



October 2009 Update  
Employment Law Newsletter  
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Consultation, Legislation and Statistics

Paternity leave rights to be extended

Fathers would be able to take up to six months' paternity leave - three months paid - under Government proposals to allow parents to share entitlements, it was announced today. The new right, due to come into force from 2011, would apply during the second half of a baby's first year if the mother returned to the workplace. The Government conceded that take-up was likely to be low, with less than one in 16 fathers expected to leave work for a period of full-time childcare. At present fathers are entitled to two weeks' paid leave and mothers to 52, 39 of them paid.

The move was hailed by Prime Minister Gordon Brown in his speech to the TUC in Liverpool. "No Tory government has ever given a single day of paternity leave. This Labour government gave men the right to two weeks' paternity leave," he told trade unionists.

"Now, from April 2011, we will give fathers the right to take up to three months' additional paid paternity leave during the second six months of a child's life, if the mother has returned to work, because Labour believes in giving couples more freedom, dads more rights and children more time with the two people who love them most."

Extended paternity rights were promised in Labour's 2005 general election manifesto alongside a "goal" to extend paid maternity leave to a full year. Mr Brown said Labour "retain our ambition" to that move although it was not included in today's proposals, which will now go out to consultation.

Business Minister Pat McFadden said the impact on businesses would be small, affecting less than 1 per cent of small firms. "We will work with business to make sure any changes are introduced in a way that minimises burdens and gives them predictability in the provision of leave," he said.

"As family-friendly policies have been introduced we have seen more retention of mothers in their current jobs when they go back to work."

Harriet Harman, Minister for Women and Equality, said: "This gives families radically more choice and flexibility in how they balance work and care of children, and enables fathers to play a bigger part in bringing up their children."

The rights will apply to parents of children due on or after April 3, 2011. Estimated take-up is less than 6 per cent.

Six months of maternity leave to be transferable to father

The Government has announced that it will launch a consultation on allowing new mothers to transfer some of their maternity leave entitlement to the father.

Consultation on implementing regulations will begin shortly. The Government intends that the law will be in force by April 2010 and will be effective for parents of children due on or after 3 April 2011, to allow employers time to adjust to the measures.

ECJ hands down guidance on collective redundancy consultation

In *Akavan Erityisalojen Keskusliitto AEK ry and ors v Fujitsu Siemens Computers Oy* the ECJ has clarified a number of points relating to the duty to inform and consult employees about collective redundancies under the Collective Redundancies Directive (No.98/59). The ECJ held that an employer triggers the duty to consult when there is a decision or change of activity which compels the employer to plan for redundancies. In a group of companies the obligation to consult falls on the subsidiary within which redundancies may be made, even if the decision was made by the parent company. Furthermore, the obligation to consult is not dependent on the employer being able to supply all necessary information to employee representatives.

Fujitsu Siemens Computers Oy (FSC) is a Finland-based subsidiary of Fujitsu Siemens Computers (Holding) BV (the parent company). On 7 December 1999 the executive council of the parent company proposed selling one of FSC's factories. On 14 December the board of directors decided to support this proposal, and FSC's board proposed consultations to take place from 20 December 1999 to 31 January 2000. On 1 February 2000 FSC began making employees redundant. The employees, via their trade unions, claimed that the decision to make the redundancies was taken on 14 December at the latest, before consultation with the workforce began. FSC had therefore failed to properly consult them as required by the Directive. FSC asserted that the decision had in fact been made on 1 February 2000 as, until then, alternatives such as sale or continuation in partnership with another undertaking were still under consideration. The Finnish court of first instance and the appeal court both accepted FSC's arguments and held that there had been genuine and appropriate consultation. On the employees' further appeal, the matter was referred to the ECJ for clarification of the obligations under the Directive. In particular, the referring court wanted to know at what point the obligation to consult arises when decisions likely to give rise to collective redundancies are taken within a group of undertakings.

