



## EXECUTIVE COMMITTEE MEETING : 21 JANUARY 2010

### MEMBERS' BRIEFING NOTE (Agenda Item 8.0)

#### 1. **Transfer of Undertakings and Protection of Employment Regulations 2006 (TUPE)**

There has been clarification following an Employment Appeals Tribunal (EAT) decision as regards who the "affected employees" are who must be consulted by an employer under the TUPE regulations and who should be consulted. Employees "affected" by a relevant transfer are those who will be or may be transferred, those whose jobs are in jeopardy by reason of the proposed transfer and those who have internal job applications pending at the time of transfer.

Under Regulation 13 of the TUPE Regulations the employer must inform and consult the representatives of "affected employees". In the case of *Unison v Somerset County Council & Ors*, the EAT clarified that this definition does not extend to everyone in the workforce who might apply in the future for a vacancy in the part of the business being transferred.

This has implications for councils in ensuring that representatives (trade unions or staff representatives) are fully consulted at all stages during a TUPE transfer and that robust records of this are kept in case of future challenge.

#### 2. **Advocate General's opinion on payments during pregnancy**

This case concerns pregnant employees who are temporarily transferred to a different job to prevent exposure to health risks. In the case of *Parviainen v Finnair Oyj (C-471/08)*, the Advocate General recommended that the European Court of Justice hold that the EU Pregnant Workers Directive (No.92/85) does not require an employer to pay a temporarily transferred pregnant worker the average salary that she earned prior to the transfer. Under Article 11, the employer is required to provide her with an adequate allowance, which must be no less than a male or female worker is paid for doing an equivalent job.

#### 3. **Options re Payment for ISA Registration**

People who wish to work with children or vulnerable adults will be able to commence applying for ISA registration from 26 July 2010. They will not be appointable to such roles as new starters or movers from November 2010 unless they have ISA registration.

The new ISA registration arrangements will involve an increase in costs. The question arises of who will bear this, the employer or job applicants? No charge will be made for volunteers.

So far, for staff who had to have an acceptable Criminal Records Bureau (CRB) disclosure, a Standard Check cost £31 (reduced to £26 from 12 October 2009), and an Enhanced Check

cost £36. However, from 12 October 2009 an Enhanced Check is required for all who work with children and vulnerable adults (including volunteers).

Since 12 October 2009 Standard Checks are appropriate only for those categories of staff which authorities need to check, but who do not work with children or vulnerable adults e.g. lawyers, accountants.

Once the ISA registration arrangements are in place, an employer can check on line and without cost that any applicant for paid or voluntary work with children or vulnerable adults is ISA-registered. Registration will cost the person £64. Early applicants are likely to be people who are looking for a career move.

Between July 2010 and April 2011 people seeking registration will either be employed and seeking a career move or will not be working and will have to bear the cost themselves.

From April 2011 to July 2015 all existing staff working with children or vulnerable adults will have to register. This will be a very much larger number with correspondingly large costs.

Councils are now considering who will pay for this and a recent survey by SEE across the south east indicates that some are considering bearing the costs as part of the recruitment process, others are still undecided. Councils may take the view:

- they do not want to pay if another employer will benefit, or
- the burden of costs will even out if all employers in the sector decide to pay, or
- they might offer to pay for their own employees seeking internal promotion, or
- given that all existing staff employed in regulated activity will have to be registered by July 2015 councils who are considering paying the cost for the large tranche of existing staff might take the view that it would not be disproportionately expensive to offer to pay for staff who wished to start registering from July 2010.

A benefit of an early start, apart from spreading the costs, is that some applicants for registration already in employment will be refused and time will be needed for the appeal process, or to progress appropriate internal processes should an appeal be unsuccessful.

#### **4. Claim of Direct and Indirect Discrimination and Harassment - Employment Equality (Religion or Belief) Regulations 2003**

Religion or Belief Regulations protect an individual's right to hold a religious belief, but do not extend to protecting the individual's right to manifest their belief as they choose. *London Borough of Islington v Ladele*.

A Court of Appeal judgment has been given concerning a Christian Registrar who refused to conduct civil partnership ceremonies on the basis that they were contrary to her Christian beliefs. The Court agreed that the Employment Equality (Religion or Belief) Regulations 2003 did not require an employer to accommodate any manifestation of an individual's religious beliefs, particularly where these beliefs were inconsistent with the Council's obligations not to discriminate in the exercise of its functions on the grounds of sexual orientation. It was held that the Registrar was not discriminated against on the basis of her beliefs.

