

Bolt Court

Employment Review

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A NATIONAL MINIMUM WAGE

While the recent Working Time Regulations caused a small storm in the legal press and human resource Wage Act 1998 has so far attracted relatively little attention. This is surprising given the radical effects of the Act. All employees have a tribunal enforceable right to a minimum wage, while wage record keeping requirements, with civil and criminal penalties for infringement, are imposed on all employers. The employees rights will be upheld by government appointed enforcement officers and an employer who is brought before a tribunal for infringement will have to overcome a statutory reversal of the burden of proof in the employee's favour. Sections of the Act preventing contracting out and protecting employees from dismissal or victimisation on the grounds that they would be eligible for the minimum wage, slipped quietly into force on 1 November 1998.

The remainder of the Act and the statutory regulations which flesh it out come into force on 1 April 1999.

The minimum wage for people over the age of 21 is 3.60 per hour. For those between 18 and 21 it is 3.00 per hour. Regulations define the pay reference period over which the average hourly pay is assessed. The wage applies to all workers which is widely defined. It includes anyone working under a contract of employment or any other contract, express or implied, oral or in writing, whereby the individual undertakes to do work or services for another party

whose status is not by virtue of the contract that of a client or customer. Agency workers are included, as are those who work from home for someone else. Charity and voluntary workers are only excluded if they receive absolutely no monetary remuneration. Charities beware!

Every employer must keep a record of the wages actually paid which is "sufficient to establish that he is remunerating the worker at a rate at least equal to the national minimum wage". If the employer fails to give a worker access to this record the worker can apply to the tribunal which can order the employer to pay a financial penalty. The employee's right to receive the minimum wage is made, by the Act, into a term of his contract and hence is enforceable by way of tribunal or county court. An employee may be unlikely to enforce his rights for fear of losing his job. However, the Act creates enforcement officers with powers to enter employers premises, inspect records and then to bring a tribunal claim on behalf of the worker affected. It remains to be seen whether these special enforcement powers will encourage general compliance with the Act.

By Peter Linstead

DISABILITY DISCRIMINATION LAW IN 1999

As most practitioners will now be aware, the Disability Discrimination Act 1995 effectively proscribes discrimination against disabled people in relation to, *inter alia*, access to employment. Following a review of the effect of the Act carried out by the Government in the course of 1998, as from 1 December 1998, the Act applies to all employers who employ 15 or more employees, as opposed to the original limit of 20 employees. This, combined with proposals to establish a Disability Rights Commission to assist individuals in enforcing their rights under the Act, and the absence of a statutory cap on tribunal awards, can only herald a further increase in the number of claims under what is already proving to be a burgeoning but increasingly misunderstood jurisdiction. Two recent cases have gone some way to clarify the widespread misunderstanding.

The decision of the EAT in *Goodwin v The Patent Office* (EAT 57/98, The Times 11.11.98) is currently the leading case on what constitutes a "disability" under

the Act, giving detailed guidance as to the analysis of this fundamental question. When faced with an issue as to whether or not the applicant suffers from a disability the tribunal should look carefully at what the parties have said in the Originating Application (IT1) and Response (IT3). If the parties have failed to identify the real issues, and it being unsatisfactory for that situation to prevail until the hearing, it will be expedient in most claims under the Act either to give standard directions in the hope of clarifying the issues or to arrange a directions hearing. It would obviously be undesirable for expert evidence to be called without proper notice having been given to the other party and the provision of a copy of any report to be relied upon. The EAT emphasised that tribunals should adopt a positive and inquisitorial approach to claims under the Act and a purposive approach to construing the statutory language.

In *Buxton v Equinox Design Ltd* (EAT 337/98) the EAT gave helpful guidance as to role of medical evi-

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dence in claims under the Act. The EAT noted that hearings may require careful judicial management and that since compensation is uncapped, the remedies hearing should involve the parties in careful preparation under the management of the tribunal. Again, directions will invariably be required.

In July 1998 the EAT upheld the award of £103,146.49 to the applicant in *British Sugar plc v Kirker* [1998] IRLR 624. In arriving at that award, account had been taken of lost earnings, injury to feelings, loss of future earnings and loss of future pension rights. What is apparent from these decisions is that the role of expert evidence, and not only medical experts but

also accountants and employment consultants, will undoubtedly expand in claims under the Act and the presentation of such evidence will be governed by careful judicial management thereby affording the parties an opportunity to prepare their cases thoroughly. With such potentially large awards at stake, hearings will become more akin to those for the assessment of damages in personal injury actions and the need for expert representation will become paramount.

By Simon Livingstone

EMPLOYMENT LAW AND THE HUMAN RIGHTS ACT 1998

Neither the Human Rights Act, nor the European Convention which it incorporates, contain express protection for the individual right to work without being unfairly dismissed or discriminated against. Indeed at first sight, the Act seems to be concerned only with public bodies, creating causes of action for breaches against public or quasi-public bodies, acting in their public capacity. What then is the effect on employers and employees in the private sector?

The Convention is not directly enforceable against private individuals or bodies but by section 6(1) and (3) of the Act, an employment tribunal or court must act in a way which is compatible with a Convention right, including in cases between private individuals. Therefore, section 6 affords the opportunity of raising breaches of Convention rights 'via the back door'. More importantly, the tribunal's duty to make decisions which are compatible with Convention rights will inevitably lead to public body case law being carried through to private body situations.

The Act also requires the Government to take steps to ensure that Convention rights are not breached by private persons. It may therefore be possible, for example, for an employee who is victim of an ageist policy, which is not contrary to national legislation, forbidding

employees over 25 from taking time off in order to study for qualifications, to claim against the State on the basis that it has failed to protect him from discrimination contrary to Article 14 (ageism) and Article 2 (the right to education).

