OCCASIONAL PAPER

REVIEW OF EMPLOYMENT LAW 2006-2007

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CONTENTS

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INTRODUCTION

The aim of this paper is to highlight key developments in employment law in Northern Ireland during the period from January 2006 to April 2007. It also seeks to identify a few (of the many) significant case decisions from the appellate courts which may prove important for Tribunals throughout the United Kingdom.

The pace of change in this area of law shows little sign of slowing. Perhaps the most significant legislative development during the period under review is the introduction of laws prohibiting discrimination on grounds of age, which will affect every workplace. So too will the anti-smoking legislation, while the introduction of the right to apply for flexible working for the carers of adult dependants seems likely to be extremely popular and to pose challenges for some organisations. The family-friendly initiatives of this Government seem likely to continue for some time.Wide-ranging changes to the disability legislative regime continue and the law on working time develops apace, with additional entitlement to paid holidays for many thousands of workers appearing on the horizon. Important new Codes of Practice on trade union recognition and industrial action have been developed. Further changes to dispute resolution procedures seem likely as a number of reports highlight problems and a review gets under way.

In terms of caselaw, the higher courts continue to grapple with problems of employee status, particularly in relation to agency workers. The extent to which employers can lawfully continue to use the criterion of length of service is raised in the context of equal pay and also age discrimination. The legal status of policies in a staff handbook, accommodation charges and the national minimum wage and requests to work part-time are all featured in the final section of the paper.

PART 1 LEGISLATION AND RELATED MATTERS IN FORCE

1.1 Age Discrimination Legislation

The piece of legislation from 2006 which looks set to have the biggest impact in the workplace in Northern Ireland, as elsewhere in the United Kingdom, is undoubtedly the legislation on age discrimination. The regulations are designed to protect both younger and older workers and to make it unlawful to treat someone differently in employment matters because of their age, rather than their skills and abilities.

The Employment Equality (Age) Regulations (Northern Ireland) 2006 (SR 2006 No.261) were made on 13th June 2006. They implement, in Northern Ireland, the age strand of Directive 2000/78 EC (the Framework Directive). They came into force on 1st October 2006 in line with the rest of the United Kingdom. The Regulations are broadly similar in structure and form to the sexual orientation regulations introduced in 2003.

The age regulations define four types of discrimination:

Direct discrimination occurs where, because of B's age, A treats B less favourably than he treats or would treat other persons unless A can objectively justify that treatment. An example would be where the best candidate at interview is not offered a job because the employer thought she was too old and might not fit in with the existing staff, whilst a less able candidate was offered the job because she was younger. The significant difference between these regulations and other strands of discrimination legislation is that direct age discrimination is capable of objective justification. This derives from Article 6.1 of the Directive and will be dealt with in more detail later.

Direct discrimination "on grounds of age" includes discrimination based on B's apparent age, whether or not it is in fact B's age. This means that people will be able to bring a claim even if the discrimination was based on (incorrect) assumptions about their age. Nor will they be required to disclose their age in bringing a claim – it will be sufficient that they have suffered a disadvantage because of the assumptions made about their age. A will not be able to raise the defence that B was in fact older or younger than he appeared to be or than A or another person inferred that he was.

Indirect discrimination is taken to occur where –

- A applies to B a provision, criterion or practice which A applies equally to other persons; and
- that provision, criterion or practice puts persons of B's age group at a particular disadvantage; and
- B suffers that disadvantage.

If B can show that he suffers in this way, then the provision, criterion or practice is indirectly discriminatory unless A can show that it is a proportionate means of achieving a legitimate aim. The reference to an "age group" means that to belong to such a group, not all of the members of the group have to be of the same age – they may have a range of ages.

An example of indirect discrimination might be where a company requires candidates for an administrative post to have at least 5 years' experience. This is likely to place younger workers at a disadvantage and could be indirectly discriminatory on grounds of age unless the employer can show that the requirement is objectively justified

Victimisation occurs where A treats B less favourably than he treats or would treat other persons by virtue of something done by B under or in connection with the Regulations. Thus a person could be victimised if they were treated less favourably than others – perhaps denied promotion or a pay rise – because they

had brought a claim in good faith under the legislation or assisted someone else in their claim.