The ECJ clarified the meaning of an employer 'contemplating collective redundancies' in Article 2 (1) of the Directive, which triggers the obligation to consult. The references in Articles 3 and 4 of the Directive to 'projected' collective redundancies confirm that the obligation arises when there is an intention to make collective redundancies. This intention will be deemed to form when the employer adopts 'strategic decisions' or 'changes in activity' compelling the employer to contemplate or plan for redundancies. By virtue of Article 2(4), this is so whether the strategic decision is taken by the employer or by the parent company, although it is always the subsidiary employer who is obliged to consult and inform its employees, even if it is not properly and immediately informed of the relevant decision by the parent company. However, in order for the obligation to consult to arise, the subsidiary within which the redundancies may be made must have been identified by the parent company.

In so holding, the ECJ also confirmed that the obligation to consult does not depend on the employer being able to supply the employees' representatives with all the information required by Article 2(3)(b) of the Directive. The employer may supply that information during the consultation as and when it becomes available. Such flexibility is essential to enable employee representatives to be fully involved in the consultation, as it requires any new and relevant information to be supplied up until the end of the consultation process. In the light of the ECJ's decision the referring court will now decide whether FSC's consultation was compliant with the Directive.

Further information:  
<http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=Submit&numaff=C-44/08>

AG's opinion: age limit on recruiting firefighters is a genuine occupational requirement

In *Wolf v Stadt Frankfurt am Main* (C-229/08) the Advocate General has given the opinion that a German law restricting applications to join the fire service to those under the age of 30 could be justified as a legitimate employment policy under Article 6(1) of the EC Equal Treatment Framework Directive (No.2000/78). He also considered that the discriminatory policy could be defended as a genuine occupational requirement under Article 4(1). The Advocate General considered that the discriminatory treatment could be justified by the need to establish a balanced age range within the workforce so as to maintain an operational service. The German government's evidence showed that the physical demands of the work involved meant that, in practice, hardly any firefighters past the age of 50 were still active in frontline fire and rescue work. The Advocate General therefore considered the age limit reasonable to ensure that there was a continuous supply of younger firefighters to replace those who had been moved on to less demanding duties.

The Advocate General also thought that the age bar was rendered lawful by Article 4(1), which allows Member States to provide that a difference of treatment based on an age-related characteristic does not amount to unlawful discrimination if the characteristic is a 'genuine and determining occupational requirement' (GOR). The Advocate General took the view that, given the high level of physical ability required for the job, which naturally diminishes with age, it was a GOR that new recruits be under 30. Furthermore, it was proportionate to apply the requirement, in that it ensured that new recruits could give sufficiently long service on fire and rescue duties. It will be interesting to see if this opinion is adopted by the full court when it gives the final ruling in this case. On the Article 6(1) point, it must be considered difficult to justify a blunt recruitment policy, such as an age bar, by reference to the link between age and physical or mental capability. For example, in *Baker v National Air Traffic Services Ltd* (Brief 876) an employment tribunal decided that an age limit of 36 on applicants to train as air traffic controllers could not be objectively justified. It considered that evidence showing a link between age and a decrease in the cognitive functions necessary to be an air traffic controller was of 'dubious' value and was in any event insufficient to justify excluding everyone aged 36 or over. However, justification arguments are often finely balanced. The German government here provided medical and statistical evidence to support its choice of age cut-off and so the Advocate General's opinion on this point is potentially well reasoned.

By contrast, the Advocate General's conclusion on Article 4(1) is less readily understandable, given that the GOR defence should be narrowly construed. If there is a determining requirement for the job in the present case, it is a requirement of physical fitness and stamina. It can readily be accepted that having these characteristics is an absolute requirement for frontline work in the fire service, and it is indeed arguable that these are characteristics related to age, within the scope of the GOR defence. However, it must be thought that the link between these characteristics and age is not so direct that the latter can be considered a reliable indicator of the former. Furthermore, on the German government's evidence, it is not the case that applicants between the age of 30 and 50 do not meet the physical capability requirement, it is rather that they will not continue to meet it for as long as younger applicants. While the need for new recruits to spend a justification defence of time in employment may properly be taken into account for the purpose of a reasonable length under Article 6, it does not seem to fit into a natural reading of Article 4.

