

## EMPLOYMENT LAW UPDATE

### SPRING 2011

---

## CONTENTS

### LEGISLATIVE CHANGES

Abolition of the Default Retirement Age	2
Additional Paternity Leave and Pay	2
The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) (Revocation) Regulations 2011	2
Consultation: Family Friendly, Working Time and More	2
Bribery Act 2010	3
The Agency Workers Regulations 2010	3
Government review: discrimination compensation, collective redundancies and TUPE	3
The Income Tax (Pay As You Earn) (Amendment) Regulations 2011	3
Minimum Wage Increase	3
Increase in Tribunal Awards	3
Immigration	4

### RECENT CASES OF INTEREST

Time off for Dependents	4
Redundancy and Maternity Leave	5
Use of Confidential Information	5

---

## INTRODUCTION

Employment law is constantly evolving to reflect changes in government policy and European law requirements. Since our Autumn Employment Law Update, there have been further important developments. Employers need to be aware of these and ensure that workplace policies and procedures are amended where appropriate in order properly to manage their workforce and reduce the scope for disputes.

In this bulletin we set out short summaries of some of the recent developments in legislation and case law guidance. Please contact Charlotte Davies, Katy Carr or your usual Ince contact if you have any queries or would like to discuss these or any other employment law matters in more detail.

---

## LEGISLATIVE CHANGES

### Abolition of the Default Retirement Age

The Default Retirement Age has been abolished with effect from 6 April 2011. Any dismissal because of age on or after 6 April 2011 will constitute direct age discrimination under the Equality Act 2010, unless it falls within the transitional provisions.

The Government originally indicated that there will be a six month transitional period (from 6 April to 30 September 2011), but this has been abandoned in favour of a 12 month transitional period. For a retirement dismissal to fall within the transitional provisions, the following conditions must apply:

- > The notice of intended retirement must have been issued on or before 5 April 2011.
- > The employee being retired must have reached the age of 65 (or the normal retirement age if this is higher) on or by 30 September 2011.
- > All requirements of the statutory retirement procedure must have been met.

Going forwards, employers have two options: they can abandon fixed retirement ages altogether or retain a fixed retirement age. If fixed retirement ages are abandoned, the employer will still need to show, on a case-by-case basis, that it acted fairly when deciding to dismiss a particular employee and that such dismissals are not tainted with age discrimination. Employees over the age of 65 can still be dismissed on the grounds of performance/capability, conduct and redundancy in the usual way, provided these reasons are genuine and a fair procedure is followed.

If fixed retirement ages are to be retained, the employer will need to be able to justify the retirement age as a proportionate means of achieving a legitimate aim. The employer will need to show that a balancing act has been carried out, weighing the discriminatory effect on the employee against the benefits achieved for the business and considering whether the aim can be met by less discriminatory means. Many employers will want to invoke a broad legitimate aim, such as workforce planning but it remains to be seen how tolerant employment tribunals will be of such generally stated aims. Other potentially legitimate aims may include:

- > Economic factors, such as the needs of and efficiency of running a business.
- > Facilitating the recruitment and retention of younger employees.
- > The health and safety of individual employees.
- > The particular training requirements of the job.

Employers will need to decide whether they can justify the retention of a retirement age and update their retirement policies accordingly. Where a retirement age is retained, the reasons should be set out fully and clearly in the policy. Where the retirement age is abandoned, any retirement policy should be amended to reflect this. Further, performance appraisal guidelines should be reviewed and revised where necessary and managers should be trained on how to communicate and manage performance issues. Consideration should also be given to the career development/promotion of younger staff who may feel hindered by the continued employment of older employees.

### Additional Paternity Leave and Pay

The Additional Paternity Leave Regulations 2010 came into force on 6 April 2010, but apply to parents of babies due (and adoptive parents notified of a match) on or after **3 April 2011**. The regulations give eligible employees (usually fathers) the right to take up to 26 weeks paternity leave if the mother, or primary adopter, returns to work early.

### The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) (Revocation) Regulations 2011

These regulations came into force on 1 April 2011 and *revoked* the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2010 which would have extended the right to request flexible working to all parents of children under the age of 18 from 6th April 2011. The right to request flexible working remains for parents of children under the age 17, or under 18 if the child is disabled. The government has stated that it is committed to extending the right to all employees and has launched a consultation on family friendly working practices (see below).

