Parker & Co

Employment Update

March 2006

INTRODUCTION

Welcome to Parker & Co's new quarterly employment and business immigration update. In between issues we will also send regular email alerters to give you news of important cases or legislative changes that affect your business.

This quarter we focus on the statutory grievance procedures and how these are working in practice for employers and in the Tribunals, case law and changes to the law on Disability Discrimination and the new TUPE legislation which comes into force this April.

Where you see links in blue in the pdf form, you can click on them to be taken to the appropriate site. If you have any questions arising from the articles, please call or email us and we will be happy to discuss them with you. We hope that you like the look and style of our new update – your comments are welcome.

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EMPLOYEE GRIEVANCES IN PRACTICE

The statutory dispute resolution procedures have been in force for nearly 18 months and the first case law is filtering through. The grievance procedures aim to encourage employers and employees to resolve disputes internally to avoid litigation. A grievance is defined as "*a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him*". In most cases, an employee is required to submit a written statement of grievance to the employer before a Tribunal will accept a claim, and most of the case law has focused on what actually constitutes a grievance as there is no prescribed form for the written statement.

Here are the key practical points from the decisions to date:

- An employee does not need to use the word "grievance" in the complaint, or request a meeting or refer to the statutory grievance procedure. In fact, virtually no formality is required at all. In most cases an employee is simply required to put the general nature of the complaint in writing, so you should consider instigating a formal procedure once you receive almost any form of complaint.
- A flexible working request can amount to a grievance if it is not accepted, but a statutory discrimination questionnaire does not.
- A solicitor's letter, even if it sets out financial settlement proposals, amounts to a grievance. Current case law indicates that it makes no difference even if the letter is marked "without prejudice", although this aspect may be appealed.
- Employees are not required to comply with the requirements of any internal grievance procedures provided they comply with the statutory requirements.

As you will see, Tribunals are taking a pragmatic approach and applying a low threshold to what can constitute a "grievance". In light of this, you should carefully review resignation letters or correspondence sent by employees (or sent on their behalf) to assess whether to implement your grievance procedure. If in doubt, seek clarification from the employee. This is particularly important because an employer's failure to comply with the statutory steps can result in a Tribunal uplifting any subsequent award made by as much as 50%, subject to any statutory cap on compensation levels.

IN BRIEF

Increase In Compensation Limits

With effect from February 2006 the maximum unfair dismissal award is now £58,400, whilst the cap on a week's pay (used to calculate statutory redundancy payments and basic awards for unfair dismissal) is now £290.

Sexual Orientation Discrimination Cases

You will probably have read about the first major sexual orientation discrimination claim to hit the Tribunals in which a banker is claiming £1m in damages from HSBC. He says that he was dismissed because of disciplinary allegations which he claims arose because of his sexual orientation. The claim also includes allegations that the banker was bullied and harassed because of his sexuality.

The case is still ongoing at the time of writing so the allegations may not be upheld. However, it serves as a stark warning to employers that not all employees are enlightened, and homophobic behaviour may be commonplace in a macho work environment. You should ensure that there are clear and well-publicised anti-discrimination policies in place, and that these are enforced by line-managers.

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APPLYING THE NEW TUPE REGULATIONS

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") come into force on 6 April 2006, making significant changes to the old legislation:

Transfers of economic entities: TUPE will apply to a transfer of an "economic entity" (an organised grouping of resources which has the objective of pursing an economic activity) that retains its identity. "Resources" could include employees, as well as other assets, meaning that TUPE is now broader as it could apply to any organised grouping of employees.

Transfer of Part: DTI Guidance on TUPE states that the "resources" do not need to be used exclusively by the part of the business that transfers for TUPE to apply, but if they are used by several different parts, it is unlikely that any one part will be deemed to be an economic entity.

Change of Service Provider: A major clarification deals with a change of service providers in contracting-in and contracting-out situations. TUPE will apply to a change of service provider where: (i) immediately before the service provision change there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client; (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee for more than just a single specific event or a task of short-term duration; and (iii) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

Changes to Terms: One area that frequently poses questions for employers is changing terms and conditions of employment following a TUPE transfer. TUPE now provides that variations to contracts can be made if they are for a reason unconnected with the transfer or, if connected, for an Economic, Technical or Organisational reason entailing changes in the workforce.

