

# Employment Act 2002 Review

## HOW FLEXIBLE IS FLEXIBLE WORKING?

Many employers view the flexible working provisions introduced by the Employment Act 2002 as a burdensome imposition. In fact these provisions, which the DTI estimates will benefit 3.8 million employees in the United Kingdom, may give employers some welcome guidance in relation to the uncertain question of how they should handle requests for flexible arrangements. An employer who refuses such a request can face a potential claim for indirect sex discrimination. The interplay between the new provisions and the Sex Discrimination Act will be of crucial importance.

The new procedure comes into force on 6th April 2003, by adding new sections to the Employment Rights Act 1996. The substance of the reforms is found in statutory regulations which will not be analysed in this article. However, it is worth noting that there are various restrictions on access to the rights conferred by the scheme. A qualifying employee is a parent (or equivalent), who has responsibility for the upbringing of the child, and who has been employed no less than 26 weeks. The child must be under 6, or under 18 if disabled. The employee must comply with the new procedures, including the requirement to include specified information in the application and to comply with time limits. The procedure is unsuited to anyone wanting a quick decision, as the whole process, including appeal, takes 12 weeks. Moreover, as long as the employer follows the procedure, the employee will be prevented from raising an internal grievance.

The grounds on which an employee can apply to the Employment Tribunal are limited. The key grounds are (i) failure to comply with the regulations concerning the handling of the application and (ii) the fact that the decision to reject the application is based on incorrect facts. Hence, if one of the specified business grounds has been cited, and basic reasons given, the tribunal cannot go behind the decision. If the complaint is upheld, the remedies are compensation up to a maximum of £2,080, or an order for reconsideration.

An employee who does not qualify or whose request is refused under the new rules could still claim indirect sex discrimination. The fact that the procedure has been properly followed is likely to assist an employer in showing an objective justification as a defence to indirect discrimination. However, this is unlikely to be enough on its own as the case law on indirect discrimination requires a balancing of the interests of employer and employee. It has been suggested that an employer could simply ignore the procedure altogether, as any liability would be limited to £2,080. This would, of course, leave the employer open to an indirect discrimination claim. However, such a claim may not be available to a male employee who is refused a request for part time work because he will have great difficulty showing that a provision, criterion or practice has been imposed on him which, because of his sex, he is less able to comply with than a woman!

*Peter Linstead*

## IMPROVING THE ROUTES TO RESOLUTION

The 2002 Act paves the way for wide ranging reform to the tribunal system via regulations made by the Secretary of State. Largely inspired by the Government's consultation document dated 20 July 2001, the changes aim to respond to the July 2002 report of the Employment Tribunal System Taskforce and ensure that tribunals reflect users' needs in an ever-changing environment.

Section 22(1) enables the Secretary of State to make regulations authorising tribunals to have regard to ability to pay in making costs awards - a direct response to the House of Lords' decision in **Kovacs [2002] IRLR 414**. This also covers costs in the EAT and the new payments for preparation time introduced by

section 22(2), inserting a new section 13A into the Employment Act 1996. Unrepresented parties will be able to recover their costs in the ET, putting them into the same position as their counterparts in the EAT.

Section 22(1) also extends section 13 of the 1996 Act to allow an award of costs directly against a party's representative as a result of his conduct in the proceedings. Furthermore, such a representative may be prevented from recovering all or part of his fees from his client. Similar rules will apply in the EAT. Regulations are awaited to clarify which representatives will be covered: non-profit making organisations are expected to be exempt, whilst lawyers acting on a no-win, no-fee basis look certain to be included. It is

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INVESTOR IN PEOPLE

*Edited by: Peter Linstead*

significant that the circumstances in which costs may be awarded have not changed: these new costs provisions will only apply where the tests set out in rule 14 of the current Tribunal Rules are met.

The Act provides for regulations setting fixed periods for conciliation, during which the case will be halted, to focus minds upon reaching a settlement at an early stage. Section 25 authorises the Secretary of State to prescribe forms for bringing or resisting a claim. Under section 27, for the first time, Tribunal Presidents will have the power to issue practice directions. These new provisions are specifically designed to improve efficiency in preparation and listing.

The new Act also confirms that weak cases may be struck out at the preliminary stage, although the

Government envisages that the deposit system will continue to be the main sanction.

Section 26 provides for regulations authorising the determination of cases without a hearing in certain circumstances. There will be certain exceptions to the present rule that both parties must give written consent, so that, for example, cases can be determined without a hearing where the Respondent has failed to respond, without the necessity for his consent.

The timetable for production of draft regulations has slipped somewhat, with consultation now planned for summer this year and implementation in April 2004. Needless to say, the success of the reforms depends on the detail.

*Anna Mathias*

## MATERNITY AND PATERNITY RIGHTS CHANGES

The Changes under the 2002 Act apply to parents where the EWC begins on or after 6th April 2003. The maternity provisions do not apply where EWC is before 6th April 2003, even if actual birth is later, however the paternity provisions apply in such circumstances. This article describes only the major changes to the existing legislation.

### *Maternity Rights*

The length of OML is increased to 26 weeks regardless of length of service. Women who have completed 26 weeks continuous service by the 14th week before EWC can take a further 26 weeks AML.

An employee must notify her intention to take maternity leave by the end of the 15th week before EWC and must state that she is pregnant, the week her baby is expected to be born and when she wants OML to start (which may be changed by giving 28 days notice). Employers are required to respond within 28 days (unless varied), setting out the date on which they expect her to return to work if she takes her full entitlement to maternity leave.

