

# Headline

news from **Head  Office**

Summer 2010



## New Coalition Government's Employment Policy

**The recently formed Conservative-Liberal Democrat Coalition Government has now published its 'Programme for Government'. Some key issues and proposals we see being relevant to our clients are:**

- Phasing out the default retirement age
- Extending the right to request flexible working to all employees
- Encouraging shared parenting from the earliest stages of pregnancy by promoting flexible parental leave
- Limiting the number of non-EU economic migrants admitted into the UK to live and work
- Working to limit the application of the Working Time Directive
- Reviewing employment laws to ensure maximum flexibility for both employers and employees
- Promoting equal pay generally and also gender equality on the boards of listed companies
- Tackling 'unacceptable' bonuses in the financial services sector

With these goals in mind the Coalition have begun to look at some of the legislation enacted by the Labour Government in the run up to the election.

The first real casualty of this review seems to have been the requirement for those working with children and vulnerable adults to register under the new Vetting and Barring system. Registration was due to commence from the 26th July however the Government have announced that it is to be delayed while they assess the scope of the Act.

At the moment there is no suggestion that the provision will be scrapped, rather remodelled to ensure the application of "common sense" to the categories of individuals required to register. However employers should be cautious as this delay does not affect the provisions of the Act which came into force in October 2009 (see December 2009 Headline).

It had been widely anticipated that the coalition would also review the provisions of the Equality Act before its scheduled implementation. However it now seems that the coalition is going to press ahead with the first provisions under the Act coming into force in October but they did note that they are still thinking about what their next steps in respect of equal pay will be.

## 56% Rise in Tribunal Claims

**The Employment Tribunal Service has recently released its annual statistics for the period 01/04/09 – 31/03/10. Once again the figures suggest a dramatic increase in the volume of claims being lodged in the employment tribunal.**

**The following are the key conclusions of the report:**

- The number of claims received rose to 236,100 in 2009- representing an increase of 56% from 2008-2009.
- There was a 17% rise in claims associated with unfair dismissal, breach of contract and redundancy
- Only 65% of claims lodged were disposed of within the 26 week target time, a figure which dropped significantly from the 74% disposal rate of 2008-2009
- There was a 17% increase in the number of single claims accepted by Employment Tribunals
- Accepted claims are now at their highest level

It is worth noting that a proportion of the increase is down to multiple claims which have seen a considerable rise over the last couple of years. However even without these the Tribunal Service is seeing record levels of claims and in consequence of the volumes it seems significantly more likely that employers will be facing longer waits before matters are dealt with by a Tribunal, which could lead to larger awards for loss of earnings where an employee is successful.

Where previously on average 74% of claims were dealt within 6 months now only 65% of claims reach resolution within that period. Further this will also have a significant knock on effect well into this year given that estimates suggest that more than 400,000 claims remained outstanding as of the 31st March 2010.

One likely cause for the increase may be the economic situation faced by employers during this period. With many employers making redundancies across this period it seems almost inevitable that there would be a corresponding rise in Tribunal claims.

However the Tribunal Service are keen to point out that they do not think that this accounts for the total increase in claims as (barring a dip in 2008-2009) claims have been rising year on year since 2005.



## Human Resources • Health and Safety

supporting your business piece by piece

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# Introduction to Head Office

## Head Office provides an innovative and effective way to ensure that your business complies with the legislative requirements of both Human Resources and Health & Safety.

Keeping up with the ever changing legislation and pressures faced managing a team of staff is very expensive, particularly with the use of ad hoc employment lawyers and HR / health and safety consultants.

Head Office aims to reduce these expenditures through a monthly subscription which provides an insurance policy against the costs of an employee taking you to an employment tribunal and any award payouts. On a day to day basis, Head Office supports the business by providing updated guidance on new legislation and case law, a dedicated helpline staffed by HR legal experts and a contract / letter template builder which can be used both as a support mechanism for an existing HR team or as a part of an owner managed business where there is no dedicated HR resource.

