

Agency Workers Rights – What's the latest?

There has been much debate about increasing the rights of agency workers. So far the Government has been reluctant to do so, particularly given strong opposition from the CBI and other employer groups.

However, this issue remains very much on the political agenda and the Government is coming under increasing pressure from the unions and others to take action. Indeed, in the decision of *James v Greenwich* (reported on in our email newflash of 8 February 2008) the Court of Appeal made it clear that it is for the Government, rather than the courts, to increase agency worker rights.

The two main initiatives currently being considered are:

EU Temporary Workers Directive

This draft directive has been under consideration for some years by the EU but has yet to be accepted.

If the directive is passed in its present form it will mean (subject to certain exceptions) that temporary agency workers will be entitled to the same workplace conditions as if they had been engaged by the client direct and have the same entitlement to pay once they have been in a job for 6 weeks.

The directive has so far been opposed by the British Government, but it is increasingly isolated in its protests. The directive could well go ahead when France takes over the EU presidency in July 2008.



Temporary and Agency Workers Bill

The difficulty in getting the above Directive accepted has led to attempts to introduce this Bill in the UK. The Bill contains similar anti-discrimination principles to those in the proposed Directive.

The Bill passed its second reading in the House of Commons in February 2008. The Bill does not have Government backing and so is unlikely to become law in its present form. However, the strength of support for the Bill has increased pressure on the Government to come up with a deal for agency workers and Gordon Brown has offered to set up an independent commission to consider the rights of temporary and agency workers.

Conclusion

The steps taken by the Government to date do not yet come close to meeting the expectations of the unions. How the Government will seek to balance the interests of employers, unions, and agency workers remains to be seen and we will keep you posted!



If your details have changed or if you know anyone who'd like to receive The Works, please contact Jen Lawson Tel: 0116 247 3522 or email jen.lawson@howespercival.com This newsletter is designed to provide a summary of the subject matters covered, it should not be relied upon as comprehensive legal advice.

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Sex Discrimination: Take Precautions

On 6 April 2008 important changes were made to sex discrimination law following a High Court decision in March 2007. The amendments bring the law into line with EU legislation.

We reported on the headline issues in our email newflash of 18 March 2008. Given the importance of these changes we take a closer look at what the changes mean in practice.

1. Harassment

Sex harassment – increased protection

To amount to sex harassment conduct no longer needs to be motivated by ('on the grounds of') the victim's sex. It is enough that it is just 'related to' sex in general. This allows claims by:

- **Witnesses:** i.e. those who see or hear conduct relating to sex, but are not the intended victim.

Example: a male manager calls a female staff member a 'floozy' and this is witnessed by another female or male colleague. That other female or male colleague could have a claim as the comment itself was related to sex.*

- **Increased number of staff:** more staff will be able to show that they have been harassed under the wider definition.

Example: a male manager angrily follows a female staff member into the ladies toilets in order to give her 'constructive criticism' about a project she has been working on. Under the old definition of harassment the woman would not have had a claim as the manager's actions were not motivated by her sex but by anger. However, this could fall under the

new definition as walking into the ladies toilets is related to sex.*

Note: in order to succeed in a claim the member of staff still needs to satisfy the rest of the definition of harassment, i.e. that the conduct was unwanted, violated his or her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for them.

Third party harassment – new protection

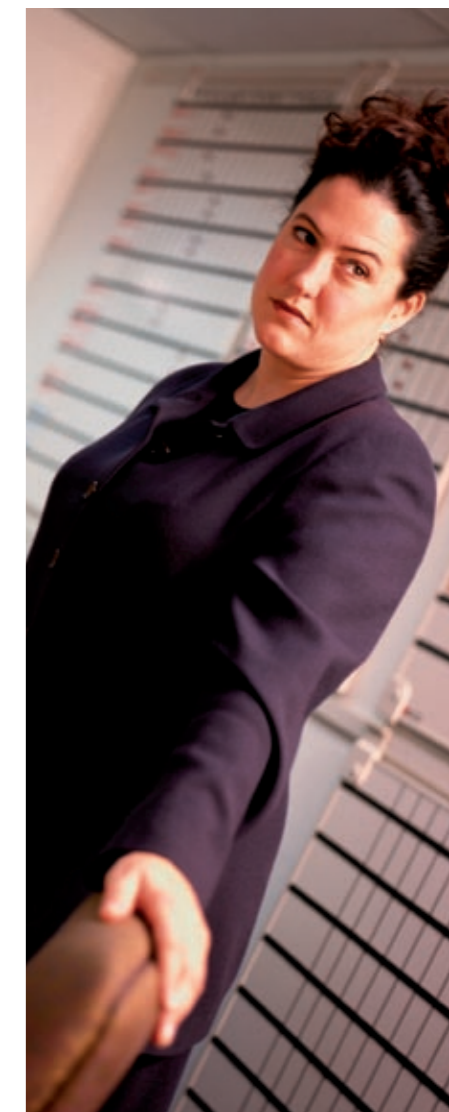
An employer is liable where:

