

Newsletter

October 2005

IN THE NEWS

In June 2004 an employee was hired as part-time Payroll Clerk on a sixteen hours per week contract by a Care Home. As a single parent with a two-year old son, the Claimant took the part-time position in order to meet her caring responsibilities. However, she was troubled when, in January 2005, her employer demanded that she start working full-time. The Claimant presented her employer's with several reasonable flexible working options including sharing her job with another part-time payroll worker on a similar sixteen hours per week contract, bringing the total number of hours close to that of a full-time position, or working the additional hours from home. Her employer refused, demanding that she worked a minimum of 25 hours per week in the office. This left her with no option but to resign. The Tribunal ruled in the Claimant's favour, finding that the employer was guilty of indirect discrimination against her, on the basis of her sex. Furthermore, the Tribunal increased the award by 40% because the employer had ignored the official grievances she had filed. She was awarded £29,294 in damages, which included an extra £2,000 in aggravated damages, after the manner in which the case was conducted by the employer.

A restaurant chains procedures for young workers came under scrutiny when it was recently prosecuted over an instance in which a sixteen year old

was seriously burned by hot fat. The young worker was preparing a fried breakfast and, after placing some bread in one of the deep fat fryers, the fryer fell from its support, without warning, and the scalding hot oil poured over the employee's leg and foot causing serious burns. A subsequent investigation by Health and Safety Officers found that some staff were aware that the fryer could move from its runners but this had not been advised to Head Office. The investigation also uncovered a previous incident which similarly involved hot oil burns to a young trainee, which had not been reported under RIDDOR 1995. Consequently the same company was also charged for this breach, to which it pleaded guilty. It was fined £3,000 on the first charge but no separate penalty was imposed on the RIDDOR charge. The company was also ordered to pay £5,600 in costs.

The principle contractor on a project to re-furbish a fire damaged building in Aberdeen was fined £35,000, after a Salvage Worker was crushed to death when the structure collapsed. The company pleaded guilty to breaches of Section 2(1) and 3(1) of the HSWA 1974, by failing to protect employees and non-employees from risks to their health and safety. The company was charged with allowing workers to operate in the building, knowing that it was in a state of disrepair, without having carried out or instructed a survey to determine the extent of the damage or identify any weaknesses. The same charges were originally brought against the companies three Directors, who were charged with corporate manslaughter, and were subsequently dropped.



Employment Law Advisory Services Ltd
Lancaster House,
Old Wellington Road,
Eccles, Manchester M30 9QG

Tel: 0161 785 2000
Fax: 0161 787 7335
www.employment-law.uk.com

Posters - Are you at Risk?

It is quite common place to have posters up in the workplace, be it a factory and/or office environment. However, in October 2004, there are amendments to the Sex Discrimination Act which will include an express inclusion of harassment as a form of unlawful discrimination. You will of course appreciate that employees can be offended by the contents of "raunchy posters", both male and female, and there is a distinct possibility that an employee could take action against you, if they were offended by it, subsequently complained and you failed to take action (i.e. remove the poster).

The action can be brought by either a male or female because the Sex Discrimination Act 1975 covers both parties.

You should ensure your Company has a formal grievance procedure as required by the Employment Act 2002, and the Employment Act (Dispute Regulations) 2004. This would enable you to deal with any formal grievance in accordance with legislation, to ensure that the employees' grievances are fully aired and dealt with accordingly.

The wording of the legislation means that it is how the employee perceives the material that matters, and not how their colleague intends it. Therefore, if anybody is offended by raunchy type posters, as an employer, you may be liable for a sex discrimination claim.



You are of course aware that awards in Employment Tribunals, for any of the discrimination acts, are unlimited. An average award for a one off act in a sex discrimination claim currently stands at £22,165. This begs the question - is having a poster up really worth it?

As an employer, you are entitled to require the employee to take it down and remind the employee that, if they object, they may well be in breach of the Sex Discrimination Act. Consequently, they may also be found to be liable themselves, if any complaint is made by any of their colleagues. Regardless of the legalities, any professional worth their salt should have the common sense to realise that this kind of imagery is unacceptable. The only way to deal with it is to confront your employee, to ensure that the matter is remedied forthwith.

