

Happy New Year!!

This issue of our newsletter will review developments within Employment Law towards the end of 2007, recent developments and a preview of what you can expect from 2008.

We will provide you with monthly newsletter updates, keeping you informed of changes and developments in addition to giving you practical advice on how best to avoid potential pitfalls thus

allowing you to keep one step ahead and to plan effectively for your company's future.

All the best for 2008 from W H Law!!



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Duty to consult over business reasons for Redundancy

(UK Coal Mining Ltd v (1) National Union of Mineworkers (2) British Association of Colliery Management)

In October 2007 the EAT overturned 15 years of established law when it held that employers **are** under a duty to consult with employees as to their business reasons for closing down a business. This considerably increases information employers are required to disclose when commencing consultation.

The repercussions for non-compliance are significant as the tribunal has the power to award up to 90 days' actual pay per affected employee.

If employers fail to properly consult employees over the reasons for closure, this case indicates that the tribunal will find the rest of the consultation procedure flawed. Therefore, even if employers engage in full, lengthy consultation on redundancy payments

and suitable alternative employment, if their consultation on the reasons behind the closure decision were inadequate, the employer could still find themselves exposed to the maximum protective award.

In *Evans v Permacell*, the EAT held that the 90 day presumption applies equally to 30-day consultation cases as it does to 90-day consultation cases.

Inside this issue:

Redundancy consultation	1
Companies Act 2006	2
TUPE 2006	2
Employment Status	2
Competition Law update	3
Legislation coming into effect in 2008	3
Corporate Manslaughter Seminar	4

Annual Leave Increases

On 1 October 2007 an increase to the minimum entitlement to annual leave under the Working Time Regulations came into effect. From this date all workers are entitled to 4.8 weeks (increased from 4 weeks) annual leave. For workers

working five days a week this means an increase from 20 to 24 days.

However, employers are permitted to give payment in lieu of this additional 0.8 week period until 1 April 2009 as a transitional measure.

From 1 April 2009 a second increase to 5.6 weeks will take effect. This will be capped at a maximum of 28 days.

These increases will affect part-time workers on a pro-rata basis.

Directors' Duties

TUPE 2006

Potential to apply to transfer of businesses outside the UK. Further information next month.

The Companies Act 2006

The Companies Act 2006 codified a number of Directors' duties for the first time.

In October 2007 the following directors duties came into force:

Duty to Act within the Companies Powers:

Directors must exercise their powers in accordance with the Company's Articles of Association and only for the purposes for which they were given.

Duty to promote the suc-

cess of the company:

Directors are required to act, in good faith, in a way they consider most likely to promote the success of the company. In doing so they must have regard to a non-exhaustive list of factors aiming to reflect responsible business behavior.

Duty to exercise independent judgment:

Directors must exercise independent judgment at all times, however, if it is reasonable to do so they may

rely on other people.

Duty to exercise reasonable care, skill and diligence:

Directors must exercise the same care skill and diligence of a reasonably diligent person with (1) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same function as that director and (2) the general knowledge, skill and experience that the director actually has.

Employment Status of Agency Workers

2007 saw a number of cases on the employment status of agency workers being decided upon. These cases now tell us that the Court of Appeal in *Dacas v Brook Street Bureau (UK) Ltd* was wrong to suggest that implied contracts of employment might readily be found between agency workers and end-user companies. This will only be the case if the facts cannot be read consistently with a true agency/self-employed relationship. The Court of Appeal shall either confirm or deny this in their judgment in *James v Greenwich Council* which is expected imminently.

Unfair Dismissal

Following the EAT decision in *First Leeds v Haigh*; competency dismissals will be automatically unfair if the employer fails to take reasonable steps to ascertain whether an employee could be considered for ill-health retirement benefits.

Statutory Grievances and Equal Pay Claims

"...a Claimant is required to identify her comparator, at least by reference to job type..."

In *The Highland Council v TGWU/Unison* the EAT held that a Claimant is required to identify her comparator, at least by reference to job type, in a statutory grievance.

If, after lodging grievance, the Claimant discovers a materially different comparator, there are a number options

available to them:

Lodge a further grievance letter (it may be agreed between employer and employee that one grievance meeting will cover both grievances);

If tribunal proceedings have been commenced, the claimant can seek to have her ex-

isting claim amended under normal principles; or

If permission to amend is not granted, the Claimant could start afresh using the new comparator and, if the matter is not resolved through the grievance procedures, making a fresh tribunal claim.

Unfair Dismissal

Statutory Dismissal Procedure

Section 111(2) of the Employment Rights Act 1996 Provides that an employment tribunal will not consider an application for Unfair Dismissal unless it is presented within a period of 3 months from the date of termination of employment or within such other period as the tribunal considers reasonable if it was not reasonably practical to present the complaint within that 3 month period.