Harassment, for the purposes of the Regulations is an unlawful act distinct from direct and indirect discrimination. Harassment is defined in broad terms using the wording of the Directive. It takes place if A's conduct has the purpose or effect of either violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The same definition is used across the regulations regarding discrimination on grounds of sexual orientation, religion or belief, race and disability. Under the age regulations harassment is only to be considered to have the effect of violating dignity or creating an intimidating (etc) environment if, taking into account all the circumstances, A's conduct "should reasonably be considered" as having violated B's dignity or created an offensive environment for him. This includes a requirement to take into account B's perception of the conduct.

The regulations make it unlawful for all employers, regardless of size, to discriminate against job applicants and employees in a wide variety of circumstances, starting with the arrangements they make for determining to whom they should offer employment and finishing with dismissal. Employers are also liable for acts of discrimination carried out by their employees in the course of their employment unless the employer can show that he took all reasonably practicable steps to prevent discrimination occurring. The regulations apply to vocational training and also to institutions of further and higher education in relation to student applications. Enforcement of the education provisions is by means of an action in the county court.

One exception to the principle of non-discrimination is that it is not unlawful for an employer to discriminate against a person in deciding to whom he should offer employment, or by refusing to offer employment to a person where, at the time of the person's application to the employer he is over the employer's normal retirement age or he is over the age of 65 if the employer has no normal retirement age. Such discrimination is also not unlawful where the applicant will reach the employer's normal retirement age or the age of 65 (if the employer has no normal retirement age) within six months of the application to the employer. For these purposes, the employer's normal retirement age must be over the age of 65.

The regulations allow an employer, when recruiting for a post, to treat job applicants differently on grounds of their age if possessing a characteristic related to age is a genuine occupational requirement ("GOR") for that post. An employer may also rely on this exception when promoting, transferring or training persons for a post, and when dismissing persons from a post, where a GOR applies in respect of that post.

Exceptions for retirement and occupational pensions

The regulations set a National Default Retirement Age ("NDRA") of 65, a provision which is to be reviewed in 2011 and which is already the subject of legal challenge (see below). Compulsory retirement below this age will be unlawful, unless the employer can objectively justify it. Employers do not have to have a fixed retirement age. The regulations permit employers to dismiss on the grounds of retirement employees who are over the age of 65 without this being regarded as age discrimination. However where an employee has a normal retirement age over 65, if the employee is dismissed on the grounds of retirement before he has reached that normal retirement age, this is capable of amounting to age discrimination.

The age regulations exempt a wide range of age-related rules which typically exist in occupational pension schemes. Where an age-based rule is not exempted under the regulations an employer will be required to objectively justify it.

Duty to consider working beyond retirement

One of the important features of the regulations is the introduction of a new duty on employers to seriously consider requests by an employee to continue working beyond retirement. For a retirement dismissal to be a "fair dismissal" the employer must follow the correct procedure. An employer is required to inform an employee in writing of their intended date of retirement and their right to request to continue working at least 6 months but no more than 12 months before the intended date. If an employer fails to do this an employee may make a complaint to the Industrial Tribunal, which may make an award of up to 8 weeks' pay.

A request by the employee to continue working must be made in writing and must be made more than 3 months, but not more than 6 months, before the intended date of retirement. Where the employer has failed to notify the employee it is sufficient if the employee's request is made prior to the intended date of retirement. The employer must meet with the employee to discuss the request within a reasonable period. The employer must notify the employee in writing of the decision as soon as is reasonably practicable after the meeting. The employee may appeal by written notice and a further (appeal) meeting must be held and decision duly notified. The employee has a right to be accompanied by a colleague to these meetings.

Exception for national minimum wage

The regulations permit employers to base their pay structures on the national minimum wage legislation contained in the National Minimum Wage Act 1998 and the 1999 Regulations. The Directive itself countenances such legislation. The effect of the 1998 Act and the 1999 Regulations is that the minimum hourly rate of pay prescribed for 16 and 17 year old employees is less than that prescribed for those aged over 17; and the hourly rate prescribed for 18 to 21 year old employees is less than that prescribed for those aged 22 and over.

Exception for provision of certain benefits based on length of service

The basic aim of this exemption is to enable employers to continue to award benefits to employees using the criterion of length of service – for example in relation to awarding increased holiday entitlement based on length of service. The primary rationale for regulation 32 derives from Article 6.1 of the Directive

> "…Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy…, and if the means of achieving the aim are appropriate and necessary. Such differences of treatment may include…(b) the fixing of minimum conditions of…seniority in service for access…to certain advantages linked to employment": see Article 6.1(b).