Key benefits can include:

- **A safety net with our exclusive insurance policy that covers the costs of getting to tribunal and any award up to £250,000.**
- **Minimising the risk to your cashflow (the average costs of attending a tribunal now stands at £9,500).**
- **Budgetary certainty without the need for adhoc HR consultants / employment lawyers.**
- **Improved procedures resulting in increased productivity.**
- **Easy access to commercial and practical legal advice.**
- **More time to focus on managing and growing your business.**

As part of the offer Head Office will provide an initial review of your current position with the aim of recommending the most appropriate solution for your needs.

Call us now on **0845 217 8650** to speak to one of our expert advisers.

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## Employees' Right to Time Off Work Relating to Dependants

Under the Employment Rights Act 1996 employees have the right to take a "reasonable" amount of unpaid time off work to take "necessary" action to deal with particular situations affecting their dependants.

"Dependants" are defined by the Act as being a spouse, civil partner, child or parent of the employee or a person living in the same household as the employee (excluding tenants, lodgers, boarders and employees).

The two key questions for employers are;

1. What specific events trigger the right to time off; and
2. How much time off is reasonable to take in the circumstances.

Employees are entitled to take time off if it is necessary:

- To provide assistance if a dependant falls ill, gives birth, is injured or assaulted;
- To make arrangements for the provision of care for a dependant who is ill or injured;
- To deal with the unexpected breakdown of care arrangements for a dependant;
- To deal with an unexpected incident concerning the employee's child and occurring within school hours;
- To deal with logistical matters arising out of the death of a dependant, including arranging and attending a funeral. There is no specific right to compassionate leave.

Determining when the right to leave arises will depend upon the circumstances of each case but the main factors to consider include "the nature of the incident which has occurred, the closeness of the relationship between the employee and the particular dependant and the extent to which anyone else was available to help out".

The focus of the legislation was to concentrate upon those events which are unexpected and unforeseen. For example an employee is unlikely to be entitled to rely upon this right to take a child to a planned medical appointment. Instead the employee would either have to take annual leave or possibly parental leave if the child were under 5 years old and the relevant criteria were met.

How much time off an employee is permitted to take depends upon what is reasonable to perform the necessary action. This will depend upon the nature of the incident and the employee's individual circumstances, however the Employment Tribunal has stated that in most situations this will be a few hours or at most one or two days. For example, where an employee requests time off work to make arrangements for the provision of care for their child, this will only cover the time taken to arrange temporary care for the child or to take the child to stay with relatives. The employee does not have a right to take additional time off to care for the child themselves.

When determining how much time is reasonable to perform the action the employer cannot consider any adverse affect or inconvenience that may be caused to the business by the absence of the employee.

The employee will only be entitled to take time off work if they inform their employer as to the reason for their absence, as soon as is reasonably practicable, and they also inform the employer as to the anticipated period which they will be away from work.

Any employee who is refused permission to rely upon this right or who suffers a detriment as a result of relying upon this right is entitled to lodge a claim with the Employment Tribunal, providing they do so within 3 months from either the date of the refusal or the date that the detriment occurred. If a claim is successful the Employment Tribunal may make a declaration or award compensation to the employee as it considers just and equitable.

To prevent employees from abusing this statutory right it is crucial that employers implement a clear policy setting out when an employee may take time off in relation to a dependant and whether any evidence is required by the employer. The policy should also set out the procedure that the employee should follow to notify the employer and any penalties that may be incurred, such as a disciplinary action, for an abuse of this right or failing to correctly follow the notification procedure.



# ‘Must hold law degree’ not age discrimination

Homer v Chief Constable of West Yorkshire, Court of Appeal

The Court of Appeal recently upheld the Employment Appeal Tribunal’s decision that a 61 year old employee had not suffered age discrimination when he was precluded from the top salary grade of the police force as he didn’t have a law degree.

The Employment Equality (Age) Regulations 2006 protect employees from discrimination on the grounds of age and this case concerns their application to a 61 year old legal advisor for the Police National Legal Database (PNLD). Although the role of legal advisor usually required the possession of a Law Degree this employee gained the position due to his previous 30 years experience in criminal law as a serving police officer. His employer offered to put him on the course part time but as this took him beyond his retirement age he refused.

