

# Bolt Court

## Employment Review

### THE DATA PROTECTION ACT 1998

The Data Protection Act 1998, which comes into force on 1st March 2000, will have a radical effect on the way in which personnel records are kept by employers and on the rights of employees to have access to them. Under the existing legislation, employees already have the right to be told about, and to demand a copy of, information which is held about them on their employers' computer systems. The new Act extends this right to information which is recorded as part of a 'relevant filing system', that is, information relating to individuals structured in such a way that specific information relating to a particular individual is readily accessible. Employers holding such information in electronic form will have to be formally entered on the Data Protection Commissioner's register though this requirement will not normally apply to those with only paper-based records.

The information which comes within the ambit of the Act includes the employer's expression of opinion, and therefore, by implication, adverse comment about employees. Confidential references, on the other hand, are excluded, whether written with a view to new employment or to a new office with the same employer. However, this exclusion does not relate to references from third parties, so it appears that an employee could request sight of a reference written by a former employer. Other documents which will be excluded from the employer's duty to disclose include data processed for the purpose of management forecasting or management planning and any record of the intentions of the employer in relation to negotiations with the employee, where that disclosure is likely to prejudice the negotiations.

Hence, the employee may not have access to documents relating to negotiations about changes in pay and conditions, redundancy, or severance arrangements.

The employee can exercise his or her right by making a request in writing and can be required to pay the employer a £10 fee. The employer must then comply promptly by giving, in writing, a description of the information held about the employee (which would normally be done by providing a photocopy of the documents), the purposes for which it is being held and any likely recipients in the event that the information will be disclosed to anyone. If the information held is inaccurate, the employee can apply to court to have it, and any opinion based on it, rectified, erased or destroyed.

It is also of fundamental importance that in respect of the information they hold, employers will be required to comply with eight 'data protection principles'. The observance of these principles will be enforced by a Commissioner with entry and search powers and by criminal sanctions. Some of the principles are that 'data shall be processed fairly and lawfully', personal data shall be 'adequate, relevant and not excessive in relation to the purposes for which it is processed', it shall be 'accurate and ... kept up to date', and it 'shall be kept for no longer than is necessary for the purposes for which it is processed'. Under transitional provisions these particular requirements of the Act will not come into force until October 2001, but employers would be well advised to review their personnel files to ensure compliance well in advance of this date.

*Peter Linstead*

### EMPLOYMENT RELATIONS ACT 1999 - UPDATE

The Employment Relations Act 1999 received Royal Assent on 27th July 1999. Various sections of the new Act have just come into force, or are just about to. The most important are:

*In force 25th October 1999*

- i. s.2 and Sch.2 - protection from detriment for TU membership;
- ii. s.18 - prohibition on unfair dismissal waivers in fixed term contracts ;
- iii. ss.19 to 21 - enabling powers for non-dis-

crimination in relation to part-time workers;

- iv. ss.33 to 37 - simplifying the system of awards made by ETs and redundancy payments etc. and increasing the limit of compensatory award for unfair dismissal to £50,000 where the EDT falls after 25th October 1999.

*In force 15th December 1999*

Sections 7 to 9 and Sch.4 concerning maternity and parental leave. The draft regulations are now available and provide, inter alia, for parental leave for a total of up to 13 weeks for any person with

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parental responsibility for a child born after 15th December 1999 until its fifth birthday (save adoption cases), such leave being for the purpose of caring for that child.

Regarding trade union (TU) legislation, prior to this Act, TUs were not legally recognised to conduct collective bargaining. The Act introduces a statutory recognition procedure, section 1, which amends the Trade Union and Labour Relations (Consolidation) Act 1992. These provisions are expected to come into force by mid 2000. The Act encourages voluntary recognition, but if this is not possible, then the Central Arbitration Committee (CAC) with new legally binding powers, may be brought in to assist, and may ultimately impose recognition.