- a third party subjects a member of staff to harassment in the course of their employment;
- the employer has failed to take such steps as would have been reasonably practicable to prevent the third party from doing so; and
- the employer knows that the member of staff has been subject to harassment in the course of their employment on at least two other occasions by a third party.

'Third-party' is defined as someone who is not the employer or another employee and covers a broad range of people including, for example, customers, clients, contractors and members of the public.

It seems that a member of staff will only be able to claim successfully if the employer has actual (rather than constructive) knowledge that he or she has been subject to harassment on at least two other occasions. (However, this repeated harassment does not need to be carried out by the same third party on each occasion and there is no defined timescale:

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so previous harassment could have been carried out some time ago).

2. Additional Maternity Leave – increased protection

An employee will have the right to the same terms and conditions during AML as during ordinary maternity leave (OML) if her expected week of childbirth (EWC) begins on or after 5 October 2008.

As a reminder these are all terms and conditions which would have applied had she been at work, except for the terms providing for remuneration (wages or salary).

3. Bonuses

Changes have been made to ensure that any time on the two week compulsory maternity leave period is treated as time worked for the purposes of calculating a bonus pro-rata, including if the bonus is discretionary. (Applicable to women whose EWC begins on or after 5 October 2008).

4. No comparator for maternity/ pregnancy discrimination

A woman only needs to show she has been treated “less favourably” on grounds of pregnancy or maternity leave. There is no longer any need to show how she would have been treated had she not become pregnant or exercised a right to maternity leave. The below examples demonstrate how the removal of the comparator will make it easier for a woman to show discrimination.

Examples:

- where an employer refuses to let a pregnant employee take additional toilet breaks;*
- where a pregnant woman whose job requires heavy-lifting which she cannot perform while pregnant is nonetheless required to carry out heavy-lifting duties.*

5. Action points:

- review definition of harassment in Equal Opportunities/Harassment/Internet/Email Policies to ensure wide enough to cover the above points;
- train managers/staff on the implications of the wider definition (if previous training does not cover) and on the implications of third-party discrimination (including



training staff to deal effectively with third parties accused of harassment);

- make plans to avoid any culture of verbal or email banter which could be related to sex;
- check procedures for reporting harassment cover conduct by third parties;
- make third parties aware of these policies and ensure that any agreement with third parties includes a non-harassment clause;
- provide non-pay benefits during AML (such as car, annual leave (statutory and contractual), private health cover etc);
- include any period of AML in calculations of length of service for the purposes of benefits;
- public bodies should be aware that the EU legislation could be directly enforceable. This means that such bodies that wait until October before changing their practices for AML are potentially at risk of claims; and

- calculate all bonuses treating the two week compulsory maternity leave period as time worked.

6. Looking to the future...

The above amendments raise the question of whether similar changes need to be made to the definition of harassment in other discrimination legislation.

Indeed the EU legislation which led to the sex discrimination amendments also applies to race, religion, age, sexual orientation and disability discrimination.

The courts have already commented on the need for amendment to the sexual orientation legislation and it is difficult to think why such amendments should not be made to all the legislation. The Government could, for example, carry out such review as part of the Equality Bill.

We will keep you updated if and when this happens...

*Examples taken from the Government's Explanatory Memorandum on the amended legislation

Case notes Redundancy

Let's hope the economic forecasts are wrong, but if not we thought it might be useful to provide an update on recent redundancy cases.