Source: ECJ 3/9/2009

RACE TO DISCLOSURE

Canadian Imperial Bank of Commerce v Beck

The test for the law on disclosure is whether or not the order to disclose is "necessary for fairly disposing of the proceedings". In *Canadian Imperial Bank of Commerce v Beck*, the Court of Appeal said that the bank must disclose correspondence (whether confidential or not) between senior management at the bank as the request was clearly not a "fishing expedition".

Mr Beck worked as head of marketing for the bank from January 2002 to May 2008 when he was made redundant. He claimed race discrimination, arguing that the bank made a "sharp distinction" in

BASIC FACTS

the way it treated people of Canadian nationality or origin and/or who were hired in Canada compared to anyone who was not. Mr Beck was German and was hired in London. He obtained a witness statement from a former senior employee - Ian Howard - which stated that he had "the clear impression" that the bank thought it was more important to look after its Canadian employees. The statement referred to a conversation Mr Howard had with a very senior member who agreed that the bank did feel it had a moral obligation to look after Canadians based in the UK, over and above other employees.

Mr Beck then asked the employment tribunal to order the bank to disclose all correspondence between senior management regarding the decision to offer guarantees and/or redeployment opportunities to bank employees since January 2007, as well as documentation relating to another (non-Canadian) employee's grievance against the bank.

TRIBUNAL & EAT DECISIONS

The tribunal refused to order disclosure, agreeing with the bank that the requested documents were not relevant to the issues in Mr Beck's claim. The EAT, however, disagreed. It said that "In order to show that there is a culture of discrimination, in statutory terms that there is a provision criterion or practice, it is relevant to look at what leading

lights within (the Bank) say and do". It felt that Mr Beck had found a "smoking gun" in the statement provided by Mr Howard and that there might therefore be other documents which also supported his case.

COURT OF APPEAL

Relying on the 1979 House of Lords decision in *Science Research Council v Nasse*, the Court of Appeal said that the test for the law on disclosure was whether or not the order to disclose was "necessary for fairly disposing of the proceedings". The employment judge had not applied that test as he only considered whether the documents were "relevant".

The Court of Appeal accepted that "relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure". "Fishing expeditions" are, however, not allowed.

In this case, Mr Beck had evidence (in the form of the witness statement from Mr Howard) to support his contention that there was a general policy in the bank to treat Canadian employees differently to non-Canadians. The documentation requested was therefore plainly relevant to Mr Beck's case, as he had evidence to support what he was alleging. It was clearly not a fishing expedition in the sense that he was hoping that demanding discovery would turn "something up". Instead, the Court said that "if there was such a general policy of differential treatment, it was likely to be revealed in communications between the senior executives during the period of decision-making. If there was no such policy, that too is likely to be revealed".

Finally, the Court rejected the bank's argument that its IT system worked in such a way that retrieving the documents would be very difficult, saying that "the way in which the Bank chooses to retain and archive its records is a matter for it. If those methods create difficulty of retrieval, that is not something which should be allowed to disadvantage Mr Beck".

COMMENT

In relation to disclosure, courts will not only be concerned with whether documents are relevant but will also consider whether they are "necessary for the fair disposal of proceedings".

Employment Tribunal Statistics 2008/09:

The Employment Tribunal and EAT statistics 2008/09 reveal the following key findings:

- 20% increase in the number of claims accepted - but if multiple airline (cabin crew) claims are excluded, there is in fact a 4% decrease
- unfair dismissal, redundancy pay and breach of contract claims rose in number. Working time claims, equal pay and sex discrimination fell.
- maximum award (in a race case) - £1,353,432
- 21 age discrimination claims disposed of (average award £8k)
- costs awarded in 367 (0.2%) cases (average costs award £2,470) for the first time, the EAT rejected over 50% of all appeals at the sift stage

EAT Cases

**Procedure:**  
The EAT in *Manning v RBS Group PLC (UKEAT/0079/09/ZT)* reminded litigants, where neither a party nor his representative attends an ET hearing of the absent party's application/claim, of the importance of persuading employment judges to consider substantive issues and give reasoned judgments in accordance with Meek v City of Birmingham District Council [1987] IRLR 250 in default of which the EAT will find error of law.

