

employment bulletin



Pritchard Englefield is a medium-sized City law firm. In addition to the full-service UK practice, the firm has highly respected French and German speaking departments. We are uniquely qualified to offer our international clients a strong multi-cultural perspective which embraces both English and European laws.

Welcome to Pritchard Englefield's employment bulletin. The aim of this bulletin is to give a brief overview of some of the more significant and interesting developments in the fast-moving world of employment law.

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Equality Act 2010 – A fairer future?

The Equality Act will come into force this Friday 1 October 2010. It is the former Labour government's attempt to streamline discrimination law but what does it mean for employers?

1. Harmonisation of discrimination law

Current provisions relating to discrimination have developed incrementally over the last 40 years. They are spread across a number of pieces of UK and EU legislation. The new Equality Act draws together the attributes which are protected in one place. The "protected characteristics" are:- age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The new law seeks to clarify the types of prohibited conduct in relation to these protected characteristics in one place. For most of the protected characteristics it will be unlawful to commit:- direct and indirect discrimination, harassment and victimisation. This simplifies the position considerably. Notably, indirect discrimination will be extended to disability for the first time.

The definition of direct discrimination will change slightly. Under the new Act, a person (A) discriminates against another (B) if, **because of a protected characteristic**, A treats B less favourably than A treats or would treat others.

The words “because of a protected characteristic”, will include discrimination by association (where someone is discriminated against because of their close link to another person’s protected characteristic) and discrimination by perception (discrimination because someone is wrongly thought to have a protected characteristic). This reflects the trend in recent case law and seeks to provide protection, for example, for the parents of a disabled child or for someone who is bullied for being apparently gay, even though he is actually not.

2. Changes in relation to disability discrimination

The most significant development is the attempt of the Act to redress the difficulties for employees in claiming disability discrimination. The House of Lords decision in the case of *London Borough of Lewisham v Malcolm* (2008) severely restricted the possibility of claiming disability-related discrimination by introducing a comparator test which was very difficult to satisfy.

The new Act replaces the concept of “disability related discrimination” with “**discrimination arising from disability**” whereby a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B’s disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. There is therefore no need for a comparator under the new Act. However, the employer’s **knowledge** is vital in this case as this provision does not apply where the employer can show that it did not know, and could not reasonably have been expected to know, that B had the disability.

Another attempt to counter disability discrimination is the **prohibition on pre-employment health questions**. This is subject to certain exceptions but means an employer will be able to be less informed about the employees it is hiring. It should nevertheless assist disabled applicants, who have felt disadvantaged in the application process or even decided not to apply for a job at all on the basis of having to answer health questionnaires.

3. Equal pay

In an effort to address the continued significant gender pay gap, the Act has rendered pay secrecy clauses unenforceable where an employee is trying to show unequal treatment. This means that an employee cannot be prevented from discussing information about a colleague’s salary or bonus payment, for example, if this is for the purposes of seeing whether there is any connection between pay levels and protected characteristics such as sex or race. Any clauses in a contract or handbook requiring secrecy will no longer be of any value.

4. Positive action

The Act contains provisions to allow employers to take proportionate action to encourage, enable or meet the needs of an under-represented group. The Government is still considering the implementation of this provision. This “positive action” constitutes a defence to a discrimination claim. The draft code is keen to stress that positive action is to be distinguished from positive discrimination or affirmative action, which are both unlawful.

In the context of recruitment and promotion, the Act also provides that an employer may choose a candidate from a disadvantaged or under-represented group, where they are as qualified as another candidate to do the job, provided that the employer does not have a policy of treating people from that group more favourably in these circumstances. The draft code comments that employers should consider the individual merits of all candidates regardless of whether they come from a disadvantaged group or from a group where there is low participation.

5. Recommendations by Tribunals

In addition to the usual remedies a Tribunal can award to a successful claimant, the Act goes one step further and provides that a Tribunal can make an appropriate recommendation to the employer to reduce the impact of the discrimination, harassment or victimisation, for the benefit of the wider workforce. We wait to see how far this power will reach but an obvious example would be for a Tribunal to recommend the employer provides equal opportunities training for staff involved in promotion procedures or to introduce more transparent selection criteria in recruitment processes. A failure to comply with a recommendation could be used as evidence in any subsequent cases against the employer.

