

hacking ashton



# Employment Law Newsletter

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Welcome to Hacking Ashton LLP Employment Law Department's Newsletter. In this edition we focus on the employment implications of the so-called 'credit crunch', the changes to the Sex Discrimination Act 1975, key changes in case law, the current dispute resolution consultation, the national minimum wage legislation review and the review of 'no-win, no-fee' funding.

### The Credit Crunch Closer to Home

A recent survey by Baker Tilly, carried out in February and April 2008, found that businesses are now reacting to the effects of the credit crunch after months of uncertainty.

According to the report, the number of companies considering cutting their costs nearly doubled during March - rising from 26% to 45% by April.

The biggest area for potential cost savings was seen in recruitment with one in four companies looking at limiting recruitment, one in six pondering redundancies, while one in ten were considering a change in remuneration policies.

Therefore it seems appropriate at this stage to reaffirm the key points of consideration in any redundancy exercise:

1. Plan ahead;
2. Send an announcement letter inviting volunteers for redundancy;
3. Consult, both collectively and individually;
4. Notify the Department for Business, Enterprise & Regulatory Reform (formerly the DTI) if more than 20 redundancies;
5. Apply an objective selection criteria;
6. Apply the 3-step statutory minimum dismissal procedure;
7. Explore the possibility of suitable alternative employment;
8. Calculate statutory redundancy payments;
9. Assist redundant employees in seeking alternative employment/training
10. Deal with any appeals against redundancy dismissals.

On a more positive note, and perhaps surprisingly, the report also found that three quarters of those surveyed were continuing their growth strategies in 2008. A third expected such growth would come from acquisitions, while a third envisaged a continuation of organic expansion despite the credit crunch.

#### INSIDE THIS ISSUE

- 1** The Credit Crunch Closer to Home
- 2** Changes to the Sex Discrimination Act 1975
- 3** Key Case Law Update and Changes
- 4** Key Legislation Update and Dispute Resolution Consultation
- 5** Other Employment Considerations

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*"The credit crunch and the subsequent employment implications"*

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## Changes to the Sex Discrimination Act 1975

With effect from 6 April 2008, the Sex Discrimination Act 1975 (“the SDA”) was amended in three important areas in order to bring UK legislation into line with the 2002 EC Equal Treatment Directive.

The SDA (Amendment) Regulations 2008 introduce the following changes:

### 1. Redefinition of Sex-Related Harassment

Prior to 6 April 2008, protection against sex-related harassment was not extended to anyone other than the complainant. Under the new Regulations, harassment will occur if the unwanted conduct is *related to the complainants sex or that of another person*. The impact of this amendments is that conduct of a sex-based nature, whether directed at the complainant or not, but which s/he finds degrading, would now be considered sex-related harassment.

Further the definition for the sex-related harassment has widened. Originally the conduct had to be on ‘grounds of sex’ whereas now it only has to be ‘related to’ sex.

### 2. Harassment by Third Parties

An employer may potentially be liable for sex-related harassment of their employees by contractors, clients or other third parties, if this occurs in the course of employment. However the employer must know that the employee has been the subject of sex-related harassment in the course of employment on at least two occasions by a third party. The employer will have a defence to such claims providing it takes such steps as would be reasonably practicable to prevent the third party from harassing the employee.

### 3. Maternity Leave – Additional Rights:

Two new provisions will apply to women whose Expected Week of Childbirth (“EWC”) begins on or after 5 October 2008;

- (a) At present, employees on ordinary maternity leave are entitled to the benefit of all terms and conditions of employment had she not been absent from work (save for normal salary). However for those women whose EWC commences on or after 5 October 2008, these rights are extended to any period of additional maternity leave;
- (b) At present, time spent on compulsory maternity leave (i.e. the two weeks immediately after childbirth, or four weeks in the case of factory workers) has to be taken into account when calculating a contractual bonus. This will now extend to non-contractual bonuses too.

### The Way Forward for Employers

There is no doubt that these changes make the area of harassment more complicated than it already is. Therefore, in order to be one step ahead, it is recommended that employers review and update their harassment policies to ensure that they have the necessary procedures and safeguards in place. In addition, employers should consider diversity training and a user-friendly procedure of how employees can report any incidents of harassment.

In order to combat third party sex-related harassment, employers could also consider displaying the companies harassment policy, making it clear to visitors that harassment will not be tolerated.

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*Updating the Sex  
Discrimination Act 1975  
and the practical  
consideration for  
employers*

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## Key Case Law Update and Changes

### 1. Clyde Valley Housing Association v MacAulay

MacAulay brought a claim of constructive dismissal and disability discrimination against Clyde. It was agreed that the *modified* grievance procedure would be applied. Clyde asked MacAulay to clarify exactly what act(s) and/or conduct was the subject of the grievance. These were not forthcoming and as such Clyde wrote to confirm that it was unable to address the grievance. The employment tribunal held that the grievance procedure had been complied with and MacAulay won her case.

The Employment Appeals Tribunal overturned this decision stating that the Tribunal could not entertain the claim unless MacAulay had set out her grievance and the basis for it. It was confirmed that the written statement must “contain the answers to essential questions that one would expect to arise in a grievance, namely ‘Who? What? Where? When? Why?’”. The letter in this case only made assertions and did not meet the threshold condition. The claim was dismissed.

### 2. Procek v Oakford Farms Limited

Yet another case asking the question of what actually constitutes a grievance, and unfortunately, this time the debate has swung in favour of the employee... the EAT has held that a statutory grievance is still a statutory grievance, even when the grievance itself states that it's not.

The claimant submitted a grievance which stated that it was to be treated informally and that failure to address it would result in a formal grievance. This never happened.

