



CIPD Law at Work



newsletter

Discipline and Grievances after April 2009

There cannot be anybody who will lament the passing of the statutory disciplinary and grievance procedures and now we know when the new regime will operate. It will come into force on 5 April 2009. After that date the new Acas Code will apply and employers will still face the potential of an uplift in compensation of up to 25% if an employment tribunal concludes that there has been a failure to comply with a relevant code.

We now also know what will trigger the new regime and when the employer and employee will have to abide by the old procedures. The government has set out its views on which events will trigger the new procedures and the relevant legislation is now contained in The Employment Act 2008 (Commencement No 1, Transitional Provisions and Savings) Order 2008, S.I. 2008, Mo 3232.

In essence the position depends on whether it is the employer taking disciplinary action or dismissing, or the employee raising a grievance.

The government plan is that the trigger event in each case will be as follows:

- a. if the employer has already sent a step 1 letter, or held a step 2 meeting and
- b. either taken disciplinary action or dismissed the employee. Then the 2004 procedures will apply.

This will be the case even if an appeal has not been concluded or the period of notice has yet to expire on 5 April 2009. The message to employers embarking on disciplinary action near to the trigger date is to delay.

Where the employee under the existing law is obliged to raise a step 1 grievance, and this will still include claims of constructive dismissal then the procedure is as follows:

- a. if the action complained of was before 5 April 2009 and the employee has either raised a grievance or lodged the claim before 5 April 2009 then the old regime will still apply to the claim
- b. if the action complained of by the employee commenced before 5 April 2009 and continued after that date and the employee raised a grievance or lodged a claim after waiting 28 days then the old regime continues.


However it will depend on the nature of the claim, so that it will only apply up to 4 July 2009 if the claim has a three month time limit or up to 4 October 2009 if the claim has a six month time limit (e.g. equal pay claims).

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I have tried to simplify the complex arrangements in the commencement order, but in a particular case employers and employees must look at the relevant provision in the commencement order. Despite the optimism of the government that this is quite straightforward, I anticipate much litigation in the early stages on issues arising from the transition arrangements.

There will be new ET1s and ET3s produced to use after 5 April 2009. At the same time the 2004 Tribunal Rules have been amended to reflect the fact that after this date the pre-acceptance procedure applied by tribunals will no longer apply, except to the transitional cases.



Off work sick?

Don't lose your holiday entitlement

The European Court of Justice (ECJ) has ruled in a judgment that may alarm employers and lead to many reviewing their absence management procedures that employees on long term sickness absence are still entitled to paid holiday leave. In the UK the Court of Appeal had ruled that only healthy workers retain the right to paid holiday leave as the purpose of paid holiday is to encourage workers to take leave.

In the case of *Stringer v HM Revenue and Customs*, a case referred to the ECJ by the House of Lords, the ECJ held that national legislation and in this case the Working Time Regulations, must either provide for annual leave to be taken in the leave year in question or, if it does not allow this, allow the worker who is off sick and unable to take leave the ability to carry forward any untaken leave to the next year.

The case will now return to the House of Lords to decide a number of unanswered questions. Firstly, as Regulation 13(9) of the Working Time Regulations provides that leave may only be taken in the leave year in which it is due, should workers elect to treat a period of their sick leave as paid holiday? What then if the worker does not want to do that? Can the employer insist? The position is clearer in respect of employees who leave, as the ECJ ruled that they must be compensated for the remainder of their leave not taken. The final question for the House of Lords, which was a question that the ECJ did not have to rule on, was whether these claims are claims for unpaid wages or claims for unpaid holiday? If the former is the case, then the worker can claim back pay, if the latter then the claim is limited to the leave year in question.

The easiest solution for employers is to require the worker to nominate a period of sick leave as paid holiday: whether this is an attractive option will depend on whether sick leave is paid at full or half pay.

In the Courts

Justifying age discrimination

In the case of *Seldon v Clarkson, Wright and James* a firm of solicitors had a provision in their Partnership Agreement which required partners to resign at 65 (although they could be kept on by agreement). The claimant alleged that this was age discrimination.

The Employment Tribunal found that although the provision constituted direct age discrimination, it was justified. In part this was found on an assumption that performance tails off at around this age. The claimant appealed on various grounds, and the Equality & Human Rights Commission was permitted to make representations as interveners in the appeal.

The EAT dismissed all the grounds save one, namely that the assumption that performance dropped off at 65 was not supported by any evidence and involved stereotyping. In principle, such a rule could be justified, but it was not justified in this case. The case was remitted to the same Tribunal to consider whether the need to achieve the other legitimate aims was sufficient to justify the rule.

In his judgment, Elias P. made the following observations:

- the test with respect to direct age discrimination is not fundamentally different from that which applies to the other forms of discrimination. Nothing in

domestic law nor the Directive requires a different test

- there is no basis for Tribunals to direct themselves that it is only in very exceptional cases that direct age discrimination should be permitted - 'it must apply the normal principles of legitimate aim and proportionality'
- the fact that, at the time when the rule was agreed upon the firm gave no thought to age discrimination or its justification, does not prevent it from justifying that rule now
- the fact that the partners consented to the rule originally may be a factor to consider, but it does not automatically make it justified
- for a partnership to seek to conduct matters so as to achieve 'a congenial relationship amongst the partners' is a perfectly legitimate aim - 'the equality laws are not designed to determine for companies what might be appropriate objectives'.

