absence from work may argue that the employer should have made reasonable adjustments to the sickness policy and given the employee more time to return to work in light of their disability). Therefore, employers should ensure this issue is carefully considered in light of any potential DDA claims.

It is also likely that the law as it now stands does not comply with EU legislation to outlaw discrimination. Therefore, the Government may look at amending the domestic disability discrimination legislation in the future.

## Key changes to sex discrimination and maternity rules

In April 2008, the Sex Discrimination Act 1975 (Amendment) Regulations 2008 came into force. Their purpose is to amend the Sex Discrimination Act 1975 to bring our domestic sex discrimination rules into line with European legislation. The Regulations make the following key changes:

### 1. Definition of harassment

Harassment no longer needs to be "on the grounds of a person's sex", and the definition now encompasses "unwanted conduct related to [a person's] sex or the sex of another person". Therefore, a person could now be harassed where they are offended by sexist remarks made about another person, or gender related banter.

Under the Regulations, any harassment that has any sexual connotation will be unlawful, even if it is not carried out because of a person's sex. Therefore, it is even more important now for employers to ensure that inappropriate comments, jokes or banter do not occur in the workplace.

### 2. Liability for third party harassment

An employer will now be liable for a third party's harassment of an employee in certain circumstances. Where the harassment takes place during the course of the 'victim's' employment, and where the employer knows that the victim has been subject to harassment in the course of their employment on at least two other occasions by a third party, the victim will have a claim against their employer. An employer will not be liable if they have taken such steps as are reasonably practicable to prevent such harassment. Therefore, employers should identify and deal with any circumstances where employees are put in a position of suffering harassment.

### 3. Terms of employment during maternity leave

Currently, a woman is entitled to the same contractual terms and benefits (other than remuneration which is replaced by the right to maternity pay) whilst on ordinary maternity leave (OML). However, this entitlement stops during additional maternity leave (AML). Instead, during AML, the contract of employment is effectively "suspended". However, the Regulations make a fundamental change to this position. For women whose estimated week of childbirth (EWC) starts on or after 5 October 2008, there will be no distinction between OML and AML in this regard, and a woman on AML will be entitled to bring a discrimination claim if they have suffered less favourable treatment.

Therefore, employers need to review their maternity policies and ensure that employees who take AML continue to receive the same benefits as during OML. This includes company cars, pension, health insurance and the accrual of holidays.

### 4. Bonuses and compulsory maternity leave

Under the Regulations, any period of compulsory maternity leave (the two weeks immediately after birth of the child) will count as time worked for the purpose of calculating any bonus allocation. This will also apply to women whose EWC starts on or after 5 October 2008.

## Recruiting foreign nationals

In February 2005, the Home Office announced new changes in relation to immigration. These include replacing existing work permit applications with a points based scheme (PBS), and is being gradually implemented over 2008 and 2009.

In February 2008, the first phase was introduced, effectively replacing the highly skilled migrants programme. Currently, the Home Office is planning to introduce tier 2 and 5 at the end of November 2008. Tier 5 will apply to people travelling temporarily to the UK for non-economic reasons, including people such as entertainers and charity workers.

Tier 2 relates to skilled migrants with job offers, who come to the UK to fill a gap in the labour market. The key requirements for this scheme are that the worker must:

1. apply for prior entry clearance;
2. have a job offer (unless they work in an area where there is a shortage of qualified people) and a certificate of sponsorship from a licensed sponsor; and
3. have scored enough points to apply. Points are awarded for sponsorship, qualifications, prospective earnings, English language skills and the worker's ability to support themselves and any dependants.

An employer will need to obtain a license from the UK Border Agency before it can offer jobs to these workers, and they will then be able to issue the worker with a certificate of sponsorship. The employer will also need to show that the position could not be filled by the resident workforce, and that they advertised the vacancy for at least 2 weeks.

As a sponsor, the employer will have a number of record keeping and reporting duties and sponsors will be rated either 'A' or 'B' depending on their application records. Employers with an A rating should find it easier to obtain acceptance for their applications.

Fees for work permit applications have been substantial, and it would appear that costs will rise with these changes. The government has stated: *"Those who benefit most from the immigration system will pay proportionately more to help fund the wider transformation of the system."*

## Improved rights for fixed term workers

Under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, an employer cannot treat a fixed term employee less favourably than a comparable employee who is in largely the same role, on the basis of their employment status.

Guidance has suggested that it may be satisfactory to deny fixed term employees pension rights if the initial vesting period/service qualification is longer than the fixed term employee's contract, and it would be disproportionately expensive and of little benefit to the employee as they would not receive any contributions prior to the expiration of their contract. In such circumstances, the employer should show that the contract is "on the whole" at least as favourable, so they may provide additional benefits (eg, increase in salary) to compensate for this.