Potentially relevant convention rights include: Article 6 (the right to a fair trial) which raises issues concerning adjournments, conduct of hearings, and amendments to originating applications; Article 8 (the right to respect for private and family life) which could be breached by electronic monitoring of employees keyboards, the monitoring of phone calls and random drug testing; and Article 10 (freedom of expression), in the light of which case law on dress codes and employee appearance may need to be revisited. The list is endless, and with imaginative reasoning, all aspects of conduct in the workplace are potentially liable to be tested against the Convention.

By Mugni Islam - Choudhury

COMPANY DIRECTORS - THE RISK OF PERSONAL LIABILITY

Many statutes contain provisions under which directors and other senior staff of companies can be held liable for criminal offences committed by their companies in diverse areas, from trade descriptions to environmental protection. For example, section 157 of the Environmental Protection Act 1990 provides that where an offence of a corporate body "is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer ... he as well as the body corporate shall be guilty of that offence". Staff of whatever seniority may be personally liable for offences which they themselves commit in the course of their employment.

An apprentice is just as liable as the managing director to be prosecuted for falsifying records or other crimes. But senior staff are liable to be prosecuted for other offences which they did not themselves commit but which were committed by their companies.

To be liable, directors etc. must be guilty of consent, neglect or connivance. This is the case even where the primary offence - that of the company itself - is one of "strict liability". The meaning "consent" and "connivance" were considered in the case of *Huckberry v Elliott* (1970) 1 All ER 189. A company was accused of operating a casino without a gaming licence. Two directors were also charged in their personal capacity.

Ashworth J approved passages in the judgment of the Stipendiary Magistrate where he said: "It would seem that where a director *consents* to the commission of an offence by his company, he is well aware of what is going on and agrees to it ... Where he *connives* at the offence he is equally well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it."

"Neglect is a well understood concept, comprising the omission to do something that the director is under a duty to do. So if the company commits an offence because junior staff have not been adequately trained in the use of machinery or in the proper procedures to follow, the director responsible for ensuring that training

is given may well find himself or herself accused even if he or she did not know an offence was being committed.

It appears that regulators of all sorts are becoming more inclined to pursue individuals and not just companies, especially where a failure to comply with the law results in personal injury or the case produces publicity. All senior staff must appreciate the potential liability that may fall on them if they fall below the required standard.

By Robert Lewis

AMENDING ORIGINATING APPLICATION

It is important for practitioners to consider the full extent of an Applicant's case before it is served on the Employment Tribunal because problems can arise on an application to amend the IT1 when the amendment seeks to introduce a new cause of action.

There is a discretion under rule 13 of Schedule 1 to the 1993 Regulations to grant leave to amend. Amendments will be either (i) alterations to the basis of an existing claim not raising a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action arising out of the same facts as the original claim; or (iii) amendments which add or substitute a new claim or cause of action not connected to the original claim. The EAT in *Selkent Bus Co Ltd -v- Moore* [1996] ICR 836 held that the circumstances to be taken into account will vary in each case but the following particular matters must always be considered: (a) the nature of the amendment (i.e. whether minor or substantial); (b) the applicability of the time limits (i.e. whether it is out of time and whether time should be extended under the relevant provisions); (c) the timing and manner of the application. The paramount consideration is the relative injustice in refusing or allowing the amendment. Any delay and costs incurred are also relevant. Amendments under (i) are not affected by the time limits because all that is to be done is to change the grounds upon which the original claim is based. An Applicant will normally be allowed to make such an amendment. Under category (ii) Tribunals have shown a willingness to permit an application to amend provided it can be justified on the facts originally pleaded. Time limits are not applied to such amendments (see *Ashworth Hospital Authority -v- Liebling* (1997) EAT/1436/96, unreported) but the general considerations in *Selkent* apply.

Amendments under category (iii) have caused the most problems particularly when out of time. An application to add an unfair dismissal claim will be more difficult than a discrimination claim because the relevant factors are different. In an unfair dismissal claim the Applicant must show it was not reasonably practicable to make the claim in time. In a discrimination claim the Applicant has to show it is just and

equitable to allow the amendment. However, two recent cases show that even adding a discrimination claim is far from straight forward.

It was held in *British Coal Corporation -v- Keeble* [1997] IRLR 336 that the discretion in an application to amend to add a discrimination claim is as wide as that contained in the Limitation Act 1980 s.33 and the factors thereunder should be considered. In *The Housing Corporation v Bryant* [1999] ICR 123 the Applicant's claims for sex discrimination and unfair dismissal had been dismissed as the discriminatory act relied upon happened more than three months before the date of the Applicant's complaint and was therefore out of time. She then applied to amend her claim to include victimisation in that she had been dismissed because of her sexual harassment complaint. She argued that her IT1 included a suggestion of victimisation, though it was not specifically alleged. The Court of Appeal held that the victimisation complaint required there to be a causative link between the discrimination and the dismissal. As this causative link was not demonstrated in any way in the IT1, this was not an expansion of the original claim but an entirely new claim brought well out of time and the tribunal chairman had not erred in finding it was not just and equitable to allow amendment.

In the light of *Bryant*, it is wise to state the grounds for the complaint in the IT1 in the fullest possible way. An Applicant claiming unfair dismissal may allege facts which could give rise to a sex discrimination claim. If sex discrimination claim is not pleaded at the outset because of the obvious difficulties associated with such a claim, it may be prudent to include the facts relevant to both complaints which would mean that, if a different view is taken at a later date, any subsequent amendment would fall under category (ii).

By Matthew Rudd

*The next issue will include:-
Fairness At Work - Status of Agency Workers -
Working Time Regulations*

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