

ACAS Code of Practice Transitional Period

In previous bulletins we have been keeping you up to date with the new ACAS Code of Practice that was published early this year. The main effect of the new code is that it is no longer mandatory for employees to raise a grievance in order to bring a claim in the Employment Tribunal.

The changes only apply to matters where the event giving rise to the claim occurred after 6 April 2009. For earlier events, there were complex transitional provisions which meant that the old rules still had to be followed if an employee wished to bring a claim; that transitional period is now over. The new Code of Practice allows for semi-voluntary compliance with the Code. It aims to promote the early resolution of disciplinary and grievance issues and ensure that they are dealt with in accordance with the basic requirements of fairness. The fairness of any procedure will be heavily dependant on whether an employer has followed the principles enshrined in the Code when dismissing an employee. A failure by an employer to comply with the Code will not, on its own, render an employer liable for a claim but it will be taken into account by the tribunal when considering whether or not the employer acted fairly. However, simply following the Code will not necessarily make a dismissal fair.

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National Minimum Wage increase

On October 1st 2009 the National Minimum Wage will rise again to £5.80 for adults aged 22 or above, to £4.83 for workers aged 18 to 21 and to £3.57 for under 18s.

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Government brings forward review of default retirement age

The Government has announced that it will bring forward the review of the default retirement age from 2011 to 2010.

Currently, the default retirement age is 65 and employers may fairly dismiss employees who are 65 years old or over by reason of retirement. If the Government decide that the default retirement age is no longer necessary, then they will not implement any changes until 2011 to allow employers to prepare and employees to consider their retirement plans.

Stop the press..... at the time of writing this the High Court has ruled that employers can force workers to retire at the age of 65.

The decision follows a claim brought by Age Concern and Help the Aged more commonly known as the *Heyday* appeal. They claimed that the legislation failed to interpret an EU Directive against age discrimination correctly.

This is an important decision as a mandatory retirement age of 65 was created in October 2006, when new laws on age discrimination were brought into force.

Under the Employment Equality (Age) Regulation, an employer could force an employee to retire or refuse to employ them beyond that age without giving a reason. Employers can also refuse to take on anyone over the age of 65. This will be a welcome decision for many employers as, for the moment, they will no longer have to go to the expense of complying with difficult legislative requirements; but watch this space...

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Redundancy Pay

In the 2009 Budget the Government announced the increase in the weekly limit used to calculate statutory redundancy pay from £350 to £380. It has now been confirmed that the increase will take effect on 1 October 2009. The limit is usually increased each February, but the Government has said it will not be increased again until February 2011. The increase is intended to provide a stronger safety net for employees in the recession.

Workers can reclaim holidays lost to sickness

The ECJ has decided in *Pereda*, that a period of illness whilst on holiday does not count towards the minimum period of 4 weeks paid annual leave under the *Working Time Directive* (WTD).

Mr. Pereda, a specialist driver, suffered an accident at work around 14 days before the commencement of his allocated period of 4 weeks annual leave. The injury sustained led to Pereda being signed off work for 6 weeks. His sick leave was almost wholly overlapped his authorised holiday. His request for an additional period of holiday to take this into account was refused. Under the ECJ's ruling his period of sick leave should not have counted towards his holiday time.

The ruling emphasises that there can be no deductions from the entitlement to paid annual leave. This means that if an employee decides not to take annual leave during a period of illness, he must be granted a replacement holiday period to ensure that he is not deprived of his entitlement to rest, relaxation and leisure. This principle is likely to apply whether the employee falls sick before or during the actual period of leave and is a big blow for the employer.

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Dismissal by post

Difficulties can arise for employers where an employee is absent from the workplace due to sickness or absence without leave, and the employer wishes to dismiss them. The problems associated with dismissal by post were considered in the case of *Gisda Cyf v Barrett*.

In this case the employee, Miss Barrett was informed that she had been dismissed by her employer by way of a recorded delivery letter. The letter informed her that she had been summarily dismissed for gross misconduct.

Miss Barrett lodged a claim for unfair dismissal with the Employment Tribunal, but the employer claimed that she was outside the 3 month time limit for bringing a claim. The employer claimed that the date of termination was the date when the dismissal letter was written and posted. Miss Barrett claimed that it was the date that she actually opened the letter and became aware that she had been dismissed. The Court of Appeal has decided that, where a dismissal is communicated by way of a letter sent to the employee at home, provided that the employee had neither gone away deliberately to avoid receiving the letter nor avoided opening it and reading it, the effective date of termination of employment - and thus the date from when the three month time limit starts running - is when the letter is actually read by the employee, not when it is posted or even when it arrives in the post.

