EMPLOYMENT LAW NEWS

May 2005 Edition

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1. 48 Hour working week opt out

The "opt-out" provision under which it is permissible for an employer and an employee to make an enforceable agreement to exceed the normal 48 hours average maximum weekly working time limit is under serious threat. As reported in our last newsletter the Employment and Social Affairs Committee of the European Parliament voted in April to change the Working Time Directive so as to make opt-out agreements unlawful by 2010, possibly sooner. Subsequently, on 11th May, the full Parliament has voted the same way. This is not what the European Commission proposed and there is much high-level opposition to the Parliament's move. The position is far from final so employers and employees who might be adversely affected may wish to contact their MEP and/or trade union or employer's organisation to make their views known.

2. Smoking at work ban nearer

In England and Wales the ***Health Improvement and Protection Bill*** will provide for a ban on smoking tobacco in public places and workplaces (with limited exceptions). Moves towards introduction of similar rules in Scotland are further ahead with stage one of the ***Smoking, Health and Social Care (Scotland) Bill*** completed on 28th April and stage two due to be completed by 15th June. In Europe similar bans are already in operation in Ireland, Italy and Norway.

3. Equal pay claims and maternity pay

The European Court ruled in March 2004 that calculation of the earnings related element of Statutory Maternity Pay must take into account pay increases made before the end of the woman's maternity leave even if they were not back-dated. On 3rd May 2005 the case in question came back to the English Court of Appeal. The Court of Appeal made the appropriate award (£204 plus interest) and also held that as a result of the ECJ ruling a literal interpretation of Equal Pay Act 1970 s.1 in the case of a pregnancy related claim would infringe European Law. Parliament may have to amend the 1970 Act to sort this out. In any event, the result is that an employer cannot resist such a claim simply on the grounds that there is no male employee with whom the woman can be compared.

4. Illegal immigrant workers

It is generally a criminal offence (under Asylum and Immigration Act 1996 s.8) to employ a person who is subject to immigration control unless appropriate permissions exist. There are now proposals for civil penalties as well as fines to be imposed on employers of illegal immigrant workers.

5. Bank Holidays

Under current law most employees have no legal right to time off, with or without pay, on bank or public holidays. One result is that (unless employees have special provision in their contracts) employers can legally treat bank holidays as counting towards the 4 weeks minimum paid annual holiday to which all workers are entitled under the Working Time Regulations. In practice, employers are unlikely to take advantage of this (which, certainly until recently, reflects the position in France and Sweden) except perhaps when an employee leaves or is dismissed. The government has promised to change the law and ensure that bank holidays can no longer be legally counted against annual holiday entitlement.

6. Reasons for Tribunal decisions

If, as occasionally happens, an employment tribunal fails to give adequate reasons for a decision and the losing party appeals, the appeal tribunal may remit the matter back for rehearing or alternatively may direct the original tribunal to provide fuller reasons. The latter course might often be more economical and more practical but was arguably not within the powers of the EAT. On 16th May 2005 the Court of Appeal, in ***Barke v SEETEC Business Technology Centre Ltd [2005] EWCA CIV 578,*** considered the position and concluded that the law gives the EAT power to adopt whichever of the two courses it may decide is appropriate.

7. Tribunal claims by email

Unfair dismissal and other claims can now be lodged by e-mail from the Employment Tribunal service website. The law sets out strict time limits for presenting claims (normally 3 months from the effective date of termination in unfair dismissal cases). The EAT has recently ruled that an e-mail claim is presented on the date on which it was successfully submitted to the ISP (internet service provider) which hosts the tribunal service website even if the tribunal itself never received the e-mail.

8. Overseas Employment

A British employment tribunal has no jurisdiction to consider a sex or race discrimination claim by an employee who is employed 'wholly or mainly outside Great Britain'. Does that mean, as the EAT has held, that a tribunal can never have jurisdiction if the employee was working overseas throughout the period during which the alleged discrimination took place? The Court of Appeal ruled "No" in April 2005, saying that account should be taken of the whole duration of the employee's employment. Thus it is now clear that British employment tribunals do have jurisdiction to consider sex and race discrimination claims made by employees working abroad if they were previously (or perhaps subsequently) working for the

same employer in Great Britain and this is so even if the alleged discrimination took place only during the overseas secondment.

9. Parental Leave

It has been confirmed (by the Court of Appeal on 18th April 2005) that an employee cannot normally take parental leave under the Maternity and Parental Leave etc. Regulations 1999 for a period of less than one week. Under the wording of the regulations there is only one exception, when a shorter period of parental leave can be taken. That is if the child in respect of whom the leave is taken is entitled to disability living allowance.

10. Health & Safety – Accident Reporting

The Health and Safety Commission is currently completing a thorough review of the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR) - they were last reviewed over ten years ago in 1994. Closing date for comments is 30th June 2005.

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