A TU may make an application for recognition to the employer, so long as the employer (and any associated employer) employs at least 21 workers on the day of application, or has employed an average of at least 21 workers in the 13 weeks ending with that day. There is formal recognition if the employer agrees within the relevant time limit, and no further steps are necessary. Where the employer rejects the request, but is willing to negotiate, the parties may continue to conduct negotiations for a further prescribed period, which if successful, will lead to formal recognition. Either party may request ACAS to assist in negotiation. If the employer fails to respond or rejects the request without

indicating a willingness to negotiate, the TU may apply to the CAC to decide the appropriate bargaining unit (ie, the group of workers to be engaged in collective bargaining) and/or whether a majority of workers support recognition. Strict conditions as to the validity of the application and time limits apply. Once the matter is referred to the CAC, it has various powers to hold ballots, assist in negotiation, or, if negotiation fails, impose a finding on the parties.

Upon recognition (voluntary or otherwise), the parties should try to agree a method by which they will conduct collective bargaining, and again, in appropriate prescribed cases the parties may apply to the CAC for assistance. If negotiations fail, the CAC has the power to impose a method of collective bargaining on the parties which is legally binding and enforceable by a court order for specific performance.

There are also complex procedures under which the employer or workers may apply to the CAC for de-recognition, which reflect in many ways those for recognition. Generally, the Act caters for situations where de-recognition may be necessary as a result of the employer employing less than 21 workers, the employer requesting an end to the arrangements, and the workers making an application to end the arrangements.

*Mugni Islam-Choudhury*

## AGE DISCRIMINATION - DOES THE CODE MAKE A DIFFERENCE?

About 30% of men between the ages of 50 and 64 are not in paid employment which is largely due to them having left work owing to redundancy or early retirement. The Government has ruled out legislation to tackle age discrimination in the immediate future and in June it announced the 'Code of Practice on Age Diversity in Employment', following the Report of the Consultation on Age Discrimination in Employment by 'Action on Age'. The Code is voluntary and provides advice covering six aspects of the employment cycle: recruitment; selection; promotion; training and development; redundancy; and retirement. The Code does not have the teeth that the legislation on sex, race and disability discrimination has. It states that employers should avoid using age limits or age ranges in job advertisements, focus on the skills, abilities and potential of candidates when sifting applications and use a mixed-age interviewing panel. But if employers fail to follow such guidance in selecting employees, a potential candidate would have no right of redress (unless he could show that because of the age discrimination he was discriminated against on the grounds of race or sex).

However, the Code suggests that employers should base decisions related to redundancy selection on objective, job-related criteria and that age should not be used as the sole criterion in redundancy selection. If an employee is selected for redundancy solely on grounds of age, it is likely that he will be able to claim that the dis-

missal was unfair. When judging what a reasonable employer would have done in the circumstances it will surely be difficult for an employment tribunal to decide that breaching the Code was within the range of reasonable responses open to an employer. As the law currently stands it appears that the only right of redress for age discrimination is likely to be a claim for unfair dismissal following redundancy selection in these circumstances.

Some equal opportunities policies provide that an employer will not discriminate against employees on account of their age. Where a provision of this kind has been incorporated into an employee's contract, he or she may be entitled to claim a breach of contract where the employer fails to comply with it. In *Taylor v Secretary of State for Scotland*, the Court of Session recently held that an employer which had lowered its employees' retirement age to 55 in order to have a younger workforce was not in breach of a contractual equal opportunities policy prohibiting age discrimination when it dismissed an employee who was above the new retirement age. The contract retained some flexibility in that both employer and employee had a discretion whether to end the employment relationship when the employee was between the ages of 55 and 60. There were two potentially conflicting provisions: one prohibiting age discrimination; the other seeming to discriminate against employees aged 55 and over. In construing the contract the court inferred a 'common intention' between the

parties that was capable of reconciling both provisions. The contractual imposition of an ultimate retirement age cannot itself, they said, offend against an equal opportunities policy which incorporates the prohibition of age discrimination. A retirement stipulation will lie at the very root of a contract of employment because it defines the period over which the employee may hope to have work under the contract. Therefore, if the employers had instructed him to retire at 60, the ultimate retirement age under the terms of his contract, he would have

had no claim for breach of contract against them, even though their instructions would have been inextricably linked with the fact of his age. This decision seems to put retirement clauses into some sort of special category, lying 'at the very root' of the employment contract, which will not be affected by a contractual prohibition against age discrimination, unless the parties are clearly seen to have intended the opposite.

