

IN FOCUS

Welcome

Welcome to the Spring edition of **In Focus**, our quarterly update keeping you informed of the latest developments in employment, pensions and incentives law.

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If you would like to receive periodic e-mail updates on employment, pensions or incentives law, please e-mail marketing@burgess-salmon.com giving your details and specifying the areas in which you are interested. In addition, to receive your own copy of **In Focus** or if you would prefer to receive **In Focus** by e-mail, please e-mail your details to marketing@burgess-salmon.com.

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The customer is *not* always right

The Sex Discrimination Act 1975 (Amendment) Regulations 2008 have been published and came into force on 6 April 2008. They make a number of changes to the law on harassment and the rights of employees who are pregnant or on maternity leave.

The Regulations have been made in response to the High Court decision in *EOC v Secretary of State for Trade & Industry* and amend the Sex Discrimination Act 1975 (SDA) in order to implement properly the EC Equal Treatment Amendment Directive.

The main changes are as follows:

■ Prohibition of harassment

The Regulations now provide that an employer will be liable if it fails to protect employees from harassment by third parties, for example, by a customer or client, during the course of their employment.

■ Terms and conditions during maternity leave

The Regulations also make amendments to the right to claim discrimination in relation to terms and conditions during maternity leave. These amendments apply to employees whose expected week of childbirth begins on or after 5 October 2008 and will mean that women on additional maternity leave (AML) will have the right to bring the same discrimination claims as those on ordinary maternity leave (OML).

Women on OML are entitled to continue to receive all

benefits, except for remuneration, under the terms and conditions of their employment, so when the amendments take effect, those employees who take AML will also be entitled to these benefits. Therefore, employers will need to review their maternity policies and procedures to ensure that benefits such as company car, mobile telephone and life assurance continue during AML as well as OML.

■ Changes to definitions

There have also been a number of technical changes made to the definition of harassment so it is no longer necessary for the unwanted conduct to be on the ground of the victim's sex, it can now be on the ground of the sex of the victim or of another person.

■ No requirement for a comparator

The requirement for a comparator when making a pregnancy or maternity discrimination claim has also been removed so that if a woman is treated less favourably on the grounds of her pregnancy or her seeking or taking maternity leave, it will be discriminatory.

Employers should consider reviewing their harassment policies and their maternity policies and procedures. Whilst the main changes to the SDA came into effect on 6 April 2008, the changes relating to terms and conditions during maternity leave will apply to employees whose expected week of childbirth begins on or after 5 October 2008.

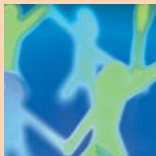
Hear no evil

The Information Commissioner's Office (ICO) have issued a new CCTV Code of Practice to replace the one issued in 2000. The new Code of Practice takes account of advances in the way CCTV is used, the technology employed and legal changes that have taken place since the original Code was prepared. The Code has been issued to help organisations who use CCTV to comply with the Data Protection Act 1998 as most uses of CCTV by organisations or businesses will be covered by the DPA regardless of the number of cameras or how sophisticated the equipment is. The DPA does not apply to an individual's private or household purposes.

The new Code states that no organisation should monitor or store private conversations as this is highly



intrusive and unlikely to be justified. The CCTV Code of Practice 2008 is available from www.ico.gov.uk/home/for_organisations/topic_specific_guides/cctv.aspx.



Employment news in brief

The new rates for Statutory Maternity Pay (SMP), Statutory Adoption Pay (SAP) and Statutory Paternity Pay (SPP) increased from 6 April 2008. The prescribed rate (flat rate) for SMP, SAP and SPP increased from £112.75 per week to £117.18 per week (or 90% of normal weekly earnings if lower).

Statutory Sick Pay (SSP) also increased from 6 April 2008 from £72.55 per week to £75.40 per week.

The Department for Business Enterprise and Regulatory Reform (DBERR) have announced that the national minimum wage rates will rise with effect from 1 October 2008 as follows:

- the adult rate for workers aged 22 and over will rise from £5.52 to £5.73 per hour;
- the rate for workers aged 18 to 21 will rise from £4.60 to £4.77 per hour;
- the rate for workers aged 16 and 17 will rise from £3.40 to £3.53 per hour.

Employers are advised to review their rates of pay and ensure that they take into account the new higher rate from 1 October 2008.

The Information and Consultation of Employees Regulations 2004 (which previously only applied to undertakings with at least 100 employees) have been extended from 6 April 2008 to apply to undertakings with 50 or more employees. This will mean many more employers will be caught by the Regulations. The obligation to consult before making changes to occupational and personal pension schemes were also extended to cover undertakings with 50 or more employees on the same date.

On 6 April 2008 the Corporate Manslaughter and Corporate Homicide Act 2007 came into effect and introduces a new offence of corporate manslaughter. More details are available in a separate briefing available from our website or email marketing@burgess-salmon.com.

On 6 April 2008, regulations came into force amending the existing legislation on sex discrimination in the provision of goods and services.