The legitimate aim justifying the retention of service-related benefits is employment planning, in the sense of being able to attract, retain and reward experienced staff. Such benefits are said to help maintain workforce stability by rewarding loyalty as distinct from performance and by responding to employees' reasonable expectations that their salaries should not remain static. The regulations therefore permit employers to continue to award benefits to employees using the criterion of length of service. However, they do impose a requirement on the employer if the length of service of the worker who is disadvantaged exceeds 5 years. In such a case, if the employer is to rely on this regulation, it must reasonably appear to him that his use of length of service "fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers)".

Paragraph (3) explains how an employer must calculate length of service if he wishes to avail himself of this exemption. Either he must calculate the length of time workers have been working for him doing work at or above a

particular level (assessed by reference to the demands made on the worker). Or he must calculate the length of time they have been working for him in total. On each occasion that he uses the criterion of length of service to award benefits, it is up to him which methodology he adopts.

In calculating a worker's length of service the employer must calculate the length of time in terms of the number of weeks during the whole or part of which the worker was working for him. This ensures that length of service is not calculated according to the number of hours worked by employees, thereby disadvantaging part-time workers.

An employer, in calculating a worker's length of service for these purposes, may discount the worker's absences from work unless it would be unreasonable for him to do so.

Exception for provision of enhanced redundancy payments

The statutory redundancy scheme contained in the Employment Rights (Northern Ireland) Order 1996 requires an employer to make a payment upon redundancy, the amount of which is dependant upon the employee's age, length of service, and weekly pay. The statutory redundancy scheme is lawful under the Directive as it is objectively justified under Article 6.1 of the Directive.

An employer who makes a redundancy payment to an employee in accordance with the legislation does not have to justify himself. He is acting lawfully, even though he calculates the payment using age related criteria. The principal object of this provision is to assist those employers who base their redundancy schemes on the statutory scheme but who are more generous than the statutory scheme requires them to be. It would be ironic if employers who did the minimum necessary did not run the risk of a successful challenge under these Regulations, yet a more generous employer – because he was doing more than he was required to do – could be challenged. If this were the position, there is a real risk that more generous employers would simply 'level down'. This would benefit no-one.

Thus, an employer legally may make "enhanced redundancy payments" to "qualifying employees". Qualifying employees are defined as employees who are entitled to redundancy payments in accordance with the statutory redundancy scheme; employees who would be entitled to such a payment but for the requirement that an employee has been continuously employed for a period of two years before his redundancy; and employees who were not "dismissed" but agreed to the termination of their employment in circumstances where, had they been dismissed, the dismissal would have been by reason of redundancy.

Legal challenge to the mandatory retirement age

In December 2006 the High Court in England referred judicial review proceedings challenging parts of the age discrimination legislation to the European Court of Justice. The proceedings were brought by Heydey, a membership organisation backed by the National Council on Ageing (commonly known as "Age Concern"). Heydey is seeking a review of the age regulations and, in particular, the mandatory retirement age of 65. It submits that this effectively leaves people over the age of 65 without the right to choose to continue to work past that age and is in breach of the Directive. A decision from the ECJ is due late in 2007. In the meantime it seems that all individual tribunal claims on the mandatory retirement provisions will be held in abeyance. According to a survey carried out by AXA Insurance for Workplace Law, some 28% of retiring employees claim that their retirement has been forced on them by their employer. The European Advocate-General has already given an opinion this year in a similar case. In January 2007, in the case of *Palacious v Cortefiel Services SA*, he stated that the EU Directive does not apply to state laws setting retirement age, and even if the Directive did apply, such a national provision could be justified by the Member State. The judgement

of the ECJ in this case is awaited. It is unusual for the Court to depart from the opinion of the Advocate-General.

1.2 Transfer of Undertakings

The aim of the original TUPE legislation (the Transfer of Undertakings (Protection of Employment) Regulations 1981) was to provide for the protection of employees in the event of a change of employer and in particular to safeguard their employment rights. That objective was achieved only in part. The Acquired Rights Directive and TUPE have led to a plethora of litigation both in the courts of the United Kingdom and also in the European Court of Justice. Much of the uncertainty has centred on the key question of whether a transfer has actually taken place which is covered by the Directive. Associated issues have been the extent to which employers can vary terms and conditions; which employees are transferred; which employer is liable for a failure to inform and consult; does liability under a collective agreement transfer? can employees object to transferring? The extent of uncertainty has been exacerbated by the drive towards privatisation, contracting-out and more recently, contracting-in. Larger and larger proportions of the workforce are affected by transfers. Recent government figures suggest that outside the public sector, some 60,000 – 100,000 workers in the UK are affected annually.