However, in the case of *Impact v Minister for Agriculture and Food (Ireland)*, the European Court of Justice has ruled that the principle of non-discrimination against fixed term workers extends to pension entitlements. Therefore, fixed term employees could claim discrimination if they are not included in any pension schemes.

# For the Future

## Equality Bill

The Government has published a White Paper setting out the proposals for the forthcoming Equality Bill. Key provisions are:

1. **Duty to promote equality in the public sector**  
A new duty will be imposed on the public sector to promote equality. Currently, separate duties exist in relation to sex, race and disability discrimination but new provisions will provide one comprehensive duty covering all areas of discrimination currently outlawed under UK law.
2. **Contracting with the public sector – new obligations**  
The Government is also looking to impose conditions on public bodies when they contract with private sector companies. Public bodies will have to take account of their contract partner's equality procedures and discrimination records. Therefore, companies who contract with the public sector are likely to be required to disclose details of their equality records and practices when bidding for work. They may also have to commit to following the public sector duty to promote equality in some cases.

### 3. Disclosure of pay information

The Government is keen to take further steps to attempt to abolish the gender pay gap. It is therefore proposed that employers will no longer be allowed to prohibit employees from disclosing their salaries.

### 4. Positive discrimination?

Under potentially controversial plans, employers will be allowed to take into account under represented groups when selecting between two equally qualified candidates. It is envisaged that when faced with two equal candidates for a position, an employer will be justified in choosing the candidate from the under represented group. Actual positive discrimination will remain unlawful, however.

### 5. Greater enforcement powers

Tribunals will also be given wider powers to strengthen the enforcement of judgements in discrimination claims. This could include making recommendations relating to an employer's business, rather than just in relation to the individual bringing the claim. For example, this may include requiring an employer to introduce an equal opportunities policy or to review its pay structure.

### 6. Goods and services – age discrimination

Outside the employment field, further regulations are proposed to outlaw unjustifiable age discrimination by those providing goods, facilities and services. This could include, for example, outlawing discriminatory practices such as charging increased costs for travel insurance for individuals over the age of 65.

The Bill has yet to be published, although the Government is seeking to have the law in place in the next parliamentary session. In the meantime, the Government will commence consultation with industry, trade unions and other interested parties. At the moment, the finer details remain to be seen but it seems certain this legislation will have significant consequences for employers.

## Right to request time off for training

The Prime Minister has announced new proposals to give employees the right to request time off work for training. This right would be similar to the existing right for employees to request flexible working.

Under the new proposals, an employee will have the right to request time off for training after 26 weeks of service. An employer will need to consider any such requests if the training would help to improve the businesses performance and productivity. An employer could refuse time off for training if this would be too burdensome on the business and the proposals set out examples of where this may be the case.

There is no obligation for the employer to provide or fund training. However, employers will have access to government funding for some types of training under the Train to Gain scheme.

The proposals do not specify how much time would be allowed off for training, and state that this would be for the employer and the employee to agree. Furthermore, it would appear that an employee does not have the right to pay during this time off.

It is expected that new legislation on these proposals will be implemented at some point in 2010.

## Temporary workers directive – new rights for agency workers?

There is currently no specific legislation in the UK to protect the rights of agency workers. Agency workers are therefore seen as an attractive option for many businesses due to their flexibility and cost effectiveness, and there are an estimated 1.4 million agency workers in the UK.

As agency workers do not have any specific rights, should a dispute arise, it is common for an agency worker to seek to prove that they have acquired employee status and therefore the associated rights (such as the right to claim unfair dismissal protection after 12 months of employment). Recent cases have made it more difficult for agency workers to prove that they have employee status. This is especially the case if there is an existing contract in place between the agency worker and the business that sets out the nature of the relationship. The agency worker will have to show there was a deliberate attempt to conceal the true nature of the relationship in order to prove that this contract is a sham.

In May 2008, the Government announced proposals for legislation intended to offer increased rights to agency workers. The proposals aim to ensure that the basic conditions of agency workers are no less favourable than if they were recruited directly by the business in the same position. This would mean that agency workers would be entitled to the same pay, benefits and holidays as they would if they were employees. However, under the current proposals, this would not extend to rights such as sick pay and pension rights.

The EU initially proposed that these rights would apply either immediately on the recruitment of an agency worker or after six weeks of work. This was resisted by the UK but the Government has now announced that agreement has been reached between unions and employers for a 12 week period to apply.

The Government has also stated that they hope for the new law to be agreed at a European level very shortly so that the UK can then introduce legislation here later this year. However, it is likely that it will be up to two years before these proposals become law in the UK.

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Our Employment Department provides clear and straightforward advice on all aspects of the employment relationship. We are pragmatic and commercial, and always look for solutions that work for you and your business. A policy of recruiting only the best lawyers from the leading firms means that our clients enjoy the benefit of city centre standard of advice and service levels, in the relaxed environment of our Altrincham offices.

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