

# Employment Law Update

## October 2005

*This month we look at the introduction of potentially radical changes in the law of sexual harassment and recent cases dealing with topics such as redundancy and alternative work, changing an employee's duties and constructive dismissal, and the expanding application of the Disability Discrimination Act.*

### **1. Sex Discrimination - Harassment**

Prior to 1<sup>st</sup> October 2005 there was no specific claim for harassment related to a person's sex. However, the Sex Discrimination Act has now been updated to prohibit:

- Harassment on the grounds of a person's sex (which need not be sexual in nature)
- Harassment of a sexual nature (such as unwanted sexual advances)
- Harassment on the grounds of gender reassignment.

Harassment occurs where unwanted conduct related to a person's sex violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment.

Finally, a person cannot be treated less favourably because they have submitted to or rejected conduct amounting to harassment.

*Comment::* The impact of the above changes are yet to be seen however, the recognition of sexual harassment as well as sex-based harassment means that the defence previously used by employers (including the Ministry of Defence) that there had been no discrimination because the act complained of (which in the case of *Brumfitt v Ministry of Defence and another* was the use of 'gender specific' language) had been directed at men and women and could not therefore be said to be on the ground of the employee's sex is no longer available.

### **2. National Minimum Wage**

The national minimum wage has increased to £5.05 for adult workers and £4.25 for workers aged 18 - 21. The rate stays at £3.00 for workers under 18.

### **3. Case Roundup**

#### **Breach of Statutory Procedures - Compensation**

##### ***Giles v Cornelia Care Homes***

The Claimant won her claim for indirect sex discrimination based on the Care Home's refusal to allow her to reduce her working hours so that she could fulfil her childcare needs. After extended discussion with her employer the Claimant lodged a formal grievance to which the Home failed to respond. The Tribunal viewed this as a serious breach of the employer's duties under the statutory procedures and increased the award payable to the Claimant by 40% (bringing her total award to £29,294.19.)

##### ***Varoujian v Chelsea Textiles Ltd***

The Claimant was dismissed without any formal procedure and she was not given advance warning of the purpose of the disciplinary meeting, nor was she given any evidence or time to consider her position. The Company failed to allow the Claimant to be accompanied and terminated her employment summarily, without considering the possibility of suspension. Again, the Tribunal viewed the employer's actions as a serious breach of their statutory duties and increased the Claimant's compensatory award by the maximum 50%.

*Comment* Tribunals are obliged to increase the compensation payable to employees by a minimum of 10% and up to a maximum of 50% if the statutory procedures are breached. The above cases demonstrate the willingness of Tribunals to punish employers who have failed to observe the procedures by applying 40 - 50% uplifts.

### **Race Discrimination**

#### ***Redfearn v Serco Ltd***

The EAT has decided that BNP activists are entitled to rely on race discrimination legislation. The Claimant was found to have been a “perfectly satisfactory” bus driver but was dismissed when it was discovered that he was a BNP councillor. The EAT found that discrimination ‘on racial grounds’ extended to instances where the decision to dismiss was significantly influenced by race - whether it be the complainant’s or somebody else’s.

*Comment* To recap the Race Relations Act 1976 states “a person discriminates against another... if on racial grounds he treats that other less favourably than he treats or would treat other persons”. The above case demonstrates that the term ‘on racial grounds’ should be given a very wide interpretation and is not limited to the race of the complainant.

### **Disability Discrimination - rejection of claim**

#### ***Noskiw v Royal Mail Group Plc***

The Claimant sent an email to his employer complaining about his pay review but did not mention a possible disability discrimination claim. He later brought a Tribunal claim for disability discrimination. The employer argued that he had not commenced a grievance (as required by the new Tribunal rules) and that his claim should be rejected. The Claimant argued that it had been made clear to him that his raising a grievance would be futile. The Tribunal held that the apparent futility of raising a

written grievance was not a valid excuse and rejected the claim.

*Comment* This case is an important reminder that an employee who fails to utilise the grievance procedure prior to commencing Employment Tribunal proceedings will be denied access to the Tribunal system.

### **Redundancy - suitable alternative employment**

#### ***Fisher v Hoopoe Finance***

In this case, the EAT held that where there are one or more possibilities of suitable alternative employment to an employee who is to be made redundant, the employer should normally inform the employee of the financial prospects of those positions to allow the employee to make an informed choice.

*Comment* A failure to provide key information relating to alternative employment is likely to make any dismissal unfair.

**For further advice on any employment or human resources matter, please contact any member of the employment team:**

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