The Directive was amended in June1998 and then consolidated into its current form in 2001. Proposals to amend the UK regulations were announced as long ago as May 1998 and the original consultation paper was published by the Department for Trade and Industry in 2001. Finally, in 2006, two new sets of amending regulations became law. These are:

- The **Transfer of Undertakings (Protection of Employment) Regulations 2006 (Statutory Instrument 2006 No. 246)** to cover "standard transfers": and
- The **Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 (Statutory Instrument 2006 No. 177)** to deal with contracting out and related transfers.

These regulations replace the old TUPE regulations in their entirety. In broad terms the new regulations are intended:

- To extend and clarify the application of the regulations to contracting out situations which will in future be known as "service provision changes";
- To clarify when contracts of employment may lawfully be varied in transfer situations;
- To reinforce the rights of employees to claim constructive dismissal due to changes which are to their detriment;
- To promote a "rescue culture" by limiting the application of the legislation in insolvency situations;
- To re-state the law on transfer-related dismissals;
- To introduce a new obligation on transferors to notify transferees about their obligations towards employees by providing "Employee Liability Information";
- To introduce joint and several liability as between transferor and transferee in relation to a failure to inform and consult;
- To clarify the situation concerning liability for personal or industrial injury.

There are a significant number of other minor changes and many areas which remain unchanged. Both sets of regulations apply to the public and private sectors and to "not for profit" organisations including charities, schools and hospitals. However, an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer. Contracting out, second generation contracting out and contracting back in are all covered by the regulations on service provision changes. Transactions which simply involve company share transfers as opposed to a change in legal identity are not covered by the

regulations. There is no protection in respect of occupational pension schemes in relation only to benefits for old age, invalidity or survivors' benefits. Other parts of pension schemes will transfer. (Some protection in relation to pension schemes is separately provided by Article 234 of the Pensions (Northern Ireland) Order 2005 and related legislation.)

Regulation 5 provides that collective agreements concluded between the transferor and a recognised trade union will transfer. Regulation 6 provides for the transfer of trade union recognition in respect of relevant transferring employees. It seems that further legislation will be necessary in order to provide for the preservation of statutory recognition declarations.

1.3 Work and Families

The **Work and Families (Northern Ireland) Order 2006** poses huge challenges for Northern Ireland's employers. Research from the law firm Browne-Jacobson indicates that 82% of UK businesses oppose the proposed extension of paid maternity leave. Three quarters of company directors believe that the measures in the Act will discourage firms from hiring women of child-bearing age, even though this would be in breach of existing sex discrimination legislation. The research is based on a survey of 220 company directors across the UK. The legislation was passed following extensive consultation. The Order is by and large an enabling one. It creates a framework and sets up powers for the government to introduce the proposed changes gradually, by Regulation. It has been announced that some of the proposals will take effect from 6th April 2007, while others may not take place until 2008 or 2009. The measures in the Order build on the government's existing package of family friendly working rights and aim to honour commitments made in the 2004 Pre-Budget Report.

Maternity and related changes

The following changes affect any employee expecting a baby on or after 1 April 2007:

- Extension of statutory maternity pay and adoption pay from 6 to 9 months (39 weeks). The actual periods of OML and AML remain unchanged but the period during which SMP is payable increases to 39 weeks, therefore overlapping the two maternity leave periods.
- Removal of the qualifying service previously in place to take additional maternity leave (previously, only women with six months' service by the 15th week before the EWC were entitled to an additional 26 weeks' maternity leave on top of the 26 weeks' ordinary maternity leave).
- The earliest a woman can start her maternity leave is still 11 weeks before the EWC, but the leave will now end after 52 weeks unless she has notified her employer of her intention to return earlier.

Significantly, the regulations will continue to require employers to maintain employment-related benefits during "paid maternity absence", whether contractual or statutory. This means that an employer is required to make pension contributions based on the full pay the woman would have received had she been working. Given the existing fit between 26 weeks' OML and 26 weeks' statutory paid maternity leave there has rarely been a problem. However, when the new provisions come into affect on 1st April 2007, employers will be obliged to provide employment-related benefits such as pension contributions, death in service benefit, retirement benefits, etc. after OML has ended and during part (13 weeks) of the AML period, up to the end of 39 weeks in total.

