



CIPD Law at Work



newsletter

CIPD applauds decision on Default Retirement Age

Following an announcement by the Prime Minister, the planned review of the default retirement age of 65, which provides that employers can decide on a default retirement age for employees of 65, is to be brought forward by a year to 2010. The litigation that challenges this, known as the *Heyday* case, will return to the House of Lords later this year.

Explaining the change in the timing of the review, Prime Minister Gordon Brown said: 'Evidence suggests that allowing older people to continue working, unfettered by negative views about ageing, could be a big factor in the success of Britain's businesses and our future economic growth.'

The planned review of the default retirement age comes in the nick of time, says Dianah

Worman, Diversity Adviser, CIPD:

"The economic situation and panic about pension income means maintaining the default retirement age is unsustainable. We never supported its inclusion in the Employment Equality (Age) Regulations 2006 because strong demographic evidence made it nonsense.

In these tough times the Government has no choice but to bring this review forward to help organisations make better use of the talent, skills and knowledge of experienced older employees, but also to help supplement their diminishing pensions.

The introduction of the Equality Bill will help to force through a quicker pace of policy change, which will make a major contribution to help pull UK plc out of the recession."

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Holiday entitlement accrues while off sick

The House of Lords finally resolved in favour of the workers in the long-running litigation in *Stringer v Inland Revenue* (sometimes referred to as *Ainsworth v HMRC*), overturning the Court of Appeal.

Their Lordships have now unanimously held that a claim for (i) unpaid holiday under regulations 13 and 16 of the Working Time Regulations or

(ii) a payment on termination under regulation 14 can be pursued as unauthorised deduction claims under section 27 and 13 of the Employment Rights Act 1996, as well as under the Working Time Regulations. Essentially holiday pay qualifies as wages under that legislation. The important practical effect is that a worker can take advantage of the more generous time limits which apply to unlawful deduction claims. A claim for unlawful deduction from wages can be brought within three months of the last in a series of deductions, so allowing a claim to go back more than three months if the underpayments form part of a series.

The ECJ had previously decided that a member state could either allow a worker off sick to take annual leave; or prevent a worker taking leave while off sick but - and this is the critical point - only if the worker has the right to carry over annual leave to subsequent leave years if he or she was unable to take leave because of illness. It also held that compensation payments on termination should not be discounted on account of sickness.

The House of Lords however was not required to address the practical questions of how to deal with the taking of leave and payment for workers on long-term sickness absence.

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Must a report be obtained to decide questions of equal value in equal pay claims?

In *Hovell v Ashford and St Peter's Hospital NHS Trust* the Court of Appeal has held that a tribunal does not need to obtain an independent expert's report before it can find equal value between an equal pay claimant and a comparator ranked higher in a job evaluation study (JES). However, a small difference in points awarded to each under the JES will not, in itself, be sufficient to establish that the jobs are of equal value.

H was employed by the Trust as a social services administrator. A valid JES consisting of nine pay bands was implemented with effect from 1 October 2004. In January 2007, she presented an equal pay claim identifying three male comparators. Although she had been placed in the same pay band as her comparators, she had scored fewer points than them. In order to recover six years' worth of back pay, H argued that she had been employed on work of equal value to her comparators under S.1(2)(c) Equal Pay Act prior to implementation of the JES.

At a pre-hearing review, an employment

judge ordered a report from an independent expert (IE) to determine this issue but H applied for the requirement for an IE to be withdrawn. She argued that the JES banding was determinative evidence that her job was of equal value to that of her comparators or, alternatively, that the difference in points was so small as to allow such a conclusion to be drawn. The employment judge rejected the application, concluding that it was not appropriate to withdraw the requirement for an IE where the work of the comparators has been scored higher than that of the claimant under a JES. To do so the tribunal would, at worst, be treating nearly equal as equal and, at best, would need the evidence of an expert witness to explain away the differences in points. It would be an error of law to decide that two jobs are of equal value simply on the basis that the difference in points is very small. H's appeal to the EAT was dismissed, the EAT rejecting the argument that equivalent rating under a JES sets up a presumption of equal value which is for the employer to rebut. H appealed to the Court of Appeal.