In 2005, in an effort to attract and retain legal advisers, the employer created a new graded career structure. The employee applied to be graded in the top grade but it was rejected as a degree was one of the nine qualifying conditions. He appealed and raised a grievance

but both were rejected. He later took the matter to tribunal stating that the requirement to have a law degree amounted to indirect age discrimination because his age prevented him from completing the degree before his retirement.

In summary the Age Regulations define indirect discrimination as occurring where the employer applies a provision, criterion or practice (PCP) that puts persons of the same age group as the claimant at a particular disadvantage when compared to other persons and the employer is unable to show that the PCP is a proportionate means of achieving a legitimate aim.

The basis of the employee’s case was that those in the employee’s age group, aged 60–65, were at a particular disadvantage as they could not achieve the degree qualification before the employer’s normal retirement age of 65, whereas other age ranges could in comparison. They also argued that it was not proportionate as recognition of alternative skills and experience could have been considered.

It was decided that there was no basis for evidence that those aged 60–65 suffered any particular disadvantage compared with younger employees as all employees without a degree were treated in the same way. They agreed that it was a barrier to obtaining a higher salary but it applied to everyone regardless of their age and was therefore not discriminatory.

# City brokers’ poaching raid on rival was an unlawful inducement to breach employment contracts

Tullett Prebon plc and ors v BGC Brokers LP and ors, High Court (QBD)

It is usual for businesses to protect their legitimate business interests with the use of long notice periods and/or restrictive covenants to prevent the loss of staff and clients to competitors. Trying to employ new recruits who are subject to these restrictions can be problematic and costly and the High Court gave this consideration in this case.

In the circumstances the High Court ultimately decided that the new employer, by encouraging a group of city brokers to resign ‘en masse’ and join the new Company had in fact unlawfully induced them to breach their contracts with their existing employer and had conspired to injure that employer by unlawful means.

The employees here also alleged constructive dismissal against their old employer but it found that this was part of an exit strategy created by the new employer so that they could all commence their new employment in one group without having to serve their contractual notice periods.



# Changing from informal to formal disciplinary procedure made dismissal unfair

Sarkar v West London Mental Health NHS Trust, Court of Appeal

This employee was employed by the Trust as a consultant psychiatrist at Broadmoor Hospital, a high security unit for patients with severe psychiatric illness. Following 2 years of previous good service and a clear disciplinary/clinical record over his 22-year medical career the Trust received complaints about the employee from at least five colleagues over a 5 month period. They alleged that they found his conduct ‘harassing and distressing’ and that it had left them ‘vulnerable and intimidated’. The Trust investigated the matter under their bullying and harassment policy and the employee accepted that at times he had acted inappropriately, but while the investigations were ongoing he behaved inappropriately on two more occasions.

The Trust utilised a trial Fair Blame Policy which was designed to deal with relatively minor performance and conduct issues by negotiation and agreement. It was originally agreed that the employee would receive a formal written warning under the policy however during consultations the Trust’s Medical Director announced that she would report the employee to the General Medical Council. The employee withdrew from the informal procedure to take his chances with the formal route and was summarily dismissed for gross misconduct.



He appealed unsuccessfully and then brought an unfair dismissal claim in the employment tribunal.

The tribunal of first instance decided that the dismissal was unfair as the dismissal was not reasonable in the circumstances as by first dealing with the matter through the informal procedure they implied that the misconduct alleged was relatively minor in nature. It would therefore be unfair for the offences to then later be regarded as matters of such seriousness as to constitute gross misconduct and lead to summary dismissal.

The tribunal did however say that the employee contributed to his dismissal and reduced his award to reflect this.

This case highlights the importance of the early decision that an employer must make about how to proceed in a disciplinary situation. Many businesses will have informal procedures to deal with minor conduct issues that arise but they should understand that the use of such procedures may restrict its flexibility later in the process when deciding what sanction to apply. It is therefore important to conduct a full and thorough investigation and give due consideration to all the issues prior to pursuing a full disciplinary process.

