

Employment Law Update – May/June 2008

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- Agency workers

A number of European laws have in recent years been introduced into the English legal system in order to safeguard the rights of agency workers (ie those who are introduced to an employer by a third party employment business (the agency) to work for one or more of its clients (the employer/ "end user"), typically on a temporary basis). This has resulted in various cases coming before the Courts and Tribunals, particularly on the question of whether the relevant agency worker can in practical terms be considered an employee of the employer. In certain cases, the Courts and Tribunals have assumed a contract exists directly between the agency worker and employer. One particular case (*James -v- Greenwich Borough Council* [2006]) is likely to prove a landmark judgment in this area, having been heard in the Court of Appeal in October 2007.

It is important to note both for employees and employers alike that where, over the passage of time, the agency worker has grown into a position which involves taking instructions directly from the employer, with the agency businesses itself gradually fading into the background, a contractual relationship between the worker and the employer may be said to have arisen. Depending upon the circumstances of the case, this may result in the full range of employment-related rights becoming available to the employee. For businesses, this of course represents a disincentive to employing agency workers, which may previously have been considered favourable in the interests of maintaining flexibility and reducing the risks of employment-related claims arising.

- Statutory disciplinary procedure

We have in previous Updates (latterly in the April 2007 Update) provided guidance on the statutory disciplinary and grievance procedures. It is worth noting that, not surprisingly, the disciplinary procedures in particular have been heavily criticised not only by businesses but also by the Employment

Tribunals themselves, for their inflexibility and prescriptive nature. It is anticipated that the procedures themselves will be repealed at some point in 2010 (although the Government's target date is April 2009). However, for the present time these antiquated procedures remain in force and employees and employers should not hesitate to contact Leonard Gray LLP's Employment Law specialists for guidance on the manner in which the procedure should operate in practice.

- Age discrimination – retirement

Two cases have recently been considered by the Employment Tribunals involving age discrimination claims brought by employees who were compelled to retire by the age of 65 years. Since the coming into force of the Employment Equality (Age) Regulations 2006, it has been unlawful for employers to discriminate against employees on the grounds of age, unless the discriminatory act in question can be justified as achieving a "legitimate aim".

The lesson to learn from the case recently heard is that, although compulsory retirement for employees who are 65 years old is still potentially lawful and has in theory survived the onslaught of the Age Discrimination Regulations, the justification for adopting such a policy must be clear and carefully thought out by employers. One of the clear messages that the Tribunals have sent out in the cases referred to above is to ensure that employees are carefully and clearly made aware of the reasons for such a policy being adopted (eg succession planning for key roles within the business, effective performance management). Failure by employers to give proper consideration to these points can result in expensive employment-related claims being brought, as the employer in one of the two cases (the Ministry of Justice no less) was left to experience.

- Statutory compensation limit increases

On 1 February 2008, the maximum compensatory award for unfair dismissal claims was increased to £63,000. The cap on a "week's pay" for the

purposes of calculating a basic award in the context of an unfair dismissal claim and also in the context of a redundancy payment has increased from £310 to £330 per week.

- Hearing of Tribunal claims

It may be of interest to both employees and employers that the Government is seeking to introduce a new fast track system for specific types of employment-related claims. Separate jurisdictions are likely to be set up in the near future for claims involving relatively straightforward issues such as unlawful deductions from wages, breach of contract and redundancy pay, the intention being that such claims will not be determined by a formal Tribunal hearing. The main driver behind these proposals is the control and reduction of legal costs.

- Redundancy

In the current economic climate it is inevitable that both employers and employees alike are likely to be experiencing the challenges and difficult issues that arise from the making of redundancies. The law on redundancy confers protection on certain employees from being treated unfairly during any redundancy process. Failing to get procedures correct can result in highly expensive claims being brought by employees. If you are or are likely to be experiencing a redundancy process either as an employer or employee then you should not hesitate to contact Leonard Gray LLP's specialist Employment Law team. You may be an employer who needs to ensure your procedures are compliant with the current law; alternatively you may be an employee who is considered making an employment claim. Please call us at your earliest convenience for advice.

If you have any queries arising from the above comments and wish to discuss any particular matters that may currently be affecting your business or you are an employee who has concerns relating to the issues detailed above, then please do not hesitate to contact Leonard Gray LLP's Head of Employment Law, John Appleby, for further assistance.