Information: There are new obligations on transferors in relation to the information that they must provide to the transferee. Although this information is usually provided in a business sale, re-tendering exercises often provided situations where a new contractor was taking on employees with no information about them. TUPE now requires certain employee liability information to be given and dates that it must be provided by. Failure to provide the information gives the transferee a right to complain to a Tribunal which can award compensation for loss of not less than £500 for each employee.

IN BRIEF

Disability Discrimination And The Duty To Make Reasonable Adjustments

The duty to make reasonable adjustments to the workplace and provisions, criteria or practices has usually been held to be limited to adjustments to the disabled employee's actual role.

However, a recent case (*Southampton City College v Randall*) has held that an employer should have considered devising an entirely new post for a disabled employee. Whilst creating a new position will not always be a "reasonable adjustment", employers should be aware of how broad the duty upon them is to consider a wide range of reasonable adjustments to assist the employee in overcoming a substantial disadvantage caused by their disability.

Paternity Leave Consultation

The Government is consulting on extending fathers' rights to take up to 26 weeks' paternity leave (a large increase on the current two-week entitlement). There is also a proposal to allow mothers to transfer some of their paid leave entitlement to the father. We will keep you informed of progress.

GUIDANCE ON EMPLOYERS' DISABILITY DUTIES

Employers should note the Court of Appeal's guidance on reasonable adjustments for disabled persons in Smith v Churchills Stairlifts plc. As you will be aware, employers must make "reasonable adjustments" (including changes to provisions, criteria or practices and physical aspects of the workplace) to combat the effects of substantial disadvantages suffered by disabled employees in comparison with persons who are not disabled.

The Claimant (a job applicant) had lumber spondylosis. He had difficulty walking, used a stick and was unable to lift and carry heavy objects. He applied to be a salesman selling and installing radiator cabinets and informed the employer of his disability, advising it that he would need an automatic car to carry out the job. The employer agreed to provide an automatic car (as a reasonable adjustment), but raised concerns about whether he would be able to carry the sales props that would be shown to potential clients, although at that time the employer had not decided on what types of props the salespersons would use. The Claimant passed the interview stage and was offered a place with seven others on a training course which would lead to a job offer if completed successfully.

Between the interview and the start of the training course the employer decided that the sales aids would be full-size sample radiator cabinets. It concluded, without consulting with the Claimant, that he would not be able to carry the cabinets and withdrew his place on the training course. The Claimant wrote to the employer asking it to reconsider, also suggesting an alternative sales method and that he could work on a commission basis. He had also constructed a demonstration model to use, but the employer refused to explore his proposals. The Claimant claimed he had been treated less favourably for a reason relating to his disability.

The Court of Appeal held that the requirement to carry the cabinets was an "arrangement" for determining to whom employment would be offered. Importantly, the fact that the Claimant was liable to lose his place on the course as he could not carry the cabinet was also an "arrangement". If these arrangements put the Claimant at a substantial disadvantage compared to others because of his disability, the employer would have had to have considered reasonable adjustments to assist him in overcoming them. To determine if those arrangements did put the Claimant at a substantial disadvantage compared to others, the Court held that the employer should compare him to those who did fulfil the other conditions for the job (i.e., the other candidates on the training course), and not to the general non-disabled population. →***page 4***

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IN BRIEF

Wide Non-Compete Restriction Is Binding

The High Court has upheld a 12 month worldwide post-termination of employment non-competition restriction (*Dyson Technology Limited v Strutt*). Post-termination restraints are generally unenforceable unless they are narrowly drafted and protect employers' specific, legitimate business interests. Employers will welcome this decision, but it should be noted that it was the very specific nature of the confidential information known to the employee that made the covenant reasonable.