### Consultation: Family Friendly, Working Time and More

The Department for Business Innovation and Skills has launched a consultation document entitled "Consultation on Modern Work Places".

It proposes the following:

- > Flexible parental leave - whereby 18 weeks' maternity leave will be maintained for mothers, with the remaining maternity leave being classified as parental leave to be taken by either parent, with most of it paid.
- > Flexible working - extending the right to request flexible working to all employees not just those with children under 17 (or 18 if the children are disabled).
- > Working time regulations - a proposal to enshrine recent European Court of Justice case law into UK law, by providing that employees can carry over untaken holiday into subsequent years if they have lost the chance to take that holiday due to sickness absence or maternity/parental leave.

The consultation closes on 8 August 2011.

## Bribery Act 2010

The Bribery Act 2010 comes into force on 1 July 2011. It introduces a new strict liability corporate defence of failing to prevent bribery by individuals acting on behalf of an organisation. The only defence open to employers will be to show that they have adequate procedures in place to prevent bribery and corruption. Adequate procedures are not defined in the Bribery Act, but the Ministry of Justice has published guidance on what these might involve. The guidance sets out the following six principles for companies to follow:

- > Proportionate procedures
- > Top level commitment
- > Risk assessment
- > Due diligence
- > Communication
- > Monitoring and review.

On a practical level, businesses should prohibit bribery in any form whether direct or indirect, and commit to implementing systems to counter bribery. This will include reviewing the adequacy of internal procedures to prevent bribery, ensuring that detailed written procedures and training are available to staff, and implementing effective risk management procedures, for example, regular auditing of compliance and monitoring and review of the effectiveness of the policy.

For further information on the Bribery Act please visit our website at: [incelaw.com/ourknowledge/publications/bribery-act-guidance](http://incelaw.com/ourknowledge/publications/bribery-act-guidance).

## The Agency Workers Regulations 2010

The Agency Workers Regulations of 2010 are due to come into force on 1 October 2011. These apply to agency workers who are assigned to do temporary work through temporary work agencies. The Regulations provide that all agency workers must be able to access a hirer's collective facilities and amenities (for example, canteens and similar facilities, childcare facilities and transport services) and have access to information about its job vacancies from the first day of their assignment, in order to be given the same opportunity as a comparable employee or worker to find permanent employment with the hirer. In addition, after completion a 12 week qualifying period, agency workers are entitled to the same basic working and employment conditions that they would have been entitled to had they been recruited directly by the hirer including for example, pay, working hours, night work, rest periods, rest breaks and annual leave.

## Government review: discrimination compensation, collective redundancies and TUPE

On 11 May 2011, the Government announced that it will extend its review of employment law to include three areas which employers have highlighted as problematic:

- > Discrimination compensation.
- > Collective redundancy consultation.
- > Employee protection on the transfer of undertakings.

Employers have indicated that the lack of a cap on discrimination claims makes it difficult for them to assess potential liabilities and that collective redundancy consultation (required where an employer intends to make 20 or more employees redundant at one establishment within 90 days or less) and the requirements of the transfer of undertakings legislation are cumbersome and limit business flexibility. However, legislation "*will not necessarily be the route to implement any change if there is a case for reform*" and even if the government concludes that any of these areas should be reformed, its hands are tied to a large degree by European law.

## The Income Tax (Pay As You Earn) (Amendment) Regulations 2011

These regulations came into force on 6 April 2011. Previously, when a payment was made to a departed employee after their P45 had been produced, income tax could be deducted at basic rate only and the employee was responsible for any additional tax. From 6th April 2011, tax at the full 20 percent, 40 percent or 50 percent rates must be deducted from post-termination payments.

## Minimum Wage Increase

The government has announced that the adult national minimum wage will increase from 1 October 2011 from £5.93 per hour to £6.08 per hour.

## Increase in Tribunal Awards

Tribunal compensation limits increased from 1 February 2011. The maximum compensatory award for unfair dismissal claims has risen from £65,300 to £68,400. The maximum amount of a week's pay to calculate statutory redundancy has risen from £380 to £400.

## Immigration

On 6 April 2011 a number of changes were made to the immigration system.