If it is important for the employer to have a definite date for dismissal then delivery in person (or even service by a process server) would appear to be the best option.

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Anonymised Job Applications

There has been considerable interest in the recent revelation that civil servants have been sending out bogus job applications in an attempt to discover whether employers turn down applicants on the basis of their names. Civil servants have applied for certain jobs with two or three CVs, all essentially the same save for a potentially lucrative detail. The detail might relate, for example to race or ethnic origin, gender, disability or, since 2006, to age. For example one application had a traditionally English name and but was then resubmitted with what could be considered to be more foreign sounding names.

The results of this 'experiment' have yet to be revealed. But, interestingly, the Government has just confirmed that it will consider including within the Equality Bill, which is currently progressing through Parliament, proposals that companies are obliged to accept only 'anonymous' job applications. This proposal would require that employers ensure the person selecting candidates to be invited for an interview, does not know the gender, race, sexual orientation, age or marital status of the candidate. The aim of this would be to try to exclude what has been referred to as 'subliminal bias' which could lead to unintentional discrimination. The intention being that it would reduce the possibility for bias against a good candidate due their name, age or nationality, although it seems unlikely that this proposal will become law.

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New Leave Rights will give more choice & Flexibility to Parents as to how they use Maternity & Paternity Leave

The government is proposing to change the law so that employed mothers will be able to transfer all or part of the last 26 weeks of their maternity leave to the father, to the extent that this "additional paternity leave" is taken during the mother's 39 week maternity pay period. It would be paid at the same rate as Statutory Maternity Pay (currently £123.06).

Existing rights, such as the father's rights to two weeks maternity leave, will not be affected. Likewise the mother's right to 52 weeks maternity leave, of which up to 39 weeks are paid would not be affected. Employed parents are also entitled to a total of 13 weeks unpaid parental leave until the child's fifth birthday. Parents of children aged 16 and under have the right to request flexible working.

A consultation on draft regulations is to be launched soon. Subject to approval, the government intends the law TO be in force by April 2010 and have effect for parents of children due on or after 3 April 2011. However, the Government is abandoning its previous proposal of extending maternity pay from nine months to a year.

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Employing Children

The Department for Children Schools and Family has produced an excellent, Guide on Employing Children, covering everything from the types of work children can (and cannot) do, through the number of hours they can be required to work, to specific health & safety requirements. It's a really good guide to print off and keep for future reference.

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IMPORTANT NOTICE

These notes are for guidance purposes only. We believe the contents to be correct but it should not be taken as accurate or full or to apply to specific situations, without first referring to us. Please feel free to call the office and speak to one of our employment team who will be willing to assist with any queries you may have.

Legal representation at disciplinary.....

When undertaking a disciplinary meeting, the employer has a duty to inform the employee that he has the right to be accompanied by a fellow worker, a trade union representative or an official employed by a trade union. Under the ACAS Code of Practice the companion should be allowed to put the employees case forward and to conclude the case, respond on behalf of the worker, and confer with the employee during the course of the meeting and, of course, to take notes on their behalf.

There is an increasing demand from employees to have a legal representative to attend any meeting with them. As it is not a prescribed right for a lawyer to attend, it is up to the employer if they wish to allow an un-prescribed third party to attend, but for employees of public authorities, there are now some circumstances in which the employee can insist on being allowed to have legal representation. This will be so if the employee is accused of an offence which is of "such gravity" that, if proven, it will effectively block him or her from continuing their chosen career. This significant development follows from the Court of Appeal's ruling on 23rd July 2009 in the case of *Kulkarni v Milton Keynes Hospital NHS Foundation Trust*.

In this case the employee, a Doctor, was accused of improperly touching a patient. The patient had complained that he inappropriately examined her by placing a stethoscope under her knickers without her permission. He was suspended with immediate effect, on full pay, pending an investigation into the matter.

Dr Kulkarni was not allowed legal representation at the subsequent disciplinary hearing. He appealed to the High Court on the basis that this infringed his Human Rights, but his case was rejected. Kulkarni appealed to the Court of Appeal and won. it was held that refusal to allow him legal representation at his disciplinary hearing could infringe his human rights.

The importance of this decision is mainly in relation to public sector employees but it could just pave the way for all employees to be entitled to legal representation. This is because, although the Human Rights Act 1998 does not make the European Convention on Human Rights part of UK domestic law, it does enable private citizens to enforce convention rights against public authorities through the domestic courts.

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