National Minimum Wage increase

The National Minimum Wage hourly rates will increase as follows from 1 October 2010:

- £5.80 to £5.93 an hour for workers aged 21 and over;
- £4.83 to £4.92 an hour for workers aged 18 to 20; and
- £3.57 to £3.64 an hour for workers aged 16 to 17.

Please note that the adult minimum wage rate will be extended to 21 (previously 22) year-olds from October 2010 and, for the first time, an apprentice minimum wage rate has been set at £2.50 an hour.

Increase in whistleblowing cases

Recent Employment Tribunal statistics show a vast increase in employees' use of whistleblowing protection. The total number of people using this legislation increased from 157 cases in 1999 to 1,791 ten years later. The Public Interest Disclosure Act 1998 introduced protection for employees who blew the whistle on an employer's wrongdoing. We make a number of observations regarding these statistics.

Firstly, an awareness of the protection afforded by the legislation has undoubtedly contributed to more cases. On the one hand this is a positive development but there is concern that disgruntled employees are using the whistleblowing legislation to try to increase their pay-outs. The fact that a "breach of a legal obligation" has been held to include breach of an employee's own employment contract, means that the threshold for an employee to argue they have blown the whistle is relatively low.

The limits of this were recently tested in the case of *Goode v Marks & Spencer*, where an employee sought to argue that he had blown the whistle in his complaint to his manager and an anonymous letter to The Times about his employer's proposed changes to a discretionary enhanced redundancy scheme. The Tribunal and Appeal Tribunal disagreed with him. There was no evidence to show that M&S would fail to comply with any legal obligation in relation to the enhanced redundancy scheme.

Clearly, whilst there are abuses of the protection, there is an important concern to protect employees who expose wrongdoing and ensure employers deal appropriately with concerns raised by whistleblowers (instead of victimising and dismissing the messenger). To this end, it is important for employers to have policies in place regarding whistleblowing, to identify disclosures that might qualify and take steps to protect rather than victimise an employee. The recent case of *BP plc v Elstone* even extended the protection afforded to an employee. It confirmed that a worker can bring a whistleblowing claim against his current employer for suffering a detriment, even though he was employed by another employer at the time he made the protected disclosure.

Whether you are an employee seeking to rely on the whistleblowing legislation or an employer dealing with whistleblowing concerns raised by your workforce, it is important to understand the ambit of the current legislation. For further information, please do not hesitate to contact us.

Fit note v sick note

The recent introduction of “fit notes” for “sick notes” means that instead of the previous two options “fit for work” or “not fit for work”, the latter is now replaced with a new option “may be fit for work taking account of the following advice”. The sample form suggests, for example, a phased return to work, altered hours, amended duties or workplace adaptations.

The aim of the fit notes is to encourage discussions between doctor and employee, and employee and employer, on the potential options that could facilitate a return to work. To what extent this will work in practice and how far employers will be willing to risk the responsibility of having an employee at work who “may be fit for work” remains to be seen. Employers should in any case check their compulsory liability insurance and carry out risk assessments.

Upcoming seminar

THURSDAY 11 NOVEMBER 2010 - *Social Networking: Grow your business, watch out for the pitfalls*

When use of social media is growing exponentially, **Helen Clifford** will address how to best use social networking to promote your business and your obligations as employer/host for the content of sites. She will also look at reputational damage and defamation. **Melanie Stancliffe** will cover issues of social networking from an employer’s point of view, including what you can monitor, how you deal with time-wasting and cyber-bullying, and how to use social networking for recruitment.

Speakers:

Helen Clifford, Head of the IP and Technology Group

Melanie Stancliffe, Joint Head of the Employment Department

The seminar is complementary but places are limited. To reserve your place at the seminar, please e-mail yclero@pe-legal.com with **Social Networking – Grow your business** as the subject line.

ABOUT US

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