The section of the decision that reaffirms that an employer can justify a potentially discriminatory practice after the event, even though it never applied its mind to the question, is consistent with a number of previous authorities, not least the decision of the Court of Appeal in a leading case on equal pay – *Cadman v Health and Safety Executive*.

'Subjective personal religious protected by indirect disc

In *Eweida v British Airways plc*, the EAT has upheld a tribunal's much publicised decision that BA's insistence that E remove or conceal a cross she wore on a necklace was not indirect religious discrimination. In so holding, the EAT noted that someone who holds 'subjective personal religious views' is only protected by direct, and not indirect, discrimination.

E, a devout practising Christian, was employed since 1999 by BA as a member of the check-in staff. For most of that time, BA's uniform policy permitted an employee to wear any item of jewellery he or she wished under the uniform, provided it was not visible. Items that were

deemed to be a mandatory religious requirement, and which could not be concealed under the uniform, could be permitted subject to management approval. In 2006, E visibly wore a silver cross on a necklace on three occasions. On the third occasion E refused to conceal the cross, and was sent home without pay. E then brought a number of claims against BA under the Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660, as well as a claim for unlawful deductions from wages. On 1 February 2007 BA introduced a new policy, under which employees were permitted to display a faith or charity symbol with their uniform. Following this, E returned to work.

Tribunal interprets Disability Discrimination Act to include associative discrimination

In *Coleman v Attridge Law* a tribunal has held, at a pre-hearing review, that the Disability Discrimination Act 1995 (DDA) is capable of being interpreted so as to protect people associated with a disabled person from discrimination or harassment. The case will now proceed to a full hearing to decide on the substantive merits of the claim, although the respondent employer, who did not appear at the tribunal hearing and relied on written submissions, has lodged an appeal against the ruling.

Ms Coleman is not disabled herself, but cares for her disabled son. When she sought to take time off to care for him, her employer allegedly called her 'lazy' and accused her of attempting to manipulate her working conditions. C brought claims under the DDA, arguing that she had suffered discrimination by association with her son's disability. Caught between the wording of the DDA, which on a literal reading does not cover such discrimination, and that of the Equal Treatment Framework Directive (No.2000/78), which suggests that it should, the tribunal unusually referred the case to the ECJ for a preliminary ruling before deciding the facts of the case. The ECJ held that the Directive should be interpreted as protecting those who, although not themselves disabled, nevertheless suffer discrimination or harassment owing to their association with a disabled person. The case

then returned to the tribunal to determine whether the DDA could be read in such a way as to give effect to the Directive.

The tribunal was satisfied that the Disability Discrimination Act 1995 (Amendment) Regulations 2003, which amended the definition of discrimination and harassment in the DDA, were intended to put the Directive into full effect. The ECJ made clear that the Directive covers associative discrimination and so, in the absence of express and unambiguous indications to the contrary, the DDA, as amended by the 2003 Regulations, must also share that purpose. In the tribunal's view, the omission of any reference to individuals who suffer associative discrimination from the DDA was not sufficient to amount to an unambiguous indication that the DDA was not intended to cover such individuals.

The tribunal therefore decided to read references to a disabled person in Ss.3A (5), 3B and 4 of the DDA as if they included the words 'or a person associated with a disabled person'. In effect the employment judge rewrote the wording of the legislation. This was compatible with authorities such as *Ghaidan v Godin-Mendoza* 2004 2 AC 557, HL, on interpreting domestic legislation in accordance with EC law. The tribunal
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New compensation limits from 1 February 2009

The Employment Rights (Increase of Limits) Order 2008 SI 2008/3055 has now been published. The Order increases the limits on certain employment tribunal awards and other amounts payable under employment legislation since 1 February 2009.

The notable changes are:

- the limit on the amount of a week's pay for the purposes of calculating, among other things, statutory redundancy payments and the basic award for unfair dismissal increased from £330 to £350
- the maximum compensatory award for unfair dismissal rose from £63,000 to £66,200
- guaranteed pay increased from the rate of £20.40 a day to £21.50 a day
- the minimum basic award in cases where the dismissal was unfair by virtue of health and safety, employee representative, trade union, or occupational pension trustee reasons increased from £4,400 to £4,700.

The new rates apply where the event giving rise to compensation or payment occurred on or after 1 February 2009. For example, in the case of unfair dismissal the rates apply to all dismissals where the effective date of termination fell on or after this date. Where the dismissal or relevant event fell before 1 February, the old limits will still apply, irrespective of the date on which compensation is awarded.

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In its decision the tribunal dismissed all of E's claims. The indirect discrimination claim failed as BA's policy did not put E at a particular disadvantage when compared to others. The tribunal went on to say that if BA's policy had given rise to indirect discrimination then the policy would not have been a proportionate response to the legitimate aim of achieving brand uniformity. The tribunal also rejected E's direct discrimination and harassment claims.

