Employment Equality Law Update

KEEPING YOU UP-TO-DATE

WITH DEVELOPMENTS IN EMPLOYMENT AND EQUALITY LAW

Equality Commission FOR NORTHERN IRELAND

Labour Relations AGENCY

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Welcome to the third edition of the joint Equality Commission and Labour Relations Agency newsletter.

In this edition we will cover some of the key issues that are likely to affect or be of interest to you, our readers, in relation to what is happening in the field of employment and equality law from a local Northern Ireland perspective.

In years gone by it would have been common for people to think that employment and equality law in Northern Ireland was identical to that in Great Britain. However we now see that there are significant differences and old assumptions can no longer be made. In our second edition of the joint newsletter we featured an article entitled Employment Law Developments in GB and by way of an update we have revised this section to show what has happened since.

Also in this edition we will be looking at - the Equality Commission's employer survey and action plan, the Labour Relations Agency's Arbitration Scheme, lessons from recent equality case decisions, updates on our help for SME's and how the Labour Relations Agency and the Equality Commission can help organisations with the skills required to handle matters relating to employment or equality law, for example - how to handle awkward grievances, how to conduct an employment investigation, how to respond to a reasonable adjustment request, how to address redundancy selection where employees are off on maternity leave and so on.

As always, we are very interested in the views of our readers and are inviting you to submit any questions relating to equality or employment law that you might have which you would like us to answer. We will then seek to publish the answers to these questions in the next Edition.

Finally, we are very interested to receive feedback on our newsletter and would welcome your comments, both positive and negative as these help us to refine the newsletter to better meet the needs of employers.

Inside this Edition

The Labour Relations Agency Arbitration Scheme: An alternative to employment tribunals

The new Labour Relations Agency Arbitration Scheme allows claims to employment tribunals to be resolved through arbitration.

New legislation came into effect on 27 September 2012 to allow claims to employment tribunals in Northern Ireland to be resolved through arbitration using the Labour Relations Agency Arbitration Scheme.

Under the Scheme claimants and respondents can choose to refer a claim to an arbitrator to decide, instead of going to a tribunal hearing. The arbitrator's decision is binding as a matter of law and has the same effect as a tribunal.

The Scheme which is the first of its kind in the UK is entirely voluntary and free to use.

Jurisdictions covered by Scheme:

- The Scheme covers claims in most jurisdictions, including:
- unfair or constructive dismissal
- payments owed, including notice pay, holiday pay, arrears of pay, and breach of contract
- redundancy payments
- discrimination in recruitment or employment on the grounds of age, disability, equal pay, gender, part-time working, political opinion, race, religious belief or sexual orientation
- flexible working arrangements
- less favourable treatment of fixed term employees or agency workers.

Only a small number of specialised jurisdictions are not covered by the Scheme.

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Scheme details

The Scheme is a legally binding alternative to a tribunal. It is:

- Confidential - hearings are held in private. The outcomes of hearings are not published
- Quick - a hearing to consider a claim will normally take place within two months of an Arbitration Agreement being received by the Agency. The hearing normally lasts for less than one day. The decision on the claim is normally issued within 14 days after the hearing
- Non-legalistic and informal - hearings take place without, for example, any swearing of oaths
- Non-adversarial - there is no cross-examination of witnesses. This makes it particularly appropriate where the employment relationship between a claimant and a respondent is expected to continue after the hearing
- Cost efficient - the speed and informality of the process mean that it is less costly to the parties than using a tribunal
- Flexible - if both parties agree, proceedings can be suspended at any time to allow for conciliation to find a way of resolving the claim without the need for a decision by an arbitrator and
- Able to award legally enforceable remedies in the same way as a tribunal.

The process

Entry to the Scheme is through an Arbitration Agreement, which will normally be drawn-up by a Labour Relations Agency Conciliation Officer. Once an Arbitration Agreement has been concluded the claim can no longer be heard by a tribunal.

Claims are decided under the Scheme by an arbitrator who is appointed by the Labour Relations Agency on the basis of their knowledge, adjudication skills and employment relations expertise. They are independent and impartial.

In deciding whether to uphold a claim the arbitrator will:

- carefully consider all aspects of a claim, taking into account the cases put forward by both parties
- make an objective decision to resolve the matter
- apply general principles of fairness and good conduct in employment relations, including principles referred to in any relevant codes of practice
- take account of the provisions of relevant guidance, such as that published by the Labour Relations Agency.

A hearing is held to consider the issues in respect of the claim. This is based on written submissions made by each party and is an opportunity for each party to highlight the key points of their case to the arbitrator. Witnesses may also attend to provide evidence. Questions are asked by the arbitrator to clarify points. The parties may also ask questions of each other through the arbitrator (in other words, this is not a cross–examination as at a tribunal).