A woman who intends to return to work at the end of her full maternity leave entitlement is not required to give any further notification to her employer. An employee who wants to return to work before the end of her maternity leave must give 28 days notice. OML starts automatically if a woman is absent from work for a pregnancy-related illness during the 4 weeks before the start of her EWC.

Women who are entitled to SMP or MA and whose

EWC begins on or after 6th April 2003 receive SMP or MA for 26 weeks. The standard rates of SMP and MA are increasing from £75pw to £100pw (or 90% of average weekly earnings less than £100pw). They apply from 6th April 2003 to all women receiving SMP or MA.

### *Paternity Rights*

To qualify, employees must have responsibility for the child's upbringing, be the biological father or the mother's partner and have 26 weeks continuous employment ending with the 15th week before EWC. Eligible employees can choose to take either one or two consecutive weeks paternity leave. Employees can choose to start their leave from the date of the child's birth, from a chosen number of days or weeks after the date of the child's birth, or from a chosen date later than the first day of the week in which the baby is expected to be born. The notice requirements are the same as for maternity leave. Leave must be completed within 56 days of the date of birth or if born early, within 56 days after the first day of the expected week of birth. Statutory Paternity Pay is paid at the same rate as SMP.

Employees are entitled to return to the same job following paternity leave and are protected from suffering unfair treatment or dismissal for taking, or seeking to take, paternity leave.

For further information see [www.dti.gov.uk](http://www.dti.gov.uk)

*Matthew Rudd*

## STATUTORY DISPUTE RESOLUTION

The Employment Act 2002 introduces statutory dispute resolution procedures with attached sanctions for non-compliance. There is one procedure for dismissal and disciplinary matters and another for grievances. In each case there is a standard procedure and a modified procedure, the latter being for use when the employee has already left the job.

The first step in the standard dismissal and disciplinary procedure is the employer setting out in

writing the alleged conduct of the employee and sending it to him. The second step is a meeting which must take place before any disciplinary action is taken, unless that action consists of suspension. The meeting is not to take place until the employer has explained to the employee the basis for the allegations made and the employee has had a reasonable opportunity to consider his response to that information. After the meeting the employee is to be informed of the decision and of his

or her right to appeal. If the employee wishes to appeal, the third step is that he must inform the employer and then he must be invited to attend a second meeting. This meeting need not take place before disciplinary action or dismissal has taken place. After the meeting the employer must inform the employee of the final decision.

The modified procedure in effect leaves out the second step. It is likely to be used only where there has been an instant summary dismissal.

The fact the disciplinary procedure has not been complied with can, depending on which party is at fault, lead to an increase or decrease in the award made by the tribunal of between 10% and 50%. Where the employer is wholly or partly to blame for failure to complete the procedure and dismissal results, that dismissal will be automatically unfair.

The standard grievance procedure mirrors the above procedure with the positions of the employer and employee reversed with respect to the need to inform of

the grievance and the basis of it in the first two steps. It is still the employer who has to invite the employee to a meeting and notify of the right to appeal against the decision. The modified procedure consists simply of the grievance and the basis for it being sent to the employer and the latter sending a written response to the employee.

In all circumstances where the procedures require an employer to invite an employee to a meeting, the employee must take all reasonable steps to attend. There is a general requirement that each step and action must be taken without unreasonable delay.

Failure to comply with the grievance procedure will lead to the loss of the right to present a complaint to a tribunal. Where the procedure has been used to state a grievance, no application to a tribunal can be made until 28 days after that step is taken. Time limits will be adjusted accordingly.

*Stephen Wells*

## NEW RIGHTS FOR FIXED TERM EMPLOYEES

**T**he Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 came into force on the 1st October 2002. It is estimated that they affect over one million workers.

### *Who is Covered?*

In addition to employees with a contract set to end on the expiry of a specific term, the Regulations apply to employees whose contracts end on the completion of a particular task or on the occurrence of a specific event. This means that they apply to casual employees and, for example, to an employee providing maternity or other short term cover. They do not apply to "workers" (including agency workers); nor do they apply to most members of the armed forces or to apprentices.

### *Rights*

The principal objective of the Regulations is to give fixed-term employees the right not to be treated less favourably than a comparable permanent employee (ie. a permanent member of staff who carries out the same or similar work). More specifically, this means that fixed-term workers now have the right to equal treatment in respect of pay, pensions, holidays, sick pay, training and other benefits.

This right is qualified, however, where an employer can show an objective justification for treating a fixed-term employee less favourably. Additionally, less favourable treatment will be regarded as objectively justified where an employer shows that, taken as a whole, the terms of a fixed-term employee's contract are at least as favourable as those of a comparable permanent employee; for example, an employer can

justify not offering a fixed-term employee a benefit, such as a pension, by paying a higher salary.

The Regulations also limit successive fixed term contracts to 4 years, thus doing away with the practice of using a succession of such contracts to create what are, effectively, permanent posts on less favourable terms. Now, where an employee renews a contract after a fourth year, unless the employer can objectively justify a further fixed-term the employee will be treated as if they have a permanent contract.

### *Remedies*

Where a fixed-term employee believes they have suffered less favourable treatment or that there is no justification for a fixed-term beyond 4 years, they can request a written statement from their employer giving reasons for the employer's actions; the statement must be provided within 21 days.

A fixed-term employee can also apply to an Employment Tribunal if they have been treated less favourably and the Tribunal, if it considers it to be just and equitable, can make a declaration in relation to the complaint, order the employer to pay compensation or recommend that the employer takes reasonable steps to obviate the adverse effect of the matter complained about.

Lastly, where an employee is dismissed and the reason (or principal reason) is that they were seeking to enforce any of the rights conferred by the Regulations, then the dismissal will automatically be unfair.

*Adam Swirsky*



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