# Britain’s Got Talent Faces Employment Tribunal Claim

An unsuccessful Britain’s Got Talent contestant has launched an Employment Tribunal claim against Simon Cowell’s production company alleging discrimination in respect of her treatment before being voted off the show.

The contestant, who suffers from cervical spine neuritis, faced the buzzer from all three judges early in her performance. She claims that she was effectively set up to fail in her audition and that her performance was affected by the fact she had been left to wait outside in the cold which aggravated her condition.

Essentially suggesting that the programme makers had been aware of that and promised her they would link the performance in the show with a better one preformed on Britain’s Got More Talent.



However she alleges they subsequently broke that promise and in consequence made one big joke out of her.

She suggested that Britain’s Got Talent should be treated effectively as an employer as the competition essentially enables candidates to compete for employment in the resulting tour. With the claim being accepted she has got over one hurdle but will face a pre-hearing review on the issues in July.

# Using Anonymous Statements in Disciplinary Hearings



**It is accepted that without the details about who has made allegations or witnessed an incident any employee may not be able to fully defend themselves at a disciplinary hearing. This poses a problem for an employer where their only evidence is from witnesses who are reluctant to provide a signed statement of events, as reliance simply on anonymous evidence (without good cause) may result in any dismissal being viewed as unfair.**

If the anonymous evidence is used the tribunal will look to the employer to prove it was necessary in the circumstances, that extra precautions were put in place and that the details were not withheld without good cause.

If an employee requests anonymity an employer should firstly look to establish what the reasons for the request are and see if they can be overcome. The mere fact an employee is unwilling to have their identity revealed to the accused is not justification enough to rely on their evidence anonymously. However there may be circumstances where it could be argued that senior employees have an obligation of good faith or fidelity owed towards the employer meaning that they should formally report on another employee's misconduct. This is unlikely to, in the absence of an express obligation, extend to more junior employees.

However the tribunal does recognise that there may be a legitimate need to protect witnesses in certain circumstances.

However, for reliance to be justified there must be a genuine risk of harassment or physical violence to the witness should their identity be revealed. The employer must consider any request carefully and may be asked to provide evidence on which their conclusion of genuine risk was based. An employer should make a contemporaneous note of the considerations and the factors they feel demonstrate a genuine risk to the witness should they seek to rely on an anonymous statement.

In the first instance a complete statement should then be taken from the witness without regard to anonymity and then edited to remove any sections which could identify the witness.

Where an employer is seeking to rely on an anonymous statement there is an additional burden in collecting the statement and investigating issues around it.

The employer should ensure that the statement contains;

- The date, time and place of observations and incidents
- The witness' position and ability to see what happened (distance, lighting conditions, line of sight)
- The witness' relationship with the accused (was there any reason for the witness to lie)
- Any circumstantial evidence, why the witness was there and what they were doing
- They have sought evidence to corroborate the witness statement
- They have considered further enquiry into the witness' character and background
- The edited statement is sent to the accused employee well in advance of the hearing
- The investigating officer is made available to attend any disciplinary hearing and be questioned on the necessity for the anonymous statement
- If possible the witness is made available to be interviewed by the Chair of the Disciplinary Hearing

If the statement is sent to the accused well in advance, they can be asked if they wish to put any questions to the witness. Employers should try to address any questions and make sure the accused employee has the responses in advance of the hearing. In limited circumstances a disciplinary hearing may need to be adjourned in order to put additional questions to the witness.

At the conclusion of the investigation the investigating officer will draw together all the evidence into a report which will be sent to the person appointed to deal with the disciplinary hearing. The report should merely present the information collected as part of the investigation and not draw conclusions or make recommendations.

The decision to use anonymous witness evidence should not be taken lightly and we recommend discussing this with one of our advisors before agreeing to this with a witness.

# Workplace Bullying – how to spot the signs...

It is estimated that 18 million working days are lost per year due to workplace bullying and 1 million employees experience bullying or harassment in a two year period.