If you require any further advice on this subject, please ring our 24 hour advice line on 0161 785 2000.

Age Matters

It won't have escaped your notice from the last two newsletters that age discrimination is fast approaching.

The Government have now published the draft Employment Equality (Age) Regulations 2006 for consultation.

Following consultation which is due to be completed by 17th October, any revisions to the draft regulations will be completed and it is intended that they will become law on 1st October 2006.

The Age Regulations will outlaw age discrimination in employment and vocational training.

Age discrimination prevents people of all ages from realising their full potential in the workplace. This prevents employers from getting the best performance out of their businesses and delivering the best service to their customers.

It is essential to realise that age discrimination will not affect the older members of the workforce. It will apply to all ages from school leavers to those contemplating retirement and beyond.

The Age Regulations will prohibit direct and indirect age discrimination, harassment and victimisation. The Regulations will place new obligations on employers and providers of vocational training, further and higher education, as well as trade unions, professional and employer's organisations, and trustees and managers of occupational pension schemes.

In most situations it will be unlawful to treat people differently on the grounds of age. However, employers and others will be able to justify doing so but only by reference to specific aims, and only if it is appropriate and necessary in the particular circumstances. This will be known as objective justification. In this situation it will be essential to produce supporting evidence if it is challenged. Mere assertions will not be enough.

In respect of retirement, the Age Regulations will contain a national default retirement age of 65 so that it will not constitute age discrimination if employers retire employees at or above the age of 65. It will only be possible to have a lower retirement age if an employer can objectively justify it. There will be a new procedure that will have to be used for any compulsory retirement to be known as the "duty to consider" procedure.

Under this procedure an employer who wishes to retire an employee will have a duty to notify the employee in writing, not more than 12 months, and not less than 6 months before the intended date of retirement. At the same time the employee must be told that they have a right to request working beyond the intended date of retirement. If the employee makes such a request, the employer will have to consider it seriously. It is intended through the Regulations that unplanned retirement cannot be used as a substitute for dismissal, redundancy or termination of contract for any other reason.

The Age Regulations will remove the current upper age limit for unfair dismissal and redundancy rights, which is 65. This means that workers aged 65 will have the same rights to claim unfair dismissal or to receive a redundancy payment as younger workers. However, there will be provision whereby retirement will not constitute unfair dismissal if it is at or after 65 or indeed the employer's own lower retirement age if this is justified, and the employer has followed the duty to consider procedure.

The Government intends to monitor the default retirement age from the introduction of these Regulations, so that in 2011 there will be a review. The review will consider the operation of the Regulations and the trend in life expectancy, the number of individuals working beyond 65 and the impact of the Regulations on business. At that stage the Government may abolish the default retirement age if it ceases to be necessary.

Employers should, if they have not already done so, start a review of their employment practices and procedures now. Employers should identify where changes need to be made to comply with the Age Regulations, and where necessary enter into discussions with employees and/or any trade unions involved to ensure that those changes are in place before 1st October 2006.

All employment procedures should be reviewed. Recruitment and application procedures should be checked. If a recruitment agency is used, the agency should not act unlawfully. If an employer undertakes the recruitment itself, job advertisements should be checked so that they are not age discriminatory. Those who conduct interviews and make decisions on job offers should not have any prejudices in relation to age.

Employment rules and procedures, including employment contracts and terms and conditions of employment, and also the content of staff handbooks should be checked. This includes the provision of employment benefits. Any potential age discriminatory provisions should be removed.

But in other forms of discrimination there will be direct and indirect age discrimination.

The draft Age Regulations define direct discrimination as occurring where someone treats one person less favourably on the grounds of his or her age, than he or she treats or would treat other persons in a comparable situation, and there is no objective justification for doing so. For example it would constitute direct age discrimination if an employer applied age limits for recruitment or promotion without justification. Requiring applicants to pass a health or fitness test for recruitment or promotion would not constitute direct age discrimination. But it might be indirect age discrimination if people of certain ages were less likely to pass this test than other age groups. Using a health test will be justifiable if the test is set at a level necessary to indicate whether someone was capable of doing the job.

The draft Age Regulations define indirect age discrimination as occurring where:

An apparently neutral provision, criterion or practice, puts or would put persons of a certain age group at a particular disadvantage compared with other persons.