The EAT held however that it was a valid grievance under the Employment Act 2002. It was confirmed that “the issue is not whether the grievance lodged is stated to be a statutory grievance. The only question is whether it satisfies the requirements laid down for a Step 1 letter. This merely requires that the grievance is set out in writing and sent to the employer. That has been done. We do not see that the classification placed on it by [Mr Procek] can affect that conclusion”.

On a more positive note, it was noted by the EAT that no statutory uplift in the award would apply for the employer's failure to follow the grievance procedure as this would be unfair on the employer when he did not realise that it was a grievance in the first place.

### 3. McKindless Group v McLaughlin

The above case has led on nicely to the controversial EAT case on uplifts to awards. The employer in this case admitted breaching the statutory dismissal procedures and as such defended the case on the point of quantum only. The Tribunal awarded the full 50% statutory uplift in compensation. However, the EAT overturned this stating that:

- (a) a tribunal cannot award more than a 10% uplift in the absence of evidence of the reason(s) for breach of the statutory dismissal procedure;
- (b) a tribunal is not entitled to take into account the manner in which the employer subsequently conducted the employment tribunal.

However it seems that both of these conclusions will be open to further debate.

### 4. Beasley v National Grid

It is every employment lawyer's worst nightmare to miss a deadline for submitting an employment claim and this case only goes to support that fear! Perhaps, however, this may be good news for employers. The EAT in this case upheld a tribunal's decision that an ET1 presented 88 seconds out of time was too late. The Court of Appeal has now confirmed this position commenting that “there is no grey area for complaints which are only a bit out of time”. The claim was dismissed.

## Key Legislation Update and Dispute Resolution Consultation

### Dispute Resolution Consultation

As reported in our previous newsletter, the Employment Bill is currently being considered by Parliament which includes, amongst other points, repealing the statutory dispute resolution procedures and related provisions about procedural fairness in unfair dismissal claims.

These legislative reforms are complemented by a number of other measures which may require secondary legislation. The matters under consultation include:

**1. extending the definition of a 'relevant advisor' who can sign off a compromise agreement (to include CIPD members);**

A compromise agreement is a binding agreement between parties to settle a dispute out of tribunal. In order for the agreement to be legally binding, the employee must seek independent legal advice. At present, the 'relevant advisors' include qualified lawyers, legal executives, certified trade union members and certified advice centre workers.

**2. changing the current position on interest accruing on unpaid tribunal awards;**

At present when interest accrues, the interest rate is fixed at 8%. The government is seeking views on whether this should be replaced by a floating rate of interest.

**3. broader powers for tribunals to make recommendations in discrimination cases;**

At present, tribunals can make recommendations for the respondent to take steps to reduce the impact on the claimant of the discrimination proved for the case. However the government is seeking views on the extension of such powers to include making recommendations where they might not benefit the employee (for example, where the claimant is no longer employed by the company). These recommendations might help employers eliminate discriminatory practices and benefit other employees of the company.

**4. tribunal procedures for employment judges to make decisions on papers only in straightforward cases, without the need for a tribunal hearing;**

This process would have the potential to both parties of reducing costs and time associated with attending and/or representation at hearings. The areas which may be encapsulated by this change include: unlawful deduction from wages, breach of contract, redundancy pay, holiday pay and national minimum wage claims.

**5. adding holiday pay to the list of jurisdictions that can be heard by an Employment Judge sitting alone;**

A full panel of three tribunal members does not sit alone in all employment tribunal cases. An Employment Judge hears certain cases sitting alone. Therefore the government proposes to bring holiday pay claims into line with other straightforward claims such as national minimum wage claims.

**6. other changes;**

In addition to the above, the government is taking the opportunity to review the tribunal rules and procedures. This includes, amongst other things, measures such as clarifying the position in regards to 'withdrawal' and 'dismissal' of claims.

**7. revising the claim form (ET1) and response to claim (ET3);**

Such amendments would have the effect of simplifying and shortening the current claim and response forms.

**8. transitional arrangements for the abolition of the statutory dismissal and grievance procedures;**

The government is seeking views on the methods to handling the transition to the new regime, in particular in regard to the dispute resolution regulations.

For further information, the full consultation paper is available at: <http://www.berr.gov.uk/files/file46775.pdf>

## Other Employment Considerations:

### **WARNING: National Minimum Wage Evaders**

Employers should be aware that more punitive measures are now in place for employers exploiting an employee's right to a basic wage. Under National Minimum Wage Act 1998 ("the NMW Act"), HM Customs and Excise (HMRC) are now to police any failures to pay employees the minimum wage.

A 'Notice of Underpayment' can be served by a HMRC officer on an employer. There are two aspects of this Notice:

1. Payment of the arrears: this is straightforward and requires payment within 28 days of the Notice;
2. Financial Penalty: this is 50% of the outstanding amount. The penalty does however have a lower limit of £100 and a higher limit of £5,000. The employer does have the right to appeal to the tribunal within 28 days of service of the Notice.

It should also be noted that there are criminal offences under the NMW Act. All these changes are likely to come into force this year however as yet no date has been fixed.

### **GOVERNMENT REVIEW: No Win No Fee Funding**

The Ministry of Justice has announced a review of 'no-win, no-fee' funding in employment cases (and other cases such as personal injury and defamation).

This review will be welcomed by employers and solicitors alike who all too often are having to defend frivolous claims. The review has been sparked by concerns that this funding option is not always operating "in the interests of access to justice". The results of the review are likely to be received towards the end of 2008.

Any statutes mentioned in this newsletter can be accessed from the website of Office of Public Sector Information - [www.opsi.gov.uk](http://www.opsi.gov.uk)

Feel free to contact Hacking Ashton LLP with any queries regarding the content of this newsletter using the contact details listed below.

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