



As another year draws to a close, we thought it might be a good idea to give a brief roundup of the highlights of the year together with what to expect in 2009.

This year has seen some fundamental changes in employment and health and safety law. In April, we saw the introduction of the Corporate Manslaughter Act, which was the subject of our seminar in February, and the extension of employees' rights under the Information and Consultation of Employees Regulations 2004. There have been some fairly dramatic decisions, such as the House of Lords decision in *Malcolm*, overruling the long established comparator test in disability-related discrimination cases and the decision of the ECJ in *Coleman v Attridge Law*, which has established that there can be discrimination by association. There have been many cases on the statutory dispute resolution procedures, which are on their way out, to be replaced in April 2009 with a simpler, more practical approach to dealing with disputes within the workplace – many will breathe a sigh of relief! We will be bringing you more information on the changes in the first newsletter of 2009.

For WH Law LLP too it has been a busy and hugely successful first year. In October, after much hard work and dedication from the whole team, we received the Lexcel accreditation, which has brought tangible benefits to our business and to our clients.

Now, in December, we are celebrating our first anniversary and extend our thanks and the Season's greetings to all of you, who have supported us and worked with us. We wish you all the best for the festive season and 2009!

Mike Rogers

Sarah Pugh

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## Health and Safety (Offences) Act 2008 comes into force

One of the latest laws that will start from January 2009 is related to health and safety. The Health and Safety Offences Act 2008 is a new piece of legislation which will make employers personally accountable for the safety of their employees and also give courts greater powers of sentencing and increase fines for those who breach health and safety legislation.

There are no changes to the existing legal duties of businesses. However, the Health & Safety Executive has made it clear that their enforcement policy will target "those who cut corners, gain commercial advantage over competitors by failing to comply with health and safety law and who put workers and the public at risk."



The new law will place personal blame on employers as opposed to punishing the business. They include jail sentences of up to two years for individuals found to be at blame. On top of the jail sentences, the maximum fine that can be imposed by magistrates has increased to a staggering £20,000 which is four times the current limit.

### KEY ACTIONS:

- Review your policies and ensure that you have the right ones in place. For example, if you don't want drivers to use handheld mobile phones, get a car kit installed and have a

clear policy stating the penalties if they are caught using a handheld mobile phone. Ensure you are following official guidelines in all operations.

- Ensure that both you and your employees have adequate health and safety training.
- Be 100 per cent certain now that everything your business does is correct and legal.

## Looking ahead to the changes in 2009...

### Annual Increase in Compensation Limits

The annual increase in compensation limits have now been published for dismissals and other trigger events occurring after 1st February 2009. The main increases are as follows:

- a 'week's pay': £330 to £350
- compensatory award: £63,000 to £66,200
- maximum redundancy payment: £9,900 to £10,500

### DIARY OF EVENTS

- ~ Minimum statutory holiday entitlement increases to 28 days - 1 April 2009
- ~ Repeal of the dispute resolution procedures - 6 April 2009
- ~ Revised ACAS Discipline and Grievance Code of Practice comes into force - 6 April 2009
- ~ Right to request flexible working is extended - April 2009
- ~ Trade union membership rules are amended - Date to be confirmed
- ~ Increased penalties for failure to pay national minimum wage introduced - Date to be confirmed
- ~ Centralised vetting system for people working with children and vulnerable adults comes into force - 12 October 2009

\*\*FURTHER DETAILS WILL FOLLOW IN 2009\*\*

## The Risks of Using “Last in First Out” Selection Criteria for Redundancy

Many organisations often use “last in first out” (LIFO) as a method of selecting employees for redundancy. After the introduction of the Employment Equality (Age) Regulations 2006 it was identified that LIFO is potentially discriminatory on grounds of age. The criterion has also been identified as being indirectly discriminatory on the grounds of both age and sex.

There are unquestionably advantages to LIFO: it is objective, easy to apply, readily understood and widely accepted.