Hearings normally last for less than one day and will normally take place within two months of the Arbitration Agreement being received by the Agency. Hearings are normally held at the Agency's offices in Belfast or Derry/Londonderry. They are held in private, unlike in tribunals where members of the public and the media are allowed to attend. If they wish, parties may bring someone to help them present their case - for example, a colleague, a trade union representative or a legal adviser.

If the parties agree, proceedings can be suspended at any time in order to find a way of resolving the claim through conciliation. The services of a Conciliation Officer are available to the parties before, and during a hearing to help them reach a settlement. A settlement reached using a Conciliation Officer is binding and legally enforceable.

The decision

The arbitrator's decision is called an award. It is final and legally binding. The award is sent to both parties at the same time, normally within 14 days after the hearing has taken place.

If the arbitrator finds in favour of the claimant, the award will contain details of what needs to be done (the remedy). The remedies available to the arbitrator are the same as those available to a tribunal. Such remedies could, for example, be financial compensation or, in the case of unfair dismissal, reinstatement or re–engagement. The award is enforceable through the courts in the same way as if it had been made by a tribunal.

In line with the Agency's remit to promote good employment relations, arbitrators may make recommendations to improve employment practices within an employer's organisation in light of the claim.

While an arbitrator's award is final and legally binding on the parties, it can be appealed or challenged in certain circumstances.

Developments in Employment Law (GB and NI)

During the summer of 2012 the Department for Employment and Learning here in Northern Ireland launched a discussion paper on employment law and asked for feedback from stakeholders.

During 2012 key changes in employment law in GB included:

- The increase in the qualification period for employees to claim unfair dismissal to two years
- The reform of the tribunal system regarding - single judges hearing a case, changes to rules regarding - witness statements, expenses and deposits
- Mediation pilot schemes for small and medium sized enterprises running throughout 2012 and 2013.

The main piece of law that will implement other pending reforms in GB is the Enterprise and Regulatory Reform Bill. Currently in GB there are several consultation documents in circulation which are addressing a multitude of issues including:

- Changing the law on compromise agreements - re-name settlement agreements and make the process more straightforward with the limited use of protected conversations in unfair dismissal related cases
- Ensuring all cases are automatically referred to ACAS before they can progress to tribunal
- Reform of TUPE - the government are now engaged in a period of policy design and will consult on proposed changes
- Reform of collective redundancy consultation provisions - consultation in GB on this matter has closed and proposals are due before 2013. Other issues that are being consulted upon in GB also include:
- Reform of employment tribunals rules and practice in addition to those implemented in April 2012.
- Reform of the ACAS Code of Practice on Discipline and Grievance - new guidance, tools and tailored documentation
- Design of new ACAS Code of practice on Settlement Agreements - covering rules and templates for agreements
- Changes in the “cap” on compensation in unfair dismissal awards - via a formula based limit on the compensatory award.

In Northern Ireland it will be early to mid 2013 before it becomes clear where the local priority areas are in employment law with the consultations beginning thereafter. At this stage it is guesswork what developments will follow and according to what timeframe, therefore it really is a case of “watch this space”.

Discrimination
- Some recent case law decisions

In the past 12 months there have been no significant developments in the statutory anti-discrimination laws of Northern Ireland.

However, there have been some interesting case law decisions from the employment tribunals and courts, both here and in Great Britain, which shed some light on the meaning of the statutory law, or which highlight good (or, bad) employment practices. The purpose of this article is to discuss a few of those decisions and what they mean for employers.

1. Seldon –v- Clarkson Wright & Jakes

- Issues
- Compulsory retirement ages
- Justifying direct age discrimination

In the first edition of this newsletter, dated Spring 2011, we included an article on the subject of retirement ages. In it we noted that the former statutory "Default Retirement Age" and its associated procedures had been repealed in April of that year. The main result of this was that employers were no longer able, as they were before, to avoid facing claims of age discrimination or unfair dismissal in situations were they had forcibly dismissed employees who had reached the age of 65 years or above. From that point on, employers who operated compulsory retirement ages for all or some of their staff would be required to *objectively justify* doing so.

Our article noted that the statutory test of objective justification requires an employer to show that his action or decision was a proportionate means of achieving a legitimate aim and that

"[a] balance must be struck between the business needs which compel the business to set a compulsory retirement age and the discriminatory impact that this will have on the employees affected by it".