There is no objective justification for the provision, criterion or practice.

Direct discrimination on grounds of age can also include discrimination based on the perception of someone's age, whether the perception is right or wrong.

A practice discriminates indirectly on the grounds of age if it does not involve age as a distinguishing criteria but nevertheless puts one or more persons of an age group at a particular disadvantage compared to other age groups. For example a business requires applicants for a driving job to have held a driving licence for 5 years. The advertisement does not mention age, but it is likely that a higher proportion of those aged for example 40, would have fulfilled this requirement than those aged 25.

Harassment on the basis of age will also be outlawed. The draft Age Regulations provide that anyone making a complaint about harassment will need to show either that their dignity has been violated, or that they have been subjected to an intimidating, hostile, degrading, humiliating or offensive environment.

The Regulations will also cover victimisation.

Quite clearly the breadth of this subject is very wide ranging and will include changes to existing legislation, and consequent changes to other established employment practices.

We will deal further with this subject in the next newsletter, where we will cover the duty to consider procedure in detail, as well as changes to unfair dismissal legislation and redundancy.

ELAS in the News

Accountancy Age (July 2005)

Head of Personnel, Pam Rogerson, was commissioned to write a double page feature in the UK's premier weekly accountancy magazine discussing the changing world of job references. Following on from an ELAS survey which showed that only one in ten firms would offer former staff a traditional reference, Pam discussed the problems this presented for recruiters and employees.

The Scotsman (July 2005)

Pam Rogerson was quoted extensively in a prominent feature on how workers are finding themselves without any form of recommendation from past employers, as the fear of litigation turns the humble reference into a legal minefield.

Pay Magazine (August 2005)

The UK's leading payroll and personnel magazine carried an article highlighting the benefits of Employersafe, a pioneering piece of software developed by ELAS which works 'like an extra legal brain in the office', spotting potential employment law problems and easily guiding employers through the best course of action to solve them.

Financial Director (July 2005)

A feature written by one of ELAS's leading personnel experts, Pam Rogerson, guided readers of Financial Director magazine's acclaimed website on how to avoid facing costly employment tribunals over a poorly written reference.

The Daily Mail (August 2005)

The Daily Mail looked at how the threat of litigation has forced scores of employers to abandon writing references. Pam Rogerson explained why for employers, putting pen to paper had become too risky to consider.

Management Issues (July 2005)

The online resource for middle and senior managers told of how the country's leading employers were increasingly switching to giving former staff testimonials over the phone rather than risk litigation by putting more than a few details in writing. Pam Rogerson was quoted.

Manchester Evening News

Senior lawyers from ELAS once again shared their advice to SMEs across Greater Manchester by answering questions in the MEN's business section.

Liverpool Echo

A regular column in the Liverpool Echo, which is written by lawyers at ELAS, helps businesses with their questions on employment law and health and safety.

WORKPLACE HARASSMENT

Complaints about harassment in the workplace are quite common and, generally speaking, are linked to an employee's sex, race, disability or religion or belief or on the grounds of their sexual orientation.

A claim can be brought against an employer on the grounds that they were vicariously liable for the actions of their employees. However, recent case law suggests that it is now no longer the case and an employee may bring a claim for harassment against a fellow employee, regardless of it being linked to sex, race, disability, sexual orientation or religion or belief. *Majrowski v Guys and St Thomas's NHS Trust* (2005) (EWCA CIV 251) is a case that now gives employees the opportunity to seek protection from harassment in accordance with the Protection from Harassment Act 1997.

The facts of the case are that Mr Majrowski brought a claim against his employers for breach of a statutory duty under Section 3, Protection from Harassment Act 1997. The matter was brought before the Central London County Court and was struck out by the said Court on the basis that there were no reasonable grounds for bringing a claim under the aforesaid Section. The reason being is that the Act was

intended to protect individuals from harassment by individuals and not corporations, and it was not intended to create another level of employers' liability in employment law. As a consequence of the strike out Mr Majrowski made an application to the Court of Appeal who made a finding that an employer could be held vicariously liable for the statutory tort (negligence) of the employee. The Court came to the conclusion that the Protection from Harassment Act 1997 was designed to protect individuals from a course of conduct amounting to harassment, regardless of who caused this. Therefore an employer may be vicariously liable in an appropriate case under Section 3 (which covers civil responsibility) for harassment in breach of Section 1 committed by one of its employees in the course of their employment.