The Registrar refused to carry out civil partnership services because of her religious beliefs. Her employer refused to reallocate these duties and decided that civil partnership ceremonies should be carried out equally by all staff. The employee was subjected to

disciplinary proceedings and threatened with dismissal for refusing to undertake civil partnerships.

No direct discrimination was found as all employees had been treated equally. The disciplinary proceedings were as a result of her conduct and not the employee's beliefs. Whilst the requirement that all Registrars carried out civil partnership ceremonies could be said to indirectly discriminate against those of the employee's religious belief, this was justified by the Council's duty to provide services in a non-discriminatory way. This decision follows a recent EAT case *McFarlane v Relate Avon Ltd* (EAT/0106/09) involving a Relate counsellor who was dismissed for refusing to work with same-sex couples on the basis of his Christian beliefs. The EAT found the dismissal to have been fair and non-discriminatory.

Councils should ensure conflicting beliefs and rights are dealt with sensitively. As commented in the EAT's judgments, where possible, flexibility should be encouraged. These cases highlight the need to have an up to date Equal Opportunities Policy which stresses the significance of providing services to the public in a non-discriminatory manner.

## 5. **Equality Bill at the House of Lords**

The Equality Bill had its first reading in the House of Lords on 3 December 2009. Its intention is to harmonise existing discrimination law across all the different 'strands' of discrimination and introduce some changes. There have been some relatively minor amendments to the Bill.

There is now a draft provision for pre-employment questionnaires to provide additional protection for people with a disability, particularly those with mental health problems. The new clause relates to how pre-employment medical questionnaires are used. If implemented, the burden of proof will be on the employer as regards any challenge of discriminatory action arising from asking about health during the recruitment process. The burden of proof will not shift to the employer if questions are asked for one or more 'defined purposes'. These are:

- Establishing whether there is a duty to make reasonable adjustments
- Monitoring diversity
- Taking positive action to eliminate discrimination
- Where the employer has an occupational requirement that the employee has a particular disability, establishing they have that disability.

Employers may become cautious about asking health-related questions during the early stages of the recruitment process. Pre-employment medical questionnaires can be used but employers will need to be careful about what questions are asked, their purpose and at what stage of the recruitment process. Additionally, employers must treat disclosed information with care so as not to breach the provisions of the Data Protection Act 1998.

The Bill may be further revised by the House of Lords and is expected to receive Royal Assent in Spring 2010.

## 6. **Dress Code did not discriminate**

An Employment Appeal Tribunal confirmed that an employer was entitled to uphold a dress code which imposed different requirements on male and female employees. This concerned a male employee who was training to be a police constable. The employer's dress code policy required the standard of dress "*to be smart, fit for purpose and portray a favourable impression of the service*". The policy provided that long hair should be neatly and securely fastened up and worn closely to the head.

The employee had shoulder-length hair was told to cut his hair or face disciplinary action. The employee agreed to cut his hair but brought a claim against his employer asserting that he had been unlawfully discriminated against on grounds of his sex, on the basis that a female employee would not have been required to cut her hair.

The Employment Appeal Tribunal (EAT) held that a dress code policy which applies “a *conventional standard of appearance*” is not in and of itself discriminatory. This is because when the policy is looked at as a whole it is evident that a female employee who has failed to comply with another part of the dress code would be treated in the same way. The employer’s policy was therefore “*equally balanced between the sexes*” and “*fully acceptable in law*”.

This confirms that employers are entitled to enforce dress codes with different requirements for men and women, provided that both sexes are subject to a similar standard of dress and the policy is enforced equally in respect of men and women.  
(*With thanks to Steeles Law*)

## 7. **Discrimination: Disability – reasonable adjustments duty - Disability Discrimination Act 1995**

*Secretary of State for the Department of Work and Pensions v Alam (UKEAT/0242/09)*

Mr Alam worked as an administrative officer for the Department of Work and Pensions (DWP). He suffered depression with symptoms including losing concentration, losing his temper and occasional severe headaches. These were not investigated by his employer. He also had financial difficulties.

His conduct in arriving late to work and seeking to leave early without providing proper explanation or discussion with his manager resulted in disciplinary action. At the hearing, Mr Alam asked for mitigatory circumstances to be considered including stress, depression and his financial difficulties. No further medical investigation took place at that stage and he was given a 12-month written warning.

Mr Alam claimed that the employer failed to make a reasonable adjustment. This refers to the duty placed on an employer to make reasonable adjustments where ‘a provision, criterion or practice applied by the employer places the disabled person at a substantial disadvantage in comparison with a person who is not disabled’.