UK Coal Mining Limited v (1) National Union of Mineworkers (2) British Association of Colliery Management [2007]: Reasons for redundancies

The EAT has increased the obligation on employers in respect of collective consultation (under s 188 Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A')). Previously employers proposing large scale redundancies (20 or more in a 90 day period) were obliged to inform, but not to consult, about the reasons for proposing redundancies. Now employers do need to consult in certain circumstances.

Facts: UK Coal, the Respondent, decided to close its colliery resulting in 158 proposed redundancies. This triggered the duty to consult with its unions. However, the Respondent did not give the required 90 days notice as it said that the closure resulted from an inrush of water which could not have been foreseen (the 'special circumstances' defence).

The Respondent carried out some consultation, but the employees' unions, the Claimants, challenged the adequacy of this consultation and brought a Tribunal claim. The Claimants raised the issue, amongst others, of a failure to consult on the reasons for the redundancies.

The Employment Tribunal found that there was no credible evidence that the reason for the dismissals was safety. The real reason was economic and the Respondent had not carried out adequate consultation. The Employment Tribunal awarded the maximum penalty (90 days per worker).

However, the Employment Tribunal

followed previous Court of Appeal authority and held that the Respondent had not needed to consult over the reasons for the redundancies i.e. the closure of the mine. Both parties appealed.

The EAT upheld the Employment Tribunal's decision overall. However, it held that there was an obligation on the Respondent to consult on the reasons for the closure. The EAT accepted the Claimants' argument that s 188 TULR(C)A had been amended since the Court of Appeal decision and the amended section imposed an obligation on the employer to consult about ways of avoiding the dismissals. In this case the duty to consult about avoiding dismissals inevitably meant consulting over the reasons for the closure. There was no alternative employment and no way of mitigating the consequences of the dismissals. Avoiding closure was the only way of avoiding redundancies.

Conclusion: employers will need to consult about the business reasons for the dismissal if avoiding those reasons is the only way of avoiding redundancies.

This will certainly apply in the case of closure of a business where this inevitably leads to redundancies. However, it is more difficult to assess if and when this will apply in other circumstances.

The EAT did not comment on circumstances other than closure. However, the logic followed by the EAT would seem to apply in other cases. For

example, if an employer wishes to change all employees' terms and conditions, but a large number of employees do not agree to this, the employer will need to dismiss and re-engage those staff to achieve its aim. In these circumstances it may well be that the employer will be required to consult about the reasons for the proposed changes, as there is no way of avoiding the dismissals other than avoiding the changes.

To understand the full reach and impact of this decision we need to wait for further guidance/decisions from the courts. However, in the meantime, it would be prudent for employers to either consult on the reasons for the redundancies in all collective consultation exercises, or to assess in each case whether consulting on avoiding dismissals inevitably means consulting over the reasons for the redundancies.



The Home Office v (1) Peter Evans (2) Ian Laidlaw [2007]

The Court of Appeal clarified that where there is a contractual mobility clause, an employer can exercise it even in a redundancy situation, provided it makes clear that this is what it is doing and does not simply seek to use the clause as a defence to a redundancy claim after the event.

Facts: Mr Evans and Mr Laidlaw, the Claimants, were both employed by the Home Office, the Respondent, running its immigration service at Waterloo International Rail Terminal (WIRT). That service was closed and the Respondent initially thought to follow its redundancy procedure. However, the Respondent then

decided to redeploy staff under the mobility clause in their contracts and informed the staff of this. The Claimants refused to participate and resigned claiming constructive dismissal. An employment tribunal agreed with them. It followed an earlier case in which the EAT made clear that an employer cannot dodge between redeployment and redundancy and hope to be able to adopt the most profitable at the end of the day. The EAT agreed and the Respondent appealed.

The Court of Appeal held that the Respondent had been entitled to rely on the contractual mobility clause and the

Claimants had not been constructively dismissed.

The Court of Appeal held that the above “no dodging” principle did not apply here. No representation had been made to the workforce that redundancy procedures would be triggered and it was legally entitled to rely on the mobility clause. Its motives for so doing were irrelevant.

Conclusion: Employers can exercise a contractual mobility clause in a redundancy situation. However, they should act carefully and reasonably in the timing and exercise of that clause.