Increase in compensation limits

The new financial limits applying to certain employment tribunal awards and other statutory payments increased from 1 February 2008 as follows:

- The maximum amount of a "week's pay" used, for example, when calculating statutory redundancy payments and the basic award for unfair dismissal, increased from £310 to £330;
- The maximum compensatory award for unfair dismissal increased from £60,600 to £63,000; and
- The minimum basic award for certain

automatically unfair dismissals (for example, dismissals where the reason is due to trade union membership, health and safety duties, pension scheme trustee duties or acting as an employee representative) increased from £4,200 to £4,400.

The increases apply where the event giving rise to the entitlement to compensation or other payments occurs on or after 1 February 2008. For statutory redundancy payment and unfair dismissal purposes the "event" will be the effective date of termination.

Schoolboy humour?

In the case of *English v Thomas Sanderson Blinds Limited*, the EAT has held that the Employment Equality (Sexual Orientation) Regulations 2003 do not prohibit homophobic banter against a heterosexual man who is known not to be gay. The claimant, who was heterosexual, was subjected to sexual innuendo by his work colleagues because he had attended a boarding school and lived in Brighton. He was subjected to homophobic banter even though his colleagues knew that he was heterosexual.

The EAT upheld the Tribunal's decision adding that the phrase "on grounds of sexual orientation" contained within Regulation 5 of the Employment Equality (Sexual Orientation) Regulations 2003 is narrower than the definition contained in the directive, which prevents harassment "related to" sexual orientation. The claimant has been granted leave to appeal to the Court of Appeal and if he is unsuccessful, it is likely that the Regulations will be amended to cover this situation.



In previous editions of In Focus we have warned employers to take care when considering previous disciplinary warnings when deciding future disciplinary action. In the case of *Airbus UK Limited v Webb*, the Employment Appeal Tribunal held that Mr Webb's dismissal was unfair because his employers had relied on an expired warning to justify the dismissal. However, the Court of Appeal has now overturned this decision.

Subscribers to our email alert service have received more details of this decision. The Court of Appeal thought that Mr Webb's repeated misconduct justified his dismissal for watching television outside normal break time even though others were not dismissed as it was their first offence.

Employers should not, however, take this decision as carte blanche that they can take expired warnings into account as a matter of course. It is clear that the conduct in question should justify dismissal on its own (regardless of whether or not an expired warning exists on the file) and the Court of Appeal made it quite clear that reliance on an expired warning should not be viewed as a standard practice.

Employers should also consider carefully the wording of disciplinary warnings, particularly final warnings, as there may be circumstances in which you might want to extend the term of the warning. Disciplinary procedures should also be drafted sufficiently flexibly to allow for this.

Underwater options

The stock markets have suffered from the US sub-prime crisis. Many companies that use share options to motivate employees have found the options to be underwater – the price of the shares has fallen below the exercise price rendering the option, at that time, worthless. This is a particular problem for companies whose shares are traded because it can have a direct demotivating effect on employees and executives – the opposite effect from what was intended.

The position can be improved, particularly if the shares under option are listed on the Alternative Investment Market and they are unapproved options. Companies will want to consider:

- the smoothing effect of annual grants of options,
- surrender and regrant,
- different awards such as Long Term (or short term) Incentive Plans (LTIPs),
- parallel arrangements,
- reviewing the overall compensation package,
- shareholder approval and the reaction of institutional investors,
- cash cancellation,



- why you might "do nothing",
- changing the option price.

If you would like help with options or more information about incentive based remuneration, please contact James Dean (james.dean@burges-salmon.com).

Budget update

The 2008 Budget delivered a few surprises for share incentives, particularly Enterprise Management Incentive schemes. Changes include:

- the abolition of taper relief and the introduction of a flat rate of 18% on capital gains, first announced in the Pre Budget Report last October,
- the introduction of "entrepreneur's relief" which may assist individuals who hold a 5% shareholding for at least a year – by rendering the effective charge to capital gains tax 10% on the first £1million of gain over the course of a lifetime,
- an increase in the individual limit for EMI options from £100,000 to £120,000,
- the introduction of a new qualifying condition that companies wishing to grant EMI options must not have more than 250 employees, with effect from the date the Finance Bill receives Royal Assent (normally late July), and
- companies with substantial trading activities in shipbuilding, coal or steel production will not qualify to grant EMI options after Royal Assent.

In addition, changes to the rules relating to non-domiciled tax payers will have a knock-on effect on the tax treatment of share incentives held by employees who are not ordinarily resident. HMRC has promised revised guidance on employment related securities for internationally mobile employees in mid May.

If your company has EMI options and its headcount is approaching 250 employees, you can still grant EMI options (to the increased individual limit) until the Finance Bill receives Royal Assent. It may be that some companies close to the limit qualify at certain times in the year to grant EMI options but not other times. HMRC has promised further guidance.

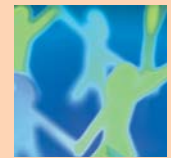
Now is also a good time to review your EMI grant documentation and communications with employees to ensure that they are up to date with the new tax position on their EMI options.

If you would like help or more information in relation to these changes, please contact Paula Hargaden (paula.hargaden@burges-salmon.com).