In general it is accepted that the criterion is potentially indirectly age discriminatory as the younger an employee is, the less opportunity he will have had to accrue service. It is then clear to see how the youngest employee could argue that he had been indirectly discriminated against on the grounds of his age, if he has the shortest amount of service and is selected for redundancy. However, it is obviously not always the case that the youngest employee has the shortest amount of service. If the individual made

redundant, on the basis of this selection criterion, was not the youngest employee, it appears that they would struggle to satisfy all of the



conditions laid down in the 2006 regulations. He would have difficulty identifying a particular age group, of which he is a member, which is disadvantaged by LIFO.

Nevertheless, just because the use of LIFO will not be discriminatory in every redundancy situation, it does not mean that it should be used. Employers should recognise that applying different selection criteria to that of LIFO is crucial, as the risk of a challenge is enough to justify such a change.

In some situations it is possible for the employer to justify the discrimination, thus providing a defence to their actions.

- **Proportionate means of achieving a legitimate aim**

Justification is said to be achieved if the employer can demonstrate it to be a ‘*proportionate means of achieving a legitimate aim*’. In order to satisfy this, employers need to show a fair method of selecting a candidate or candidates for redundancy from the selected pool of employees. It appears reasonable to say that there is an aim and it is legitimate. However, it appears unlikely that the use of LIFO would be considered to be proportionate. There is a considerable range of selection criteria that can be used by employers in place of LIFO and therefore it should not be difficult for employers to consider non-discriminatory means of selecting an employee for redundancy.

Employers should be aware that LIFO is also potentially sex discriminatory. It is generally recognised that, mainly as a result of children and raising families, women are more likely to have shorter service than men and so are at risk of being selected for redundancy in accordance with LIFO criteria. Again, LIFO will not be sex discriminatory in every case but it does expose employers to the possibility that it will be.

In conclusion it appears that the use of LIFO has reached the end of the road. Not only does it open up employers to the risk of sex discrimination and age discrimination claims, it also fails to always achieve the best results for employers, in terms of maintaining a well balanced team encompassing all of the necessary skills. The consequences of using LIFO are potentially very serious and whilst it may seem like the easiest option, it may end up being the most problematic option in the long run.



If you require any further advice on this or on redundancy in general, we would be more than happy to discuss this with you.

## Respondents’ details must be published by the Employment Tribunal

Following an application under the Freedom of Information Act, the Information Commissioner’s Office the Department of Business Enterprise and Regulatory Reform (BERR) has been ordered to disclose details of respondents (which could include organisations’ and individuals’ details) to all Employment Tribunal claims lodged since October 2004.

The decision comes in response to a dispute between BERR and a complainant who had requested, under the Freedom of Information Act 2000, a list of the names and addresses of respondents to employment tribunal claims presented since October 2004. Before 2004, the public could access both respondents’ and claimants’ details via the Register of Employment Tribunal Applications, which was subsequently abolished. BERR refused to disclose the information, arguing that disclosure was against the public interest because it would reduce the chance of settling disputes privately and informally, potentially cause unwarranted damage to the respondents’ reputations and such exposure would reduce the chance of resolving disputes by organisations seeking to represent them.

The Information Commissioner rejected those arguments. Although it was accepted that BERR could invoke the s36 (2) (c) exemption, the Commissioner did not accept BERR’s weighing of the public interest considerations. It was held that the public interest in maintaining this exemption was ‘very weak’ and the concerns were outweighed by the “...public interest in “open justice” so that the details of the cases were brought before the courts and tribunals should normally in the public domain unless there is a good reason for confidentiality.” The information sought by the complainant was made public via the Register from 1965 until October 2004 and BERR had not provided any evidence that disclosure of the information sought during this period did have any of the adverse effects that it now considers disclosure would have. The relevant information would therefore be disclosed.

Employers may take some comfort from the fact the decision does not set a legal precedent. There are no plans to make details of Employment Tribunal applications readily available to the public. To obtain such details, an individual would have to make a specific request under the Freedom of Information Act.