The Court of Appeal accepted that the employment judge had been wrong to imply that, where a claimant scores fewer points than her comparator in a JES, a tribunal cannot find that their work is of an equal value without an IE's report. That said, to rely on a JES alone to show that the work was of equal value, the claimant must, at the very least, set out the difference in points 'in the context of the particular JES and explain why the difference should be ignored'. However, the employment judge had been right to find that a small difference in the points award was not, in itself, capable of establishing that the jobs were of equal value. The Court highlighted tribunals' discretion, at any stage in the proceedings, to determine whether an IE's report is necessary. In the instant case, the employment judge was justified in taking the view that an IE's report would be useful, having found that the difference in the claimant's and comparators' scores was not marginal.

Progress of the Equality Bill

The Equality Bill has completed its Commons Committee stage. Apart from the introduction of a 'dual discrimination' clause, there are few other major amendments. The Solicitor General did however indicate that attempts would be made to re-draft the disability-related discrimination provisions before the Bill reaches Report stage, an attempt by the government to address the implications of the House of Lords judgment in *Malcolm v London Borough of Lewisham*, which although a housing case, has since been applied in the employment context by tribunals. It controversially changed the appropriate comparator in the context of disability-related discrimination.

The press release issued by the Government Equalities Office (GEO) confirmed that the Government has proposed an amendment to the Equality Bill, currently progressing through Parliament, aimed at protecting people who experience discrimination because of a combination of two characteristics. The new clause provides that it will be discriminatory to treat someone less favourably on the basis of a combination of two of the following protected characteristics: age, disability, gender reassignment, race, religion or belief, sex or sexual orientation. At the moment, people may only bring separate discrimination claims

relating to one protected characteristic; however, some people may still have stereotyped attitudes about certain groups with a combination of protected characteristics, such as Asian men or black women.

Dual discrimination is the more logical name for a multiple discrimination provision limited to two protected characteristics. Thus, a black woman who was discriminated against could bring a dual discrimination claim on the basis of sex and race, rather than trying to fit her experience into separate sex and/or race claims. For such a claim to succeed, it will not be necessary that there is sufficient evidence to support a claim based on either of the protected characteristics individually. Note that marriage and civil partnership, and pregnancy and maternity, which are covered elsewhere in the Bill, are not potential grounds of dual discrimination.

Vera Baird, Solicitor General and Equality Bill Lead Minister, said:

"People's identities are multi-faceted and complex, and we are delighted to bring forward an amendment to the Equality Bill which would reflect this. This clause would provide protection for people who at present

would have to guess on what basis they have been discriminated against, wholly outside their dignity. Business will benefit if all the issues in one case can be dealt with together and there will be better access to justice for all. Protection against 'dual discrimination' would be a progressive step forward and confirm our place as a world leader in the fight against discrimination and disadvantage."

The Bill has been subject to few other significant amendments with relevance to employment law. The test for work-related pregnancy and maternity discrimination in what is now clause 18 has been changed, so that a woman complaining of such discrimination will have to show that she has been treated 'unfavourably', rather than 'less favourably'. Such an amendment makes sense as there is no need for a woman complaining of pregnancy or maternity discrimination to compare her treatment to that afforded to a comparator. Clause 140 has been amended to prevent contracting out from provisions made under the Equality Bill, in addition to the provisions of the Bill itself. This would prevent employers contracting out of provisions such as compulsory pay audits, which may be introduced by regulations at a later date.

BIS consults on blacklisting

The Department for Business, Innovation and Skills (BIS) is consulting on new regulations that will make it unlawful for trade union members to be denied employment through secret blacklists.

Under the Employment Relations Act 1999, the Government has the power to introduce regulations prohibiting the blacklisting of workers for their union membership or activities. In 2003, the Government consulted on draft regulations, but at that time no hard evidence was found that blacklisting was taking place. In response to the consultation, the Government committed to reviewing the issue if hard evidence came forward.

In March 2009, the Information Commissioner reported that 40 construction companies had subscribed to a database used to vet construction workers, which has now been closed under data protection law. On 27 May 2009, Mr Ian Kerr, the individual who operated the database, pleaded guilty at Macclesfield Magistrates Court to committing a criminal offence under data protection law.

In response to this new evidence, the Government announced that it would seek to bring forward legislation to outlaw blacklisting.