This decision means employees can now bring a claim whilst employed against both the harasser and the employer for damages, irrespective of whether the harassment was on the grounds of sex, race, disability, sexual orientation or religion or belief.

It follows that an employee may have a cause of action against their employer which they might not previously have had, particularly if they had not suffered

personal injury or have suffered personal injury but cannot meet the strict foreseeability test. This is because Section 3 of the Protection from Harassment Act 1997 expressly provides for recovery of damages for anxiety caused by harassment.

An even more far reaching effect of bringing such an action means that the matter is in the control of the Civil Courts (County Courts) and therefore the Civil Courts costs apply. As a consequence, this means that costs will be recoverable from the losing party.

It is also likely that Legal Aid will be available for an employee to bring a claim and, unlike an employment tribunal claim, the employee will not be statutory bound to bring the claim within three months of the incident happening. They will have six years to bring a claim!

It therefore follows that it is most important now, more than ever, that as employers you should have policies in place covering equal opportunities and bullying and harassment in the workplace, at least mitigating any subsequent claim in the event that such a case did occur.

For more information contact the ELAS Advice Line on 0161 785 2000.



Forklift Truck Fatality Court Case

The majority of organisations accept that using forklift trucks in the workplace can pose a significant risk of injury or, in the worst cases, fatalities.

In situations where forklift trucks and delivery drivers operate, it becomes even more important to ensure that operations are properly coordinated and controlled. A recent court case has reminded us of the significance of the risks involved and the consequences of failing to control activities. On the 30th June a Leicester based Company, Pall-Ex (UK), was fined a total of £100,000 following the death of a forklift truck driver. Nottingham Crown Court heard that Moray Inglis, an employee of Pall-Ex (UK) was driving a forklift truck on the 10th January 2003. The work involved unloading palletised goods from haulage vehicles, re-palletising the goods and reloading them onto distribution lorries.

The accident arose whilst Mr Inglis was halfway through a lorry loading operation. The driver of the articulated lorry was at the wheel of the vehicle whilst this operation was being carried out. He moved the vehicle forward, unaware that Mr Inglis was in his forklift and halfway through an unloading operation. This resulted in the forklift truck overturning and Mr Inglis being crushed to death under the truck.

When the HSE investigated the tragedy they were informed that a system of work had been introduced six months earlier that directly caused the risk. Although, in mitigation, Pall-Ex (UK) said that all its

forklift truck drivers were competent trained people and they had complied with the requirements of some previous HSE recommendations, they didn't realise the consequences that could have arisen due to the system of work they had introduced.

The failing was due to the fact that the Company had put the lorry drivers in control. In summing up, Judge Bennett rejected the Company's suggestion that the incident was caused due to human error on the part of the lorry driver. Pall-Ex pleaded guilty to the offence of breaching section 2(1) and 3(1) of the Health and Safety at Work etc Act and was fined a total of £100,000 and ordered to pay costs of £8,638.

This unnecessary tragic accident could have easily been avoided and highlights the importance of having a properly controlled safe system of work. The system must ensure that pedestrians and vehicles are properly segregated. When any vehicles are being loaded or unloaded by forklift trucks, it is important that operations do not start until the lorry is secured. Lorry drivers must secure the vehicle and exit the driver cab prior to any loading / unloading operations. Proactive organisations have wheel chocking and lorry key handover procedures in place, which prevents the lorry being moved until operations are completed. Cooperation and coordination is essential to ensure the safety of all those involved in the work environment and activities. If you currently have any concerns regarding your workplace transport controls contact your ELAS health and safety consultant for further assistance.

SEMINAR LISTINGS

As you are aware ELAS are holding free employment law and health and safety seminars across the country. The sessions, run by Senior Lawyer, John Peel, are of use to both clients and non-clients, providing a broad overview of recent changes to legislation and the impact these may have on your business. If you would like to attend a seminar please contact Lisa Skinner, as soon as possible, on **0161 785 2000**.



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Eccles, Manchester M30 9QG

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Fax: 0161 787 7335

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