We also noted that there were some unanswered questions about what reasons or aims for retaining a compulsory retirement age would be accepted by the employment tribunals and courts as being legitimate. We noted, for example, that there was some doubt about whether a professed aim of trying to spare the feelings or dignity of older workers (i.e. avoiding their humiliation) by not dismissing them on grounds of incapability or underperformance could amount to a legitimate aim for the purposes of justifying their dismissal on grounds of age instead.

We noted that these questions would be answered at the highest level when the UK Supreme Court gave its judgement in the case of **Seldon –v- Clarkson Wright & Jakes**, which was expected later in 2011. The judgement was actually delivered in April 2012.

The main outcome was that although the Supreme Court confirmed that employers may in theory be able to justify a compulsory retirement age, it will be more difficult *in practice* for them to do so, and more difficult than our previous article may have indicated. The Supreme Court noted that when justifying an act of direct age discrimination (such as a compulsory retirement age or a maximum recruitment age), an employer must have an aim that corresponds to the *social policies* of the State. It must also be an aim that is relevant and applicable to his business and which he is genuinely trying to pursue. This test differs from that which applies in cases of indirect discrimination, where a legitimate aim need not be a social policy aim but could be a purely private aim that is relevant only to the employer's own business, such as reducing his costs or improving his competitiveness.

The Supreme Court also confirmed that preserving the dignity of older employees by retiring them on grounds of age rather than dismissing them on grounds of incapability or underperformance could be a legitimate social policy aim, and thus could *in theory* be used to justify an act of direct age discrimination.

Conveniently, the Supreme Court set out a handy list that summarised the kinds of social policy aims that the higher courts and tribunals, including the European Court, have to date been prepared to accept as being capable of being legitimate aims for the purposes of justifying direct age discrimination. Some of these are relevant to compulsory retirement ages and some to other policies, such as maximum recruitment ages. It is important when reading this list to consider the social and economic situation of the State (e.g. if there is currently a situation of very high youth unemployment, that may justify social policies that seek to open up more employment opportunities for younger people). The list is as follows:

- promoting access to employment for younger people;
- to enable the efficient planning of the departure and recruitment of staff;
- sharing out employment opportunities fairly between the generations;
- ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas;
- rewarding experience;
- cushioning the blow for long serving employees who may find it hard to find new employment if dismissed;
- facilitating the participation of older workers in the workforce;
- avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job which may be humiliating for the employee concerned;
- avoiding disputes about the employee's fitness for work over a certain age.

The *Seldon* case focused on the question of what could be a legitimate aim for the purpose of justifying acts of direct age discrimination. It did not answer the second important justification question of whether the firm's aims in this particular case where proportionate (i.e. whether there was a fair balance between the firm's business needs and the policy's discriminatory impact on Mr. Seldon). The case was remitted to an employment tribunal to consider that crucial question. So, the case goes on, but at least some important legal questions have been answered.

2. Stone –v- Ramsay Health Care UK Operations Ltd

- Issues
- Maternity leave discrimination
- Statutory maternity rights

The complainant, Mrs. Stone, was employed as a general manager at a private hospital owned and operated by Ramsey Health Care in England. After the birth of her child, she properly exercised her right to take a period of 52 weeks statutory maternity leave (26 weeks Ordinary Maternity Leave and 26 weeks Additional Maternity Leave).

Within two days of the child's birth, a Ms. Terblanche, the substitute who was filling Mrs. Stone's post on an interim basis, began sending a series of e-mails to Mrs. Stone seeking her views on issues relating to the running of the hospital. Mrs. Stone initially attempted to answer some of these requests but later stopped when it interfered too much with her ability to attend to her baby's needs and to her own health needs. Due to this, Ms. Terblanche informed higher management that Mrs. Stone was being uncooperative. She followed this up by lodging a written grievance that Mrs. Stone was being uncooperative and unsupportive.

The employment tribunal held that this action *"had at its core pregnancy and maternity discrimination"* because Ms. Terblanche *"considered it unprofessional of women to take additional maternity leave and considered it proper to pressurise a work colleague within two days of giving birth and during her period of compulsory maternity leave to provide her, as interim manager, with advice and support and then take umbrage against her when she eventually withdrew from any further contact to enable her very properly to focus on her relationship with and responsibilities to her baby."*

The women's line manager, another woman, initially accepted the grievance and commenced investigating it; although, fortunately, she later abandoned it. Furthermore, the same line manager failed to include Mrs. Stone in a pay review for general managers that she conducted during the maternity leave period.

The tribunal awarded Mrs. Stone £18,000 in compensation for injury to feelings, and followed this up with a recommendation that the employer should implement a programme of training for all its managers and all members of its HR team relating to the organisation's existing maternity policies and especially to its particular statutory legal obligations to employees in relation to maternity leave. A further recommendation was that the employer should redraft its current equal opportunities policy to expressly include references to maternity and pregnancy as a protected "equality" characteristic.