Lord Mandelson, Secretary of State for Business, said:
"Blacklisting someone because they are a member of a trade union is totally

unacceptable. I am determined to act quickly to stamp out this despicable practice. Today's proposals outline how we will deliver this."

The main areas on which the consultation seeks views are:

- the definition of a blacklist of trade unionists and the prohibition of the compilation, dissemination and use of such blacklists;
- making it unlawful for organisations to refuse employment, to dismiss an employee or otherwise cause detriment to a worker for a reason related to a blacklist;
- making it unlawful for an employment agency to refuse a service to a worker for a reason related to a blacklist;
- providing for the employment tribunal to hear complaints about alleged breaches and award remedies based on existing trade union law; and
- providing for the courts to hear complaints from any persons that they have suffered loss or potential loss because of a prohibited blacklisting activity.

The consultation ended on 18 August 2009. It was a shortened consultation of eight weeks as the Government feels that it is important to act swiftly on this issue. According to BIS, ministers plan to seek Parliamentary approval for the regulations this autumn and 'implement them urgently as soon as it can thereafter'. The speed of the decision and the brevity of the consultation period contrasts with the attitude adopted by the government in both 1999 and 2003.

In the news

Redundancies – CIPD publishes 'Redundancy Watch' data

New data from the Chartered Institute of Personnel and Development (CIPD) shows that the proportion of HR professionals seeking advice on how to make staff redundant barely changed between the first and second quarters of 2009, suggesting that redundancies are set to continue at a high rate into the second half of the year.

A CIPD press release notes that an analysis of around 15,000 calls made to the CIPD's legal helpline each quarter – released as part of the CIPD's ongoing 'RedundancyWatch' series – finds that the proportion of enquiries related to redundancy fell by only a single percentage point between Q1 (19 per cent) and Q2 (18 per cent). This compares with 12 per cent for the second quarter of 2008.

Dr John Philpott, the CIPD's Chief Economist and Public Policy Director, told delegates at the CIPD's Annual Employment Law Conference in Church House Westminster, that the helpline statistics served as a reminder that any signs of 'green shoots' of economic recovery will not provide early relief for people anxious about their jobs.

Dr Philpott said:
"Our CIPD Helpline data offer little comfort that there will be any significant let up in the redundancy rate in the next few months, though we remain hopeful that the first quarter will prove to have been the worst for redundancies in this recession and that the situation will start to look better by the end of the year. There is considerable encouraging survey and anecdotal evidence of co-operation between employers and staff to seek alternatives to redundancy in the current recession. However, looked at from a macroeconomic perspective there is insufficient data to enable a firm conclusion to be drawn on whether this recession has resulted in proportionately fewer redundancies than previous recessions."

This newsletter was written by Chris Chapman, CIPD Law at Work Faculty Member and Senior Personal Tutor for the Advanced Certificate in Employment Law

National Minimum Wage (NMW) rates announced

The Government has announced that from 1 October 2009:

- the adult minimum wage rate will increase from £5.73 to £5.80 an hour
- the minimum wage rate for 18-21 year olds will rise from £4.77 to £4.83 an hour
- the minimum wage rate for 16-17 year olds will increase from £3.53 to £3.57 an hour.

In response to a recommendation by the Low Pay Commission (LPC) the Government also accepted that the adult rate should be extended to 21 year olds with implementation from October 2010. Consultation is currently under way to consider the introduction of a NMW for

apprentices. The consultation period ends on 8 September 2009 with LPC expected to report on this by the end of February 2010.

Government proposals on tips and minimum wage

Following a recent consultation to review the current use of mandatory and non-mandatory service charges, tips, gratuities and cover charges in payment of the national minimum wage, the Government has announced that using tips to make up minimum wage levels will be illegal from 1 October 2009. The Government is also looking into introducing a code of best practice for the hotel and catering industry on managing tips.

Government seeks views on whistleblowing

The Government has published a consultation document on how employment tribunals can pass on details about whistleblowing cases to appropriate regulators.

Employment tribunals determine complaints made where claimants believe that they have suffered a detriment at work, or have been dismissed for making a protected disclosure ('whistleblowing') under the Public Interest Disclosure Act 1998 (PIDA). The employment tribunals do not make any assessment of, or take any action on, the issue underlying the allegation, as these matters do not fall within their powers or area of expertise. Therefore, currently, whilst claimants themselves can make whistleblowing disclosures to a relevant regulator, there is no process in place for employment tribunals to pass information about claims under the PIDA to regulators.