*Matthew Rudd*

## PROTECTING WHISTLEBLOWERS - THE PUBLIC INTEREST DISCLOSURE ACT 1998

This Act came into force on 2nd July 1999 and protects workers who make 'qualifying disclosures' from being subjected to a detriment, or dismissed or selected for redundancy. The Employment Rights Act 1996 is amended so that any dismissal on the ground that the worker has made such a disclosure will be automatically unfair. The Public Interest Disclosure (Compensation) Regulations 1999 SI 1999/1548 effectively remove the limit on the unfair dismissal compensatory award, the usual qualifying period and upper age limit in cases involving qualifying disclosures. The anti-victimisation provisions cover an extended class of workers, including agency workers and trainees. The Act cannot be excluded by a contract of employment.

For a disclosure to be protected, the information must, in the reasonable belief of the worker, tend to reveal one or more categories of malpractice, namely, criminal offence, failure to comply with any legal obligation, miscarriage of justice, endangering the health or safety of any individual, damage to the environment, or deliberate concealment of any information tending to reveal one of the other five categories. The worker must make the disclosure in good faith and reasonably believe that it is substantially true. The malpractice may be past, ongoing, or likely to occur, and its geographical location is irrelevant. However disclosure must be made in the UK. Disclosures which are, in themselves, criminal offences (by virtue of the Official Secrets Act, for example) are not protected.

The Act requires concerns to be raised with the employer (or with the person responsible for the malpractice) in the first instance. Alternatively, disclosure may be to prescribed persons, as set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 SI 1999/1549. In sectors where there is a regulator, disclosure should be made to that body and there is no requirement that internal procedures should be followed first, if the worker reasonably believes the malpractice

to fall within that regulator's sphere. The scope of such disclosures is potentially wide and is likely to place a considerable burden on bodies such as the Health and Safety Executive and the Commissioners for Customs and Excise.

If the employee decides to 'go public', for example to the press or an MP, the disclosure will only be protected in narrowly defined circumstances: the disclosure must not be made for personal gain; the employee must reasonably believe that one of three reasons make internal or regulatory disclosure unsuitable or inadequate (fear of victimisation, likelihood of concealment of evidence or the fact that internal disclosure has already been made); it must be 'reasonable', in all the circumstances, for the worker to make the disclosure. Factors relevant in deciding reasonableness include any action which the employer has taken or could be reasonably expected to take and whether the malpractice is likely to continue.

Where the disclosure relates to matters of exceptional seriousness, the only factor which must be taken into account in assessing the reasonableness of the disclosure is the identity of the person to whom it is made. It is noteworthy that 'exceptional seriousness' is not defined. Disclosure made for the purposes of seeking legal advice will be automatically protected.

Thus, the Act does not create a general right for disgruntled employees to 'blow the whistle'. Indeed, it has received widespread support from employers' groups. Internal disclosure may alert the employer to wrongdoing; employees must believe in the truth of their allegations and, generally, follow internal procedures first. However, employers are well advised to establish and publicise internal procedures, keep them separate from grievance procedures, train management in how to treat disclosures and review confidentiality clauses, to ensure that they do not fall foul of the Act and that disclosures can be dealt with internally.

*Anna Mathias*

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TUPE latest developments - Sexual orientation issues -  
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# Bolt Court

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*Edited by: Peter Linstead*

*Designed by: Julian Steward*

*Produced by: Berrico Ltd W3 6AU*