Unfortunately, discrimination against women on the grounds of pregnancy and maternity is still all too common and, ironically and surprisingly, the perpetrators of that discrimination can often be other women.

This case signals a clear warning to employers about the dangers of not respecting the raft of legal rights that women have in relation to pregnancy and maternity leave. The recommendations made by the tribunal should be implemented by all employers.

Further information and advice on this important subject may be obtained in a publication jointly issued by the Equality Commission and the Labour Relations Agency, namely: *Pregnancy and Maternity Rights: The Law and Good Practice - A Guide for Employers [2010].*

3. Crilly –v- Ballymagroarty Hazelbank Community Partnership

- Issues
- Indirect sex discrimination
- Women and career breaks for family reasons

This local case warns about the risk of indirect sex discrimination against women who, after having taken career breaks in order to raise their families, may now find obstacles in the path of getting back into the labour market.

The employer, a community development organisation, was seeking to fill a vacancy for the post of Community Regeneration Officer. One of the job selection criteria was that applicants had to have *two years relevant paid work experience in a community development capacity within the last five years.*

The complainant, Ms. Crilly, had more than two years relevant paid work experience but it had been gained six and more years before the job was advertised. In the interim she had been on a career break to raise a family; although within that period she had relevant work experience albeit of an unpaid kind (i.e. she had been doing voluntary work). However, as Ms. Crilly did not meet the job selection criterion to the letter, she was not shortlisted for an interview and her application was rejected.

The industrial tribunal accepted that the job criterion placed proportionately more women at a disadvantage compared to men. There was compelling statistical evidence to support that finding, which in turn suggested that the criterion caused indirect sex discrimination against women. This meant that the criterion was potentially unlawful. If the employer could not *objectively justify* the criterion, then the tribunal would have to make a finding that it was unlawful.

The employer offered these reasons for setting the said criterion:

- the need for a job-holder who could perform in post:
- with minimal supervision; and
- with the ability to "hit the ground running" (i.e. without extensive training);
- the need to have a wide pool of applicants.

The tribunal accepted that these reasons were capable of being legitimate aims in a recruitment exercise, but it rejected the argument that the employer had used means that were proportionate to achieving those aims; i.e. the employer had not applied selection criteria that were appropriate for achieving its professed aims effectively and without discrimination, or with minimal discrimination, against women.

For example, the five year window on the work experience criterion actually narrowed the pool of applicants rather than widened it. Also, the fact that the relevant work experience could have been achieved either very recently (i.e. within the last two years) or quite a while in the past (i.e. three to five years ago), was not consistent with a professed need that the job-holder needed skills that would enable them to "hit the ground running" (which rather implied that experience should be quite recent as opposed to further in the past). Furthermore, the professed need for a job-holder who could start work without extensive training was undermined by the fact that the employer had envisaged giving the successful applicant a two-month induction period, which the tribunal thought could be used for training purposes.

So, the tribunal rejected the employer's justification arguments and found that the criterion was unlawful when used in this particular set of circumstances. The tribunal awarded Ms. Crilly £11,600 in compensation.

The decision does not mean that other employers, or even this employer, may never set criteria about the nature and duration of relevant work experience, such as when and how recent it was gained. It simply means that the criteria must be objectively justified with compelling arguments that withstand scrutiny.

If relevant work experience must be recent or paid, rather than having being gained several years ago or unpaid, then the employer must convincingly explain why this is necessary. For example, there may be jobs in which technical knowledge and skills must be regularly and frequently updated or risk becoming outdated and stale quite easily. In such occupations, the arguments which justify a need for very recent relevant work experience may be quite convincing.

So, this case is a useful reminder of a longstanding principle of good employment practice: always think carefully about the job selection criteria that you set and be ready to objectively justify them with convincing reasons.

4. Dziedziak –v- Future Electronics Ltd

- Issues
- Race discrimination
- migrant workers and language restrictions

This case from England was concerned with several different issues that arose within the workforce of a retailer of electrical components. One of the issues was concerned with language. A Polish employee, Ms. Dziedziak, had a conversation in her native language with a Polish co-worker about a work-related matter. The conversation apparently annoyed another, non-Polish, employee who said she found it distracting and she complained about it.

Their line manager reprimanded Ms. Dziedziak and specifically told her not to speak *"in your own language"* in the workplace.

The complaint was initially upheld by an employment tribunal who found that the language ban was an act of direct race discrimination. The employer appealed to the Employment Appeals Tribunal, which upheld the employment tribunal's decision.