Debt relief

From 6 April the statutory (s.75) debt in multi-employer schemes is easier to manage. This is good news for companies doing corporate transactions. At the same time, members remain well protected because the new options to reallocate and defer liability all require the agreement of the trustees. If you take our

by email alerts on pensions you will have received our Stop Press. If you did not receive it and would like to, please email marketing@burges-salmon.com. Please do the same if you would like to join the email list for future alerts.



Pensions & incentives news in brief

The Myners principles on scheme investment are up for review. The Treasury, the DWP and TPR have issued a consultation paper about reducing the current ten principles to six higher level ones backed by best practice guidance. The paper is based on proposals from the NAPF in its 2007 review of the Myners code. The consultation ends in June.

Since 6 April the employer's obligation to consult staff about changes to future service pensions applies to an employer with 50 or more employees (down from 100).

In June the government will begin a consultation on the scope and appetite for pension schemes that share risk between the employer and members in new ways.

The Finance Bill 2008 makes technical changes to pensions tax legislation. But of practical significance: flexibility in the amount pensions can increase without a lifetime allowance test and relaxing the rules on trivial commutation.

The Pensions Bill 2008 is in Parliament. Mainly about Personal Accounts it also simplifies private pensions: capping revaluation in deferment at 2.5% on future accrual and simplifying contracted out benefits on divorce. Other deregulatory measures may be added.

Mortality assumptions are a particular focus of TPR's consultation paper about good practice over assumptions. The consultation runs until 12 May.

Encouraged by its success in imposing a financial support direction (FSD) in the difficult Sea Containers case, TPR has said it is considering issuing other FSDs. Moral hazard begins to bite.

TPR in conflict

The Pensions Regulator (TPR) has issued draft guidance on conflict of interest. It has done its best to set high level guidelines but in the end the emphasis is on taking independent legal advice. It is a fair guess that TPR wanted to offer clear dos and don'ts but was unable to

Highlight clearances

TPR has issued revised guidance about when companies should seek clearance that it will not use its moral hazard sanctions (contribution notices and

Consent is personal

Literal readings of scheme rules can be incorrect and it is hard for individual members to argue that general circulars constitute personal undertakings to them. These are the points from *Wright v MGN*.

Did a deferred need the employer's consent for an unreduced early pension and, if so, had the employer consented? One rule cross-referred to another in a way that appeared not incorporate a proviso about employer consent that preceded the rule referred to.

Come round the front



The court has rejected a back door attempt to rewrite a scheme rule that was more generous than intended. In *Smithson v Hamilton* it refused to set aside a rule that, through a drafting error, gave deferrals an unreduced early pension without needing consent. The trustees argued for

setting it aside, saying they were not aware of the true meaning of the rule when they agreed to it. They were trying to use a legal principle that actions by trustees

find one size fits all solutions. A Stop Press note went to clients and contacts on our email alert list for pensions. If you did not receive it and would like to, please email marketing@burgess-salmon.com. Please say if you would like to join the email list for future alerts.

financial support directions). We are preparing a Stop Press note about it.

The High Court held that no consent was required but, if it was, the employer had given it in a circular saying that consent to early retirement would normally be given. The Court of Appeal went the other way. The cross-reference did include the proviso despite the way the text was laid out on the page, so consent was required. But the circular did not constitute consent in any individual case; it was simply a general policy statement.

can be set aside if the trustees took account of the wrong considerations or failed to take account of the right ones. The principle is more usually used against trustees than by them.

The court rejected the claim saying that the trustees were looking for rectification by the back door. "Rectification" is another way of correcting scheme documents but the evidential requirements are much higher. It needs clear evidence of unanimous agreement by all the parties to a document that it says something no-one intended. There is going to be an appeal. Many commentators think the pensions industry needs a court-supervised way of sorting out errors in documents when the stringent requirements for rectification cannot be met.

Sufficient unto the day

"Secure the benefits under the scheme" in a contribution rule does not necessarily mean funding to buy-out level. In *Alitalia v Rotunno* the court was asked the meaning of an employer's contribution rule calling for a rate to "secure the benefits under the scheme". Did the ongoing scheme have to be funded to the high level that would allow the trustees to buy the benefits out with an insurer?

The court said "no". The right construction was one that made commercial sense both when the scheme was ongoing and when winding up was in prospect. The rule was designed to be flexible and allow different funding targets according to the circumstances. This is an example of the principle that pension scheme rules are to be read so they have a reasonable and practicable effect.

STOP PRESS

Big extensions to TPR's moral hazard powers are announced. Contribution notices no longer depend on an attempt to avoid a s.75 debt but on the weaker test of company action that is materially detrimental to a scheme's ability to pay benefits. TPR will be able to look back to 14 April 2008 to apply the power

despite the legislation not even having been published in draft. Groups with corporate transactions on the go should take stock but until final legislation is enacted (perhaps late July) it will often be hard for them to be sure where they stand. TPR's clearance procedure remains available.

In the office

Congratulations to **Richard and Irene Knight** on the birth of their daughter.

Congratulations also go to **Huw Cooke and Albane** on the birth of their son.

Our best wishes to **Penny Laver** as she leaves to take up a challenging new career.

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