# Stop Press!

## Advice following some recent cases...

### Time Off for Emergencies

In *The Royal Bank of Scotland (RBS) v Harrison*, the Employment Appeal Tribunal (EAT) clarified the position regarding entitlement to parental leave (under s57A(1)(d) of the Employment Rights Act 1996) due to unexpected disruption or termination of care arrangements for dependants, by stating that it is not limited to last minute unavailability or emergencies.

In the case, *RBS* refused their employee, Mrs. Harrison, parental leave on the grounds that the right to time off to care for dependants only arose in "a sudden and unexpected emergency". They contended that Mrs. Harrison had had two weeks' notice of the problem and therefore, was not entitled to parental leave.

The EAT, however, like the Employment Tribunal, disagreed.



They held that the emergency need not be 'sudden' or 'in emergency', only unexpected. Whilst Mrs. Harrison had had 2 weeks' notice of the problem, the fact still remained that the problem was unexpected. The only

significance the 2 weeks' notice had in this case, and the significance time factor has in general, is in relation to whether the time off is essential. Any notice received of the forthcoming problem obviously provides the employee with time to make other arrangements. In this case, Mrs. Harrison had tried to make alternative arrangements, but her actions had proved unsuccessful. In view of this, the EAT held that Mrs. Harrison had been entitled to parental leave as her emergency was unexpected, and it was necessary for her to take the time off to deal with the issues arising out of the emergency.

The EAT's decision confirms that s57A (1) (d) applies to all disruption to childcare which cannot be planned for. The emphasis placed on whether time off is necessary and that gives tribunals the flexibility to consider requests for time off on a case-by-case basis, considering the employee's specific circumstances.

### **'No show' clause in employment contract is not a penalty clause and is enforceable as liquidated damages...**

In *Tullet Prebon Group Ltd v Ghaleb El-Hajjali [2008]* Tullet entered into an employment contract with Mr El-Hajjali (EH) considering him to be a key player in generating increased profit for the company. The contract included a "no show" clause, requiring him to pay a sum equal to 50 per cent of his net basic salary if he failed to start employment. Shortly after signing the

contract, EH changed his mind about taking up employment with Tullet and decided to remain with his existing employer.

On EH's subsequent no show, the High Court upheld the clause as a liquidated damages clause. It was not a penalty. Among other factors the Court gave particular attention to the fact that EH had received considerable pre-contract legal advice and on the facts found that, as the parties were equal negotiating parties, the amount due was not "extravagant or unconscionable" and, while no agreement had taken place as to the amount due, Tullet had carried out an assessment of the cost of employing EH versus the predicted return.

Prospective employers may rely on these clauses to protect themselves from high-level or significant performers playing the job market. Current employers may find pressure on them to settle such clauses where an employee has accepted a post elsewhere but is then persuaded to stay.

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### **Alliance 4 the Black Country: Keeping local talent in the local area.**

Since the Alliance was launched by Black Country Chamber of Commerce last year it has focused on bringing together the professional sectors of the Black Country. The Alliance celebrated its first birthday at the end of October and over the last year it has gone from strength to strength.

A particular topic has grabbed the attention of Alliance members: 'how can we keep local talent in the local area?' Future partners and MD's of our firms should be encouraged to stay here rather than flee to the big cities.

Throughout early 2009 the Alliance will be promoting a number of events to highlight the excellent work of local programmes and initiatives for young talent in the Black Country. We will in turn educate local firms on how to access these resources and the young talent that they produce.

Sarah Pugh, Partner at WH Law LLP in Dudley and Chair of the Skills & Collaboration group for the Alliance, said "I am keen to ensure that the needs of local business in the West Midlands are met by local school leavers and graduates and that the HE & FE institutions are developing graduates with the skills that businesses need".

In early 2009 the Alliance will be holding a skills roadshow to bring together all of the organisations that contribute towards helping both businesses and graduates. Sarah Pugh says: "the roadshow is a win-win for both business and graduates."

