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EMPLOYMENT TEAM NEWSLETTER

Season's Greetings and Happy New Year.

This edition of the newsletter looks forward to some key cases and changes to expect in 2009 and looks back on some important cases in 2008. If you have any suggestions or ideas for our coming editions please contact Louise Poppelwell, Marketing Manager at Hardwicke Building on louise.poppelwell@hardwicke.co.uk or phone Louise on 020 7242 2523.

5 employment cases to remember from 2008

1. The ECJ in *Coleman v Attridge Law* [2008] IRLR 722 held that where an employer treated an employee who was not himself disabled less favourably than another employee who had been or would be treated in a comparable situation, and it was established that the less favourable treatment of that employee was based on disability of his child whose care was provided primarily by that employee, such treatment was contrary to the prohibition of direct discrimination laid down by article 2(2)(a) of Council Directive (EC) 2000/78. The prohibition of harassment laid down by article 2(3) was also capable of covering a primary carer harassed for a reason related to the disability of his child.
2. *LB Lewisham v Malcolm* [2008] IRLR 700, the HL gave its rulings on the correct comparator for the purpose of section 24(1)(a) Disability Discrimination Act 1995 and on the requirement of knowledge (actual or imputed) of the disability for a finding of unlawful discrimination.
3. In *Corr v IBC Vehicles Ltd* [2008] UKHL 13, the HL upheld the CA's decision that the widow of a man who committed suicide when severely depressed as a result of injuries sustained in a workplace accident was entitled to recover damages under the Fatal Accidents Act 1976.
4. The CA held in *Oyarce v Cheshire County Council* [2008] EWCA Civ 434 that the reversal of the burden of proof in the Race Relations Act 1976, section 54A did not extend to cases where the complaint was of victimisation.
5. In *James v Greenwich LBC* [2008] EWCA Civ 35, the CA approved the EAT's decision that the ET had been entitled to hold that there was no implied contractual relationship between Greenwich and an agency worker where the provision of work by Greenwich and the performance of that work by the agency worker was explained by their respective express contracts with an employment agency and it was not necessary to imply the existence of another contract in order to give business reality to the relationship between the parties. Whether an "agency worker" is an employee of an end user must be decided in accordance with common law principles of implied contract.

Important changes to expect in 2009

On **8th December 2008**, the Equal Pay and Flexible Working Bill to amend the Equal Pay Act 1970 and to make provisions about flexible working had its first reading in the House of Lords.

From **1st February 2009** The Employment Rights (Increase of Limits) Order 2008 SI 2008/3055 increases awards in employment payments and awards where the event giving rise to the entitlement to compensation or other payments occurs on or after 1st February 2009. The limit on the amount of the compensatory award for unfair dismissal will increase from £63,000 to £66,200. A week's pay for calculating statutory redundancy payments, the basic award etc will increase from £330 to £350. A copy of the 2008 Order is at

www.opsi.gov.uk/si/si20083055_en_1

From **1st April 2009**, the statutory minimum holiday entitlement will increase from 24 to 28 days, including bank holidays, for those working five days per week, by virtue of the Working Time (Amendment) Regulations 2007.

On **13th November 2008**, the Employment Act 2008 received Royal Assent. It is anticipated that the major provisions set out in sections 1 to 7 will come into force on 6 April 2009, when the Employment Act 2008 (Commencement No 1 and Transitional and Savings provisions) Order 2008 is approved. The EA 2008 will abolish the disciplinary and grievance procedures, and put in place a power for employment tribunals to increase or decrease awards of compensation for failure to follow the requirements of a relevant statutory Code of Practice.

On **6th April 2009**, the new ACAS Code of Disciplinary and Grievance Procedures will come into effect. The current draft provides that the ET will be able to increase or decrease any award they have made by up to 25% if a party unreasonably fails to follow the guidance set out in the Code.

ECJ employment cases to watch out for in 2009

In July 2008, the Advocate-General handed down his opinion in *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform (C-388/07)* in the Heyday challenge on whether the inclusion of the default retirement age, which allows employers to retire individuals at 65 or over, in the Employment Equality (Age) Regulations 2006 makes them incompatible with the Framework Directive. His opinion was that:

- The Directive does apply to national rules, such as the regulations, which allow employers to dismiss employees at or over 65 by reason of retirement;
- The Directive also allows members to introduce legislation which provides that a difference of treatment on the grounds of age can be justified;
- a national rule which allowed employers to dismiss employees aged 65 or over for retirement can, in principle be justified by a legitimate aim which relates to employment policy and the labour market, and the means of achieving that aim are appropriate and necessary for the purpose.

The ECJ's ruling is expected in 2009. The High Court will then need to address the issue of the default retirement age in the UK and determine whether the rule which currently allows employers to retire employees at or over 65 is in fact justified.

In Stringer and others v Her Majesty's Revenue and Customs [2008] the Advocate General gave her opinion on the HL's questions as to whether or not a worker who is absent on sick leave is entitled to take paid annual leave during the period of sick leave and the extent to which a worker who has been absent on sick leave for all or part of the leave year in question is entitled to an allowance in lieu on termination of the employment relationship. Her opinion was that:

- A worker on indefinite sick leave is entitled to designate a future period as paid annual leave, during a period in which he would otherwise be on sick leave. However, he may not take this leave during a period in which he would otherwise be on sick leave.
- Where an employment relationship is terminated, workers are in any event entitled to a compensatory payment as a replacement for leave which has been acquired but not taken due to illness (allowance in lieu). This is also the case where the worker was on sick leave for all or part of the leave year in question. The amount of the allowance in lieu that the worker receives is equivalent to that of his normal pay.

Following the ECJ's decision, the House of Lords will have to determine whether an entitlement to annual holiday under the Working Time Regulations can be claimed as an unlawful deduction from wages, with its considerably more advantageous time limit regime, or whether such a claim can only be brought under the WTR.

Upcoming Seminars

The Employment Team will be continuing its program for employment professionals through the Chartered Institute of Personnel and Development (CIPD) in 2009.

If you would like our members to provide you with in-house CPD-accredited seminars on particular employment topics then please do not hesitate to contact Louise Poppelwell on 020 7242 2523 or email louise.poppelwell@hardwicke.co.uk for further information.

This newsletter was edited by Morayo Fagborun Bennett. For further information on the Hardwicke Employment Law Team and the services we offer, please visit our website at www.hardwickebuilding.co.uk

The members of Hardwicke's Employment Team have specialised skills and experience in all aspects of employment law including matters such as discrimination, unfair dismissal and redundancy, restrictive covenants as well as non-contentious work. We represent both employers and employees via conventional means in addition to direct access.

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