E appealed against the rejection of her indirect discrimination claim only; BA cross-appealed against the tribunal's findings on justification.

On appeal, the EAT held that in order to establish a claim of indirect discrimination, it must be possible to make general statements that would be true about a religious group, so that an employer ought reasonably appreciate that a provision it puts in place may have a disparate impact on that particular group. In the words of Mr. Justice Elias, President of the EAT, 'there must be evidence of group disadvantage and the onus is on the claimant to prove this'. The tribunal had found no evidence of a group disadvantage, and the claimant did not adduce any evidence to effect that anyone other than she was disadvantaged
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Tribunal interprets Disability Discrimination Act to include associative discrimination

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therefore found the DDA to be capable of an interpretation protecting against associative discrimination, without distorting the words of the statute.

The case will now go forward for a full hearing; however, the tribunal will only be able to consider C's complaints in so far as they relate to matters taking place from 1 October 2004 onwards. The tribunal held that it did not have jurisdiction to consider previous allegations, as the 2003 Regulations were not in force at that time.

'Subjective personal religious views' are not protected by indirect discrimination

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by BA's policy. In the EAT's view, this meant that E's claim had to fail. The fact that it is highly likely that there are others who share E's beliefs is not sufficient to establish the necessary degree of disparate impact or group disadvantage.

The EAT recognised that its decision meant that those holding 'subjective personal religious views' are only protected by direct discrimination, but thought that this was not an injustice, as the purpose of indirect discrimination is to counter group disadvantage. The EAT also rejected BA's cross-appeal, holding that the tribunal's reasons for finding that BA's policy would not have been a proportionate response to a legitimate aim were clear and permissible on the evidence before them.



What is the extent of the employers' duty to inform and consult under TUPE?

The EAT, in *Royal Mail Group Ltd v Communication Workers Union*, has considered the scope of the obligation on employers to inform and consult affected employees with regard to the effect of a proposed TUPE transfer. In particular, the EAT holds that where an employer is mistaken in its belief that TUPE does not apply, it will not automatically be in breach of its information and consultation obligations by failing to inform employees of the correct legal position.

RMG Ltd ran a network of post offices. Since 1986, several post offices had been converted to franchise status to be run privately. RMG Ltd had a policy of giving employees employed in the affected post offices the choice of voluntary redundancy or a transfer to another workplace, consistent with a standard mobility clause. RMG Ltd believed – having taken legal advice – that this meant that Regulation 4 of the Transfer of Undertaking (Protection of Employment) Regulations 2006 SI 2006/246 did not apply to transfer the affected employees' contracts to the new franchisees. When a large-scale franchise arrangement to WH Smith was proposed in the summer of 2006, the CWU, the recognised union, asserted that TUPE did apply and that the information and consultation obligations set down by Regulation 13 required RMG Ltd to inform employees that a TUPE transfer was proposed and to set out its implications for them. RMG Ltd continued to maintain that TUPE did not apply. The first two franchised post offices were closed on 8 August 2007 and re-opened by WH Smith the next day.

Test cases concerning four franchises were taken to a tribunal. The union's central contention was that RMG Ltd was mistaken in its belief that TUPE did not apply, and that it was therefore in breach of its information and consultation obligations. Although the tribunal did not make this clear, it appeared to accept that the principle of automatic transfer set down by Regulation 4 would apply at least

in some cases. It then went on to find that RMG Ltd did not genuinely believe that Regulation 4 did not apply, and so concluded that there was a breach of the Reg 13 duty to inform and consult employees. RMG Ltd appealed to the EAT.

Considering first whether Regulation 4 did in fact apply, the EAT decided that automatic transfer must occur in at least some of the cases. If an employee is employed at the time of transfer in the business transferred – as at least some of the post office employees were – then he or she will automatically transfer to the transferee. That is so even where the employer has the contractual power to redeploy the employee away from the business so that he is not assigned to it at the point of transfer. The EAT considered it at least arguable that where an employer exercises a mobility clause solely in order to avoid the automatic transfer of certain employees, this might be inconsistent with the principle underlying TUPE, in so far as the right to transfer is frustrated. However, the EAT gave no concluded view on the point.

This conclusion meant that RMG Ltd was mistaken in its belief that TUPE did not apply.

However, the EAT emphasised that this did not mean RMG Ltd's belief was not genuine. The question that arose was whether a genuine belief that TUPE does not apply excuses an employer from its Regulation 13 obligations. The EAT thought that if the intention had been that the transferor had to warrant the legal accuracy of the information he was providing, the Regulations would have said so in terms. The sanctions for non-compliance are significant and penal, and the EAT was not prepared to assume that the draftsman intended to impose a principle of strict liability in this sensitive field of labour relations. Accordingly, RMG Ltd was not acting in breach of Regulation 13 by misstating the effect of Reg 4 and by identifying the measures it proposed to take on the premise that its analysis of TUPE was correct.