Details on the skills roadshow and other events can be found on [www.alliance4theblackcountry.co.uk](http://www.alliance4theblackcountry.co.uk). For further information please contact Alliance Coordinator Gemma Butler on 07810 377833 or email [gemmabutler@blackcountrychamber.co.uk](mailto:gemmabutler@blackcountrychamber.co.uk)

## Tis' the Season to avoid a legal hangover...

### *How to survive the legal pitfalls of the office Christmas Party*

That time of year is almost upon us when employers must consider organising the office Christmas party. How can you ensure everyone is kept happy, religious pitfalls are avoided and all goes smoothly? Christmas parties can provide grounds for litigation against employers who fail to take basic precautions. So, how can companies protect themselves from potentially costly and damaging claims? Below is our brief guide to avoiding the party pitfalls...

If the organised office party takes place outside of working hours and away from company premises, the usual laws which protect workers and their rights still apply. If an employee is injured or abused in any way during an office party the company may well be legally liable. Companies can take several measures to combat this:

- Review the company HR policies and handbooks and be aware of the legislation that applies. It may be helpful to develop a specific HR policy that relates to office parties.
- In the run up to the party, send a memo around to staff reminding them clearly of what conduct is acceptable and unacceptable.
- Just as with any other work-related activity, a risk assessment must be conducted to identify potential hazards.
- Intoxication may cause problems. If you can control the flow of alcohol, then do so. But in any event remind your staff of their duty to act in accordance with the company's alcohol and substance abuse policy.
- Consider making travel arrangements to get employees home after the event. You should take all reasonable steps to ensure employees do not attempt to drive home whilst intoxicated.
- Review your company insurance policies to ensure that they cover your Christmas party activities, including the legal liability pitfalls.

Where parties are held on office premises, there is likelihood that office equipment will get damaged. It is therefore, generally recommended that the party is held away from company premises. Not only does this avoid any additional workplace risks associated with the event, it also results in a better atmosphere. However, be aware that parties held off-site also bring risks of damage and subsequent compensation payments – for example



where an overnight hotel stay is offered to staff.

Employee relations are a high risk area. Employers need to ensure that the parties do not involve

activities which could potentially damage employee-to-employee and/or employer-to-employee relationships. The office party provides a minefield for long-term conflicts arising from party behaviour such as sexual harassment; verbal abuse and staff fights. Although these issues are fairly difficult to control, it would be useful to have a clear HR policy outlining what is unacceptable behaviour and the possible sanctions for those who offend.

Sensitivity needs to be shown to other religions. It may be better to rename the Christmas Party as simply the 'Office Party' or the 'Holiday Party' and perhaps best to avoid decorations with religious themes or messages. It is sensible to make the party optional and therefore allowing those staff who may feel uncomfortable celebrating a festival of another religion to avoid the situation.

Although the annual office party is a potential legal minefield, there are proactive measures employers can take to reduce the risk of unforeseen eventualities during and after the event and thus, ensuring the party fun in 2008 does not become an expensive headache in 2009!

## **SERVICES**

*WH 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 advice and consider the practical as well as the legal implications of decisions made within your business.*

*We provide a holistic service to businesses, focusing primarily on the assessment and management of the risks involved in employing people within a business, with particular focus on diversity issues and post-termination issues such as employee competition and breach of fiduciary duties. We prepare and review documents (contracts, policies and procedures) and conduct litigation on your behalf.*

*Our services include bespoke training for managers and personnel officers and running seminars.*

*We can offer these services through a programme tailored to your needs with a monthly retainer, negotiated with you, or on an ad hoc basis according to your needs*

### **Contact us at:**

WH Law LLP  
Trafalgar House  
47-49 King Street  
West Midlands DY2 8PS

DX 12741

Tel: 01384 216920

Fax: 01384 458131

[www.whlawllp.co.uk](http://www.whlawllp.co.uk)