The EAT considered whether the employer fell with the exemption from the duty to make reasonable adjustments as applied under s.4A of the Act. This relates to the employer’s knowledge of the existence and the effects of the disability.

As regards the effects of the disability two questions arise:

1. Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner complained of? If ‘no’, then the second question is
2. Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner complained of?

If the answer to the second question is also 'no' then the employer is not liable to make reasonable adjustments.

The EAT found the answer to both questions was no. Whilst the DWP was aware of a disability and even if they were aware he had difficulty in controlling his feelings, that itself was not sufficient to conclude that, as a result of his disability, he would have difficulty in complying with his employer's reasonable expectation as regards his conduct at work (asking for permission to leave early). The DWP was therefore not under a duty to make reasonable adjustments.

Whilst this case was decided on the facts, there could reasonably be an expectation that large employers would explore the nature of the disability further. In doing so, a manager may find that the disability has a substantial effect, triggering the need to make reasonable adjustments. It is unlikely that a defense of 'ignorance is bliss' would necessarily hold for a council. There are lessons here about the role of a good employer in working proactively and positively with disabled employees.

## **8. Discrimination – Compensation for stigma loss**

Employees who suffer a stigma when looking for a new job as a result of having brought a discrimination claim against a previous employer can be compensated for their loss by that employer.

*Case: Chagger v Abbey National Plc and another (Court of Appeal)*

The Employment Tribunal upheld Mr Chagger's claim of racial discrimination during the selection process for redundancy by Abbey National. Mr Chagger unsuccessfully applied for other employment and finally took a place on a teacher training course. He claimed he lost his ability to pursue a career in financial services or in the jobs market because of the stigma attached to having brought legal proceedings against Abbey. He was awarded almost £3million. This figure was referred back to the Employment Tribunal for re-assessment using the principles established by the House of Lords in *Polkey v AE Dayton Services* (on the basis that Mr Chagger would have been dismissed even if there had been no discrimination – which is what Abbey argued).

The Court of Appeal considered what position he would have been in had there not been a discriminatory dismissal. He was looking for a job at a time and in circumstances not of his making and the stigma of making a tribunal claim may have influenced his chances of employment in his profession. Whilst sympathetic to the employer's argument that it should not be liable for the practices of other employers (in refusing to employ him), the Court applied the decision of the House of Lords in *Malik v BCCI* which established that an employer can be liable for losses resulting from other employers not wanting to recruit its former employees.

Whilst the compensatory figure is high, an employee will normally have to show that they have made all reasonable efforts to lessen the loss by finding suitable employment.

This is a valuable reminder for councils of the importance of conducting a transparent, fair and consistent redundancy selection process as a challenge of discriminatory practice may result in significant financial costs after employment is terminated.

## **9. Consultation on collective redundancies**

*In Akavan Erityisalojen Keskusliitto AEK ry et al v Fujitsu Siemens Computers Oy (2009)*

IRLR 944 ECJ the European Court of Justice (ECJ) held that an employer triggers the duty to consult employees and their representatives about collective redundancies at the point where strategic decisions are taken that lead to a consideration of large-scale redundancies. This is interpreted as consultation for collective redundancies must begin when the employer intends to think about redundancies.

The Court held that there is no need for the employer to delay the consultation until it has all the necessary information required under the Directive. Information should be provided to employees and their representatives as it becomes available.

The employer's obligations for consultation on collective redundancies are set out in the Trade Union and Labour Relations (Consolidation) Act 1992. The duty to consult when the employer 'proposes' collective redundancies within a 90-day period could be interpreted to mean that consultation should start at a later stage, i.e. when strategic decisions have been confirmed in place. However, the EJC has clarified that consultation is triggered at the point when a strategic decision is made that will clearly require the employer to consider collective redundancies.

Councils should check their policies, trade union recognition and facilities agreements to ensure their approach is in line with the Directive and also to ensure confidentiality is maintained if information is to be disclosed earlier than would normally be the case. There are clearly sensitivities in communicating difficult information, to whom, and when. Such information can be reserved to representatives until an appropriate time to communicate more widely and this will rely on confidentiality arrangements being in place.

## **10. Acas Code of Practice – Time off for trade union duties**

The new Code came into force on 1 January 2010. It updates the section on time off for Union Learning Representatives to reflect the changing nature of workplaces and increased use of information technology. There are two guides dealing with managing time off for union and non-union representatives. This will be useful for councils seeking to update their policies on trade union facilities.

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