The issue of how allegations of underlying abuse in PIDA cases might be addressed was raised during the passage of the Employment Act 2008. The Government committed to explore whether there was a practical process which would enable the substance of allegations giving rise to PIDA claims to the employment tribunals to be assessed, and

where appropriate acted upon, without involving the release of unsubstantiated allegations into the public domain. It was envisaged this would involve information being passed from the employment tribunals to the relevant regulators ('prescribed persons' under the PIDA). This would mean that the regulator could take action where appropriate in accordance with their own practices and procedures. It would then be a matter for the regulator to address instances of unlawful, fraudulent or dangerous behaviour.

According to a press release issued by the Department for Business, Innovation and Skills (BIS) the measure is designed to make it easier for regulators to assess whistleblowing claims and decide whether further action needs to be taken. This consultation aims to create a clear mechanism for keeping regulators informed, whilst ensuring that unsubstantiated allegations against companies are not made public.

The Government is seeking views on:

- the proposed process
- obtaining express consent of the claimant
- the draft statutory instrument to amend the employment tribunal rules
- phased implementation.

The consultation document contains draft regulations proposing changes to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 making provision for the Employment Tribunal Service to forward a claim to regulators listed in a new Schedule 1A. Subject to Parliamentary approval, it is intended that the regulations would come into force on 6 April 2010.

Lord Young, Minister for Employment Relations, said:

"This is an important step forward in improving the flow of information between tribunals and industry regulators. This change in the rules will help provide an early warning system for patterns of unlawful, fraudulent or dangerous behaviour emerging within an industry."

The consultation runs until 2 October 2009. Early indications are that the judiciary in the employment tribunals do not see it as their role to assume this reporting function, but it is not clear what the position of the employment tribunals' administration would be. Bearing in mind there has already been a fairly comprehensive change to some aspects of the tribunal rules it is difficult to see the need for yet further changes.

House of Lords judgment on the meaning of disability

The House of Lords has handed down judgment in *SCA Packaging Ltd v Boyle*, holding that the word 'likely' as used in paragraphs 6(1) and 2(2) of Schedule 1 to the Disability Discrimination Act 1995 refers to an outcome that 'could well happen'. Thus, this is the standard to be met if a tribunal is to conclude that an impairment would be likely to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities but for the fact that the person takes measures to treat or correct it, or that an effect that has ceased is likely to recur. Their Lordships also suggested that the same meaning should apply elsewhere in Schedule 1. The House of Lords therefore specifically rejected case law in England and Wales to the effect that 'likely' means 'more probable than not', thereby lowering the hurdle for a claimant to overcome in establishing a 'disability' within the meaning of the Act.

The tribunal found that the claimant suffered from a physical impairment in the form of hoarseness and vocal nodes and that, but for the coping strategies used by the claimant in her daily life, it was 'more likely than not' that the substantial adverse effect of the impairment would have continued.

The House of Lords has now found that tribunals would have been correct in endorsing the 'could well happen' over the 'more probable than not' approach. According to Baroness Hale, the word 'likely' in each of the relevant provisions simply means something that is a real possibility, in the sense that it 'could well happen', rather than something that is probable or 'more likely than not'. Lord Hope, concurring, said that it is usually quite difficult to predict what will happen with any degree of accuracy. In this context, asking the question whether a particular outcome is more probable than not is simply inappropriate. Accordingly,

the purposes of the DDA were best served by adopting a 'broader and less exacting test'.

Their Lordships went on to note that the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability', which a tribunal should take into account when considering what amounts to a disability, specifically states that 'it is likely that an event will happen if it is more probable than not that it will happen'. However, according to Baroness Hale, the Guidance appears to confuse the meaning of the word 'likely' with that of the word 'probable'. In any event, as Lord Rodger put it, while the Guidance can helpfully illustrate the way that a provision may work in practice, it cannot be regarded as an authority on a point of statutory interpretation. Accordingly, English case law that has, up until now, adopted the 'more probable than not' test should no longer be followed.