The employee had acquired technical information relating to the design of vacuum cleaners during the course of his employment with Dyson. His contract of employment contained a confidentiality clause which the employee argued was sufficient to protect Dyson. The Court did not agree, considering that due to the nature of the information it might be inadvertently disclosed. Further, Black & Decker (the new employer) could not guarantee that the employee would not be asked to work on the design of vacuum cleaners. The lack of a territorial limit to the restriction was held to be reasonable in view of the international nature of the business of the Dyson Group as a whole.

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The others who had been accepted onto the course were not disadvantaged by being unable to carry the cabinets, so the employer was required to consider making reasonable adjustments to the arrangements to assist the Claimant in overcoming the disadvantage he faced. It should have allowed a trial period to see whether alternatives proposed by the Claimant were commercially viable, rather than instantly deciding that he could not do the job.

If the duty to make reasonable adjustments arises, the employer must take such steps as are reasonable in all circumstances of the case. This is an objective test and employers need to review how practical the step is, the financial implications and the employers' resources to make the adjustment. You should remember that if an adjustment in respect of a disabled person is deemed to be "reasonable", it must be made. There is no justification for failing to make the adjustment and not making it will be potentially discriminatory.

NEW DISABILITY LAWS IN FORCE

The Disability Discrimination Act 1995 ("DDA") was amended in December 2005 to the benefit of employees. A mental impairment no longer has to be "clinically well-recognised" to qualify as a disability. Employees used to have to demonstrate that any mental impairment they suffered from was recognised by a respected body of medical opinion. This no longer applies, meaning that stress and depression could amount to disabilities, although employees are likely to still have to provide substantive medical evidence of the seriousness of their condition before coming within the DDA's protection.

Cancer, HIV infection and multiple sclerosis are now automatically deemed to be disabilities. Any employee suffering from one of these conditions is a "disabled person" entitled to the DDA's protection. These employees will not need to demonstrate that their condition is likely to have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities since diagnosis is sufficient to prove disability. For example, employees suffering from minor skin cancers with no secondary growth are disabled and employers must consider reasonable adjustments if the disability causes them a substantial disadvantage compared to employees who do not have that condition, such as an inability to work outdoors.

Job advertisements discriminating on the grounds of disability are unlawful and the amended law now extends to third parties who publish a discriminatory advertisement, as well as any person (such as an employer) who places a discriminatory advertisement.

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WHAT'S COMING UP?

April 2006

- Introduction of new TUPE regulations

October 2006

- Introduction of age discrimination legislation. Our next issue will cover the final age discrimination regulations, with an in-depth analysis of their impact on employers

NEW POINTS SYSTEM PROPOSED FOR WORK PERMITS

A radical overhaul of the Work Permits system is envisaged by the Government. Currently, Work Permit applications involve a complex submission based on a person's skills, qualifications, experience and the needs of the role. The Government is now planning to introduce a points system (similar to that used for the current Highly Skilled Migrant Programme visa) whereby applicants would need to have a certain level of points measured by qualifications, language skills and experience to even qualify for consideration for a Work Permit.

Highly-skilled migrants, such as financial workers, IT specialists, and professionals would be likely to qualify for the most points. There will be several tiers of migrants, from highly-skilled to low-skilled workers and students, and quota systems will be introduced where certain sectors lack UK resident workers. The new regime is planned to be introduced for 2008.

What does this mean for employers?

All employers will be affected. Employers seeking to recruit staff from overseas will have to assess a recruit's potential point score which could affect whether the person will even be considered for a Work Permit. The system will generally favour highly-skilled migrants, so employers in the professional sectors may be less affected overall.

However, employers such as international organisations that habitually recruit from overseas may face more difficulty in recruiting at lower levels as not all "white collar" workers will qualify as highly-skilled migrants, and could therefore be subject to more stringent qualification criteria. In addition, where potential recruits are, for example, young and with little industry experience, they may struggle to attain the points needed to qualify for consideration for a Work Permit. The benefits of the system will be that those in the higher tiers may eventually be able to take up permanent residence in the UK. Employers with a significant highly-skilled migrant workforce may thus benefit in the long-term from reduced costs from not having to make applications for Further Leave to Remain or Work Permit extensions.

See our website for details of the immigration services we offer.

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