In the case of *Ashcroft v Haberdasher's Askes' Boys School* The result of an internal appeal was only given 6 hours before the end of the 3 month period. As a result of this, at the expiry of the 3 month period there was no

pending appeal and so no automatic extension of 3 months.

The EAT stated, that Mr Ashcroft had the anticipated protection of regulation 15 of the *Employment Act 2002 (Dispute Resolution) Regulations 2004* (extending time for three months) up until 6pm on the last day of the limitation period, and given the purpose of the statutory disciplinary and grievance procedures was to discourage tribunal proceedings before an internal appeal was dealt with, it was not reasonably practicable to lodge tribunal proceedings within the normal three month period.

Competition Law

The Office of Fair Trading (OFT) have the power to fine businesses that break the law up to 10% of their annual worldwide turnover and individuals found to be involved in cartels can be fined and imprisoned for up to five years and directors of companies that breach the prohibitions can be disqualified for up to 15 years. Also, third parties (including injured competitors, customers and consumer groups) can bring damages claims against them.

Towards the end of 2007 the OFT brought charges against 3 executives of a marine hose sector with cartel offences under the Enterprise Act 2002. This is the first case in which the OFT have exercised their powers since cartel offence came into force in June 2003. In December 2007 the 3 men entered a plea bargain with The Department of Justice which allows them to return to the UK to face charges brought by the OFT. They will serve a combined sentence of

74 months in US imprisonment in addition to US\$275,000 in fines. If found guilty under UK law they could face a further 5 years imprisonment each and unlimited fines.

If the European Commission's investigations find them guilty under Article 81 of the EC Treaty, the companies involved will also receive fines of up to 10% of the group annual global turnover.

"...individuals found involved in cartels can be fined and imprisoned for up to 5 years..."

What businesses can do...

In addition to its own research and market intelligence, the OFT relies on complaints to help them in enforcing competition law.

The OFT runs a leniency programme for businesses that come forward with information about a cartel in which they are involved.

Businesses that comply with competition law will also avoid the serious consequences of non-compliance.

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W H Law LLP have specialists able to assist and advise both employers and employees in all aspects of Employment Law. We take a client focused approach to business and look at both the legal and practical implications associated with Employment decisions.

We provide a holistic service to businesses, focusing primarily on the assessment and management of the risks involved in employing people within a business and providing assistance with litigation where necessary.

We provide day-to-day advice, prepare and review documents (including service agreements, contracts and all procedures and policies) and conduct litigation on your behalf. We also offer training for managers and personnel officers, with particular focus on diversity issues in addition to post termination issues such as employee competition and breach of fiduciary duties.

We can offer these services through a bespoke programme with a monthly cost, negotiated with you, or on an ad hoc basis according to your needs.

Re-branding

On 1 December 2007 Employment Tribunal "Chairmen" were re-titled as "Employment Judges"

The Department of Trade and Industry became DBERR, the Department for Business, Enterprise & Regulatory Reform.

The new Commission for Equality and Human Rights (CEHR) re-named itself the Equality and Human Rights Commission (EHRC).

Corporate Manslaughter - February Seminar

The Corporate Manslaughter and Corporate Homicide Act 2007 creates a new statutory offence in England, Wales and Northern Ireland of "corporate manslaughter" and in Scotland of "corporate homicide". It will come into force on 6 April 2008.

Penalties will include an unlimited fine, the imposition of a publicity order and remedial orders.

Directors of firms will be personally liable if any of their employees are convicted of manslaughter in relation to their business.

A company will be guilty of the new offence if the way in which its activities are managed or organised, by its senior management, amount to a gross breach of the duty of care it owes to its employees, the public or other individual and those failings caused the person's death. In essence the crime is committed where

an organisation owes a duty to take reasonable care for a person's safety, but the way in which its activities have been managed or organised amounts to a gross breach of that duty and causes death.

Senior management is defined in the Act as "the persons who play significant roles in (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities."

An organisation will be guilty if the management failure amounted to a "gross breach" of the duty of care owed to the deceased. When determining this, the jury should consider whether the evidence shows that the company's conduct fell far below that which could reasonably have been expected of it. Factors that will be

taken into account include whether the organisation failed to comply with any relevant health and safety legislation, and if it did, how serious the failure was, and how much of a risk of death it posed. The jury may also consider the extent to which the evidence shows there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged, or tolerated, such failings.

W H Law LLP will be holding a seminar in February on Corporate Manslaughter and how to minimise any potential risks.

Seminar

Sponsored by

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For further information or to book a place please contact our office.