The Government's new annual limit on the number of non-EU workers who can be given permission to work in the UK came into force. Under the annual limit, only 20,700 people from outside the EU can be granted permission to work in the UK under the skilled tier 2 (general) tier of the points based system. It should be noted that those earning a salary of £150,000 will not be subject to the limit.

The intra-company transfer route of tier 2, which is not subject to the annual limit set out above, has also been changed in three ways:

- > The job will have to be an occupation on the graduate occupation list.
- > Only those paid £40,000 or more will be able to stay for more than a year (they will be given permission to stay for three years with a possibility of extending it a further two years).
- > Those paid between £24,000 and £40,000 will be able to come to the UK for only 12 months, at which point they must leave and will be unable to reapply for 12 months.

The various sub-categories of the tier 2 (intra-company transfer) category have been amended to reflect the new rules. There are now four sub categories: long-term staff, short term staff, graduate trainee and skills transfer.

Further, tier 1 of the points based system will be unavailable for all but entrepreneurs, investors and people of exceptional talent. The old tier 1 (general) category has now been abolished. There will be 1,000 visas available each year to people of "exceptional talent". These will be given to those whose experts believe will make the biggest contribution to science and the arts in the UK.

Under the new rules for investors, those investing large sums of money will be able to settle permanently in the UK more quickly: those investing £5 million will be allowed to settle here after three years and those investing £10 million or more will be allowed to settle in two years. Entrepreneurs will also be able to settle in the UK more quickly if they create 10 jobs or have a turnover £5 million in a three year period.

There have also been changes to the settlement criteria, including a clearer criminality requirement, a new income requirement and changes to the English language requirement for those in the UK on work-based visas.

## RECENT CASES OF INTEREST

### Time off for Dependents

#### *Clarke v Credit Resource Solutions*

An Employment Tribunal has held that an employee was unfairly dismissed for taking time off work to make emergency childcare arrangements.

The claimant arrived at work 30 minutes late in order to arrange emergency childcare, when his mother-in-law, who usually looked after his children, was ill. The claimant's wife worked for the defendant company as well and she advised his line manager that he would come to work as soon as he had found another relative to care for the children. On his arrival at work, the claimant refused to sign a "late form" agreeing that due to being late, one hour's pay would be deducted from his salary for the month. An hour's pay was nevertheless deducted. The claimant questioned the deduction and, in a discussion with the wages department about the issue, he became agitated. The claimant was then suspended and summoned to attend a disciplinary hearing. At the hearing, he was told that he would be dismissed unless he signed the late form, provided a written apology and accepted a final warning. He refused to do so and was dismissed for gross misconduct for refusal to carry out duties or reasonable instructions and threatening behaviour.

The claimant issued Employment Tribunal proceedings claiming that he had suffered a detriment and been unfairly dismissed for exercising the right to take time off to make childcare arrangements contrary to the Employment Rights Act 1996. The Employment Tribunal upheld the claim. It found that the claimant had taken time off work on 5 July 2010 solely to arrange necessary emergency childcare, which is a statutory right under the Employment Rights Act 1996, and that being half an hour late was reasonable in the circumstances. In so deciding, the Employment Tribunal took the view that the legislation must be given a wide purposive interpretation and the application of the test should be approached in a pragmatic commonsense fashion on the facts of the case.

This is one of a few decisions on the exercise of an employee's right to take time off work to deal with situations affecting their dependents. Employers should be aware of employee's statutory rights and avoid introducing policies which may impact on those rights.

## Redundancy and Maternity Leave

### *Eversheds Legal Services Limited v De Belin*

In this case, it was held that inflating the score of an employee on maternity leave in a redundancy selection process was sex discrimination against her male colleague.

Two associates at a law firm were placed at risk of redundancy. The male employee was placed in pool with his colleague who was on maternity leave and, to decide which employee would be made redundant, they were scored against various criteria. One of the criteria was called "lock-up". This measured the time between a lawyer completing a piece of work and receiving fees for it, with more points being awarded for a quick turnaround. The male employee received the lowest possible score, but as his colleague was on maternity leave, she was awarded the highest possible score. The male employee raised a grievance, pointing out that his colleague's lock-up immediately before maternity leave had been similar to his, which would have resulted in her achieving the same score for that criteria and lower score overall than his. He argued that by artificially inflating her score, his employers had discriminated against him. The employers rejected the grievance, maintaining that they had to provide a high level of protection for pregnant women. The male employee was made redundant.

