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THE EMPLOYMENT RELATIONS BILL

The Employment Relations Bill, which follows the radical "Fairness at Work" White Paper, will be enacted late this summer. Some of the provisions are considered here. Provisions relating to Trades' Unions will be considered in the next issue. At the time of writing, the Bill is at the Committee Stage in the Lords. The qualification period for unfair dismissal claims was reduced from 2 years to 1, on 1st June 1999 (see SI 1999/1436).

Maternity and Parental Leave

Ordinary maternity leave is increased from 14 weeks to 18 and the qualifying period for "additional maternity leave" is reduced from 2 years to 1. The Secretary of State acquires new enabling powers to reform maternity rights and parental leave by statutory instrument. These powers relate, inter alia, to leave in the case of "family emergency" (eg illness of a family member or other emergency concerning a child's welfare). The Bill also makes it clear that continuity of employment is preserved during periods of statutory leave and returning employees should not be subjected to detriment.

Disciplinary and Grievance Hearings

Statutory force is given to the ACAS Code provision that an employee may be accompanied at a grievance hearing by a co-worker or union representative. If this right is denied, complaint may be made to an Employment Tribunal, which has a power to order two weeks pay in compensation. The employer is also obliged to provide the "co-worker" suitable time-off. The employer must not unreasonably refuse to adjourn the hearing for up to 5 days to allow the employee to find a suitable representative.

Unfair Dismissal

Dismissal is automatically unfair if the reason for it is the employee's participation in "protected" industrial action although certain strict conditions have to be satisfied to claim. The Bill prohibits the waiver of unfair dismissal rights in fixed-term contracts although clauses in fixed-term contracts waiving the employee's entitlement to redundancy payments will still be valid. Finally, and most importantly, the Bill will, when enacted, raise the compensatory award for unfair dismissal from £12,000 to £50,000.

Other Changes include the protection of part-time workers from discrimination and the extension of employment rights to non-employees (eg home workers, agency workers and those "in bogus self-employment").

Mugni Islam-Choudhury

THE DECISION IN SEYMOUR SMITH - WHAT DOES IT MEAN?

The European Court of Justice has finally given judgment in R -v- Secretary of State for Employment ex parte Seymour-Smith & anor. [1999] ICR 447 which concerns the 1985 Statutory Instrument increasing the unfair dismissal qualifying period from 1 year to 2. It was claimed, under Article 119 of the Treaty of Rome, that the 2 year period was indirectly discriminatory on grounds of sex because the proportion of women who could comply with it was considerably smaller than the proportion of men. In March 1997 the House of Lords certified a number of questions to the ECJ, which were answered as follows:

1. Compensation for unfair dismissal is 'pay' within the meaning of Article 119;
2. Article 119 only applies to a claim for compensation and not for reinstatement or re-engagement;
3. The ECJ did not properly decide when the legality of the 2 year qualifying rule is to be assessed (i.e. the time of adoption, implementation or dismissal). It noted that Community law must be complied with at all stages but if it was alleged that the Secretary of State had acted ultra vires in adopting the 2 year period the legality must, in principle, be assessed at the time when it was adopted. In circumstances involving the application to an individual of a national measure, which had been lawfully

adopted in 1985, it might be appropriate to examine whether, at the time of dismissal, it was still in conformity with Community law;

4. The test for establishing indirect discrimination is whether a considerably smaller percentage of women than men can satisfy the 2 year qualifying period as based on the statistical evidence;

5. If the 2 qualifying period was found to be discriminatory it was for the member state to show that the rule was a legitimate aim of its social policy unrelated to any discrimination based on sex and it could reasonably consider that the means chosen were suitable for attaining that aim.

Therefore, applications can be made under Article 119 but, on statistical evidence, it will have to be shown that the 2 year qualifying period had an indirectly discriminatory impact on them. This means it will be impossible for men to show they have been discriminated against on the grounds of sex. The House of Lords still have to rule on the appropriate time to assess the statistics. If it finds that the relevant date is the date of dismissal, statistical indications appear to show that since 1991 the difference between men and women being able to fulfil the 2 year requirement has narrowed.

As far as future dismissal are concerned the qualifying period has now been reduced to 1 year which means the 8 year legal roller coaster ride of Seymour-Smith will only loop the loop in the minds of academics.

Matthew Rudd

THE WORKING TIME REGULATIONS 1998 - UPDATE

On 1st October 1998 the Working Time Regulations (SI 1998/1833) came into force, implementing not only the Working Time Directive (No. 93/104), but also part of the Young Workers Directive. There have a number of recent cases on both the Directive and the Regulations.

In Gibson v East Riding of Yorkshire Council, EAT 3.1.99, the EAT held that those provisions of the Directive relating to annual leave are sufficiently clear and precise to have direct effect. Accordingly, they can be enforced by employees of the state or an "emanation of the state" against their employers as from the date when the Directive fell to be implemented in the UK (23 November 1996). The implication is that employees in the private sector, who are unable to rely upon the direct effect of the Directive, may be able to claim damages from the UK Government for loss suffered by them as result of late implementation of the Directive.