In *Ayres v Fuel Parts UK (UKEATPA/0118/09/MAA)* the EAT stressed:

1. employment tribunals have no duty to forward appeal notices to the EAT when they are wrongly lodged with the ET (see *Dunham v Hull and East Riding Overseas Plastic Surgery* (A2/2006/0214), also *Pierre-Davies v North London Hospitals NHS Trust* (UKEAT/1496/08/LA, 14/7/09);
2. the importance of offering an adequate explanation where the appeal notice/requested documentation is lodged out of time and the appellant seeks a time extension;
3. only exceptionally will the EAT attach weight to the merits of the grounds of appeal themselves when deciding whether a time extension is granted to a late appeal (*Aziz* [2000] ICR 111, CA).

In *Merelie v Newcastle Primary Care Trust (UKEAT/0203/09/RN)* the EAT commented that whether after delay a fair trial is possible is a matter of fact, upholding an ET's decision to strike out an unfair dismissal claim relating to events 10-11 years previously of which the employer's witnesses could have no reliable recollection.

In *Dhillon v May and Baker Ltd t/a Sanofi Aventis (UKEAT/0120/09/ZT)* the EAT:

1. commented when upholding an ET's finding of unfair dismissal that the 'band of reasonable responses' test does not prevent tribunals from considering an employer's actions against external standards. Here the claimant was dismissed on a charge of 'damaging property' after writing, in easily-cleaned ink, comments on an office trolley "which were not thought to be generally offensive";
2. reminded itself that it is unnecessary for tribunals to make factual findings upon all alleged comments however immaterial when determining (race) discrimination claims.

In *Liversidge v London Borough of Haringey and another (UKEAT/0191/09/PEA)* the EAT stressed that it is particularly important that the tribunals give adequate reasons when making findings of deceit, allowing the appeal of a teacher whose dismissal followed him purportedly lying about his qualifications.

In *Hakim v Italia Conti Academy of Theatre Arts (UKEATPA/1444/08/DA)* the EAT granted a time extension to a late appeal in the case of a severely dyslexic appellant whose disability compounded his 'stress', and lack of 'focus', 'organisation' and 'assistance' which cumulatively rendered it impracticable for him to institute his appeal with the 42 day time limit.

Discrimination:

In *Osman v Belstaff International Ltd (UKEAT/0238/09/MAA)* the EAT upheld an ET's decision to strike out a race discrimination claim, commenting that a manager was entitled to be selective in his friendships and speak persistently in a foreign language with persons other than the claimant.

In *Eagle Place Services Ltd and others v Rudd (UKEAT/0497/08/DM)* the EAT, dealing with a DDA claim, held that an unreasonable and incorrect belief on the employer's part that an employee inhibits its commercial objective is not part of the employee's 'relevant circumstances' within the meaning section 3A(5) the DDA. An employer who agrees to reasonable adjustments cannot dismiss on the pretext that he unreasonably considers that those adjustments make the employee a commercial liability even though he would have formed the same unreasonable view of a non-disabled comparator in respect of whom such adjustments might have been made.

Unlawful deductions/Contracts:

In *MBL UK Ltd v Quigley (UKEATS/0001/08/BI)* the EAT upheld a tribunal's finding of unlawful deductions, finding that evidence that the claimant had undergone a conventional induction did not evidence that he had received 'training' provided for contractually with a 'claw back' clause. The employer produced no evidence of either the nature or the true cost of the purported training.

TUPE:

In *OCS Group UK Ltd v Jones and Ciliza (UKEAT/0038/09/CEA)* the EAT upheld a tribunal's decision that there was no service provision change in an office canteen because the activities of the transferor (full catering services) were too dissimilar from those of the transferee (sandwiches, cold snacks and pre-cooked foods).

Unfair dismissal:

In *Shrewsbury and Telford Hospital NHS Trust (UKEAT/0499/08/DM)* the EAT found that the claimant whose employment as a locum consultant doctor was by statutory effect *ultra vires* was nevertheless an employee for the purposes of ERA 1996, hence that he could claim unfair dismissal.

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