**Workplace bullying can have a huge cost to your business through loss of productivity and performance, absenteeism, turnover of staff and the subsequent costs associated with replacing staff that leave as a result of bullying.**

Employers have a duty of care to their employees, as well as a social and ethical obligation to provide a safe working environment, and if bullying is not dealt with employers could find themselves liable for the actions of their "bullying" employees.



## What is bullying....?

ACAS define bullying as "Offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient".

- Bullying does not include legitimate and constructive criticism of an employee's performance or behaviour, an occasional argument or raised voice.
- Bullying may be persistent or a serious isolated incident, committed by one or more employees against an individual or group of employees.

## Bullying behaviours or actions can include:

Signs of bullying.....

1. **Reduced productivity or performance** – this can be gradual or sudden, there can be other reasons for a decline in productivity / performance, but often negative relationships with team members or a line manager can have an impact on employees' output.
2. **Absenteeism** – employees who are being bullied will often take "sick days" in order to avoid the perpetrator, likewise incidents of workplace stress can often be linked to bullying. Absenteeism may start with the odd day here and there, or may result in the employee being medically certified sick for a longer period. Absences relating to "stress or anxiety" should be discussed with the employee to find out the underlying causes for their absence.
3. **Low morale** – this can affect not only employees who are being bullied, but also colleagues who witness bullying by a manager or team member.
4. **Turnover** – employees who are being bullied or witness bullying often choose to leave rather than report the bullying. Conducting confidential exit interviews can help to identify the reasons for employees leaving, likewise see if there are relevant trends. For example if one team or department has a higher level of turnover, it may indicate that there is a problem with the manager or team leader.
5. **Changes in behaviour** – employees being bullied are likely to have a loss of confidence, become withdrawn and have difficulty concentrating. Those who are bullying may display aggressive behaviour or loss of control, but often their behaviours maybe more subtle (see the examples listed in the table above).

## How can you prevent bullying...?

Implement a Workplace Bullying policy to raise awareness and communicate to employees. Your policy should include:

1. A statement that bullying behaviour is not acceptable and will not be tolerated. Outline and reinforce the positive behaviours you expect and encourage from employees, such as fairness, equality, recognition. This will help you communicate what is and isn't acceptable behaviour.
2. Define bullying and provide examples of the type of behaviour that is considered to be bullying.
3. Advise employees who believe they are being bullied to keep a record of any incidents, e-mails or memos that maybe relevant evidence.
4. Provide guidance to employees so they know how to report bullying. Perhaps delegate a person as a point of contact so people can approach them in confidence if they feel they are being bullied. Remind employees that allegations will be treated sensitively and confidentially. However, confidentiality cannot be guaranteed as it maybe necessary to disclose information in order to investigate.
5. Set out your procedures for dealing with bullying and respond to and investigate allegations promptly. The nature of the allegations and the circumstances will often indicate if the issue can be resolved using informal or formal methods.
  - Informally – if possible encourage the person to speak to the person concerned and let them know the impact their behaviour is having on them, or offer mediation.
  - Formally – if an informal approach is not successful or is not appropriate, the complaint should be dealt with under the grievance procedure.
6. If bullying has occurred consider how to manage the working relationship going forward. For example the use of mediation or counselling, change of duties or reporting lines. If the complaint of bullying is upheld, it may be appropriate to deal with the bully under your company disciplinary procedures.

**If you would like any further information on how to manage bullying in the workplace, don't hesitate to contact Head Office.**

CIPD Bullying at Work 2005  
DTI Survey – Employee Relations Research Series, number 6

# QUICK GUIDE

## Current statutory rates

	From April 2010	
Maternity Pay	6 weeks 90% of salary 33 weeks at £124.88pw	
Paternity Pay – Max 2 wks	£124.88 pw	
Adoption Pay	£124.88 pw	
Sick Pay	£79.15 pw	
NI Earnings Threshold	£97.00 pw	
Guarantee Payment	£21.20pw	
National Minimum Wage	1st Oct 2009	1st Oct 2010
22 and over	£5.80 ph	£5.93 ph
18 to 21	£4.83 ph	£4.92 ph
16 to 17	£3.57 ph	£3.64 ph
Apprentice Rate (Oct 2010)	n/a	£2.50 ph

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