The position of other entitlements arising from the Regulations is less clear. The EAT has remarked (Cawley & Others v Hammersmith Hospitals NHS Trust, EAT 20.1.99) that Articles 3 and 8 of the Directive, dealing with daily rest periods and length of night work, rely upon the "patently ambiguous" definition of "working time" in Article 2(1). This indicates that aspects of the Directive are incapable of being directly enforced, even by public sector employees.

As to the Regulations themselves, in Barber v RJB Mining (UK) Ltd, The Times 8 March 1999, it was held that Regulation 4(1), which imposes the 48 hour working time limit, creates a free-standing right that could be the subject of proceedings in the civil courts. The result of this decision is that Regulation 4(1) is deemed to insert a clause into all employment contracts whereby employees cannot be required to work in excess of the limit, without a valid opting-out agreement. Despite the ill defined nature of many of the Regulations, it is clear that they are profoundly reshaping the landscape of employment relationships in the UK.

Anna Mathias

THE EMPLOYMENT RIGHTS OF AGENCY WORKERS

Increasingly there is a trend in legislation to grant employment rights to workers from employment agencies (e.g. in the Working Time Regulations such workers are deemed employed by whoever is responsible for paying them). Courts and tribunals have traditionally taken the view that agency workers do not have an employment contract with anyone. Hence, they cannot acquire rights, such as those relating to unfair dismissal, which depend on there being an employment contract.

However, in McMeechan v Secretary of State for Employment [1997] ICR 549 the Court of Appeal had to decide the status of M in relation to an employment agency. M signed terms and conditions stating that he was a "self employed worker and not under a contract of service", that there was no duty to offer M work and that he was under no duty to accept any work. The Court found there was no general proposition of law that an agency worker cannot be an employee. In the context of the performance of a par-

ticular assignment with one of the agency's clients, they found factors supporting the existence of an employment contract which outweighed those not supporting it. They relied on the existence of a grievance procedure, the fact the agency paid M a specified hourly rate and was responsible for his statutory deductions, the power of dismissal for misconduct and a term that M "fulfil the normal common law duties which an employee would owe to an employer".

In Serco v Blair (EAT 345/98) the EAT considered whether two agency workers were employed by an agency's client company. The client gave them pagers, mobile phones, a van and uniforms, though wages were paid to them via the agency. The EAT held that an employment contract, based on mutual trust and confidence, could not be created by the intervention of the agency and as such there was no legal relationship between the workers and the client. They also said that even if there were a legal relationship, it was not capable of amounting to a contract of employment as it did not come within the conditions suggested by Ready Mixed Concrete v Minister of Pensions [1968] 2 QB 497, that is, (i) work is provided in return for remuneration, (ii) a sufficient degree of control, and (iii) the other provisions of the contract are consistent with it being a contract of employment. Here, the agency had ultimate control over whether to terminate any engagement with a client.

These cases show that agency workers will not be denied employment rights as a matter of course, although the existence of an employment contract with either the agency or its client will depend on the facts of each case. In Serco, the EAT indicated that if a contract of employment were negotiated by an agent third party who dropped out of the picture, their intervention would not necessarily stand in the way of there being an employment contract.

Peter Linstead

Euroland Watch

The European Council met in Cologne on 3rd and 4th June 1999 and endorsed the European Employment Pact with plans for a special European Council on Employment to be set up by the spring of 2000. Whilst the Pact will deal predominantly with the economic reform and social cohesion aspects of employment necessary to achieve higher levels of employment in Europe it has already identified priority areas in which legislation will be necessary in order that these objectives are implemented. This will be done through the introduction of legal instruments which will deal with avoidance of long-term unemployment, arrangements for participation of older employees in work, and equal employment opportunities for people with disabilities.

Moreover, in order to improve employment trends in Europe and to ensure that they are balanced with the need of social protection of employees the European Union will develop a further core of instruments to establish minimum social standards. Member States have already implemented various provisions concerning parental leave, part-time work and fixed term employment contracts. A number of directives are already in force but the Council will be proceeding along this road and introducing fairly detailed measures covering these areas with a package of new regulations on job creation and employment in accordance with the provisions of the EC Treaty relating to the improvement of living and working conditions.

The Commission has now been charged with distilling the best practice comparisons from the implementation of the Employment Guidelines and of the National Action Plans and evaluating them in time for the meeting of the European Council in Helsinki in December 1999. By September, however, the Commission has to prepare a Joint Employment Report with draft new employment guidelines for the year 2000. This will provide greater detail in which areas new European legislation may be expected. Approval of the new areas of legislation may be expected in the Spring 2000 meeting of the European Employment Pact Council.

Adrian Jenkala
European and International Law Group

The next issue will include:-
Trade Unions under the Employment Relations Bill -
Whistlblowers - The Data Protection Act

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