What was significant here was that the complainant had not been told to speak English *per se*, but that she was banned from speaking Polish. The workplace had workers from many different countries and no one else was banned from speaking their native tongues. There was no general policy that all workers had to speak English. So this was strong evidence of direct racial discrimination against a Polish employee, for which the employer did not provide any innocent, non-racial explanation. Thus, the finding of unlawful direct discrimination was correct.

If, on the other hand, the employer here had operated a general policy requiring all workers to speak English, regardless of their nationalities, then it is unlikely that a finding of direct race discrimination would have been made. However, that would have left open the possibility of a finding of indirect race discrimination being made instead.

But that is a significant difference, for whereas an act of direct race discrimination is immediately unlawful, acts that may be indirectly race discriminatory are not necessarily unlawful. Whether such an act is unlawful or not will depend on whether the restriction is objectively justifiable. That will depend on whether the employer's business needs convincingly justify the restriction. Thus, a workplace rule that all workers must always speak English to English-speaking customers might be justifiable, but it will probably go too far if it seeks to ban migrant workers from speaking their native languages during other times, such as during tea-time conversations with their compatriots.

Support for Small and Medium Enterprises

One of the Equality Commission's strategic objectives is to support small and medium sized businesses through the provision of advice and assistance on day-to-day equality issues.

This includes supporting small employers in the development of equality-related policies and other documentation, such as equal opportunity and harassment policies, and those relating, for example, to recruitment and selection, redundancy and flexible working.

To highlight the support available, a campaign was initiated early in 2012 and five lunchtime Briefing Sessions were delivered to intermediaries such as economic development officers in the local councils, enterprise agency staff, Business Support contacts in the colleges of further and higher education and representatives from various chambers of commerce. The purpose of the sessions was to inform those present about the support available from the Equality Commission to enable them, in turn, to inform those employers with whom they have direct contact.

As a result, Commission staff have been invited to take exhibition stands at various events such as: Castlereagh Borough Council's "Evolution Project"; Lisburn Business Link's "Meet the Expert" event; Down District Council's "Beyond Business" week, in association with Invest NI and the European Regional Development Fund; and employer awareness breakfast events run by DEL and various councils.

In addition, speaking engagements were undertaken as part of North Down Development Organisation's "Exploring Enterprise" programme and as part of the Signal Centre of Excellence Business Improvement Programme; Presentations were also delivered to Lisburn Female Entrepreneurs' Network and to various Employer Information events organised by the Construction Industry Training Board.

More theme-specific presentations were delivered to several groups, such as the Employment of those with Criminal Convictions to a group of employers in the Derry City Council area and an Introduction to Disability to the North-East region of the Federation of Small Business. It is anticipated that these types of session will increase in number as the year proceeds.

In terms of information on the Commission's website, we have begun to develop a section particularly aimed at SMEs and we will continue to add information to an SME specific Landing Page which will include FAQs, up-coming events as well as information on the Law and Best Practice.

If you are interested in finding out more about the free services available to Small and Medium Enterprises, you may contact us by telephone, or textphone or by e-mail. The relevant details will be found at the back of this document.

Support for smaller businesses

Click www.equalityni.org

The Equality Commission's role is to help you understand about equality and what you should and shouldn't do. We can provide you with a range of advice and support - see below for guidance on some common challenges you may face. If you need more information please do not hesitate to contact us.

one	Taking on new staff?
two	Dealing with flexible working requests?
three	Managing absence?
four	Dealing with pregnancy and maternity?
five	Staff reaching retirement age?
six	Making staff redunant?

"Launching a new online resource to help address the equality aspects of these issues, Chief Executive of the Equality Commission for Northern Ireland, Evelyn Collins, CBE said: "We are very focused on ensuring that we provide all businesses with expert advice on equality issues."

Beyond Information Provision

Get your skills with the Labour Relations Agency and the Equality Commission - How they add value to the services they provide.

Did you know that both organisations do more than simply provide information, advice and direction? The Labour Relations Agency and the Equality Commission run seminars and programmes designed to equip attendees with skills related to main issues of employment and/or equality law, for example:

Good practice seminars on - negotiation skills, how to handle grievances, how to conduct employment investigations.

Training on - dealing with reasonable adjustment requests, maternity leave and sex discrimination, and dealing with retirement in your workplace.

The Equality Commission and the Labour Relations Agency want to ensure that organisations are given the help they need in terms of how the law applies and how it impacts on their people, policies and procedures. So come along to a seminar/programme that suits your needs, they are free and do not last more than a morning or an afternoon. Please make time to get the skills.

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