The male employee succeeded with direct sex discrimination and unfair dismissal claims before an Employment Tribunal. The Tribunal also held that there was insufficient evidence to suggest that he would have been made fairly redundant in a non-discriminatory way in another redundancy exercise shortly after his dismissal and it thereby declined to reduce his compensation. The employers appealed to the Employment Appeal Tribunal.

The Employment Appeal Tribunal held that employees who are pregnant or on maternity leave should sometimes be treated more favourably than their colleagues. However, they should not be favoured more than is reasonably necessary to compensate them from the disadvantages caused by their condition and the favourable treatment must be a proportionate means of achieving that legitimate aim. The redundancy selection criteria in this case was considered not to be proportionate, as there were alternative less discriminatory ways of removing the maternity-related disadvantage. The most satisfactory alternative would have been to measure the lock-up performance of both candidates as at the last date that the female employee was at work. The Employment Appeal Tribunal therefore upheld the findings of unfair dismissal and sex discrimination. However, it accepted that the claimant's compensation for loss of earnings should have been discounted to reflect the risk that he would have been made redundant in the subsequent redundancy exercise.

This case shows the difficulty in balancing the rights of pregnant women and those on maternity leave against the rights of men not to be discriminated against. Employers should not automatically assume that favouring an employee on maternity leave will protect them from claims and should consider ways in which the disadvantages of a maternity absence can be mitigated rather than automatically favouring female employees.

## Use of Confidential Information

### *Brandeaux Advisers (UK) Limited and Others v Chadwick*

In this case the High Court held that an employee was in repudiatory breach of contract when she sent large amounts of her employer's confidential information to her private email address. The employee argued that it was implied term of her contract that she was entitled to use or disclose confidential information in order to be prepared for a future dispute with her employers or the regulators. The Court doubted that the possibility of litigation with an employer could ever justify an employee in using confidential information. In particular, if a dispute arose, the employee could rely on the Court's disclosure process to obtain any documents needed. The Court also held that the employer would have been entitled to rely on the employee's repudiatory breach of contract to justify her dismissal even if, by the time of her breach, the employer was itself in repudiatory breach of contract. The Court did not, however, award the employer the salary paid after the employee's breach, on the basis that the employee had been working as usual and earning her salary and thus there was no loss to the employer.

This case demonstrates that possible litigation with an employer is unlikely ever to justify an employee in copying or transferring confidential documents. The employee must instead rely on the Court's disclosure process.

**If you wish to discuss any of the issues raised above or if you would like advice and assistance with any employment issues please contact Charlotte Davies ([charlotte.davies@incelaw.com](mailto:charlotte.davies@incelaw.com)) or Katy Carr ([katy.carr@incelaw.com](mailto:katy.carr@incelaw.com)).**

---

**Ince & Co International LLP, and its affiliated entities of commercial law firms together form the Ince & Co network with offices in Dubai, Hamburg, Hong Kong, Le Havre, London, Paris, Piraeus, Shanghai and Singapore. Ince & Co network firms practise in seven strands:**

Aviation    Business & Finance    Commercial Disputes    Energy & Offshore    Insurance & Reinsurance  
International Trade    Shipping

**E: [firstname.lastname@incelaw.com](mailto:firstname.lastname@incelaw.com)  
[incelaw.com](http://incelaw.com)**

**24 Hour International Emergency Response Tel: +44 (0)20 7283 6999**

**LEGAL ADVICE TO BUSINESSES GLOBALLY FOR OVER 140 YEARS**

The information and commentary herein do not and are not intended to amount to legal advice to any person on a specific matter. They are furnished for information purposes only and free of charge. Every reasonable effort is made to make them accurate and up to date but no responsibility for their accuracy or correctness, nor for any consequences of reliance on them, is assumed by the firm. Readers are firmly advised to obtain specific legal advice about any matter affecting them and are welcome to speak to their usual contact.

© 2011 Ince & Co International LLP, a limited liability partnership registered in England and Wales with number OC361890. Registered office and principal place of business: International House, 1 St Katharine's Way, London, E1W 1AY.