You can access the new maternity leave regulations by going to the following url: http://www.opsi.gov.uk/si/si2006/20061947.htm The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations (Northern Ireland) 2006 are available at this url: http://www.opsi.gov.uk/si/si2006/20062379.htm

Keeping in touch days

In addition, it has been recognised that employers often struggle with the issue of

whether they can contact employees who are on maternity leave without intruding on their personal time. The regulations have introduced "keeping in touch days" (KIT days) where an employee on maternity leave can carry out limited work for her employer without affecting her maternity rights. There can be up to 10 such days during statutory maternity leave, without the employee having her SMP stopped for the week in which the work occurs, as is currently the case. There are no restrictions on when KIT days can be used; it is entirely a matter for the woman and her employer to agree how and when the KIT days are used during her maternity pay period. It is important to note however that employers are not obliged to offer work and employees are not required to accept it. An employee will be protected from suffering a detriment or dismissal for accepting or for refusing to accept offers of work from her employer.

The Order does not require employers to pay employees for the work done on these days and many women will be in receipt of maternity pay as noted above. However, the maternity regulations do specify that any work done on any one day constitutes a day's work. Therefore a woman attending work for even a few hours would have completed a day's work. This gives rise to several questions. If an employee works a KIT day but she is no longer receiving maternity pay, how much should she be paid and will she be entitled to receive employment-related benefits such as pension contributions for those KIT days worked? Failing to do so could result in a claim for breach of contract, breach of Equal Pay legislation or even a breach of the National Minimum Wage legislation.

Flexible working for carers of adult dependants

From 6 April 2007, many more employees with caring responsibilities will have the right to ask their employer for flexible working arrangements and their employers will have a legal duty to consider requests seriously. Under existing legislation employees with children under six or disabled children under 18 are already legally entitled to the right to request flexible working. Under the new legislation the right to request flexible working is to be extended to the carers of adult dependants – a right which may well prove popular. The provisions are contained in **The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations (Northern Ireland) 2007** (Statutory Rule 2007 No. 53) In order to qualify for the new right an employee:

- must have been continuously employed for a period of not less than 26 weeks; and
- must be or expect to be caring for a person in need of care who is either –
  - (i) married to or the partner or civil partner of the employee;
  - (ii) a relative of the employee; or
  - (iii) living at the same address as the employee.

The term "relative" covers any of the following:

- parent, guardian, step-parent, parent-in-law, son, daughter, step-son, step-daughter, brother, sister, step-brother, step-sister, brother-in-law, sister-in-law, uncle aunt and grandparent.
- adoptive relationships and relationships such as half-brother and half-sister.

Examples of flexible working include annualised hours, compressed hours, flexi-time, home-working, job-sharing, shift-working and staggered hours.

When making an application for flexible working under the new right, employees will need to tell their employer how they think the working hours they want can be accommodated. They can do this by making constructive suggestions as to how the employer might deal with the change. The employer must give the request serious consideration, and can only turn it down if there are sound business reasons for doing so. If the employer does turn down the request, the employee can appeal this decision.

The Work and Families (Northern Ireland) Order is available at:
http://www.opsi.gov.uk/si/si2006/20061947.htm
The Explanatory Memorandum is at:
http://www.opsi.gov.uk/si/si2006/06em1947.htm

Further reading: www.delni.gov.uk/workandfamilies
www.delni.gov.uk/index/er/workandfamilies/er-existing-rights-for-working-parents.htm
www.delni.gov.uk/index/er/workandfamilies.htm
www.parliament.the-stationery-office.co.uk/pa/ld200506/ldbills/065/06065.i-ii.htm

1.4 Anti-Smoking Legislation

Following a widespread consultation process the **Smoking (Northern Ireland) Order 2006** takes effect on 30th April 2007. The policy objective of the legislation is to protect employees and the general public from exposure to second-hand smoke. The Order makes provision for enclosed workplaces and public places to be smoke-free. Premises which must be smoke-free are those which are "enclosed or substantially enclosed" and that are:

- open to the public;
- that are used as a place of work by more than one person (even if the persons work there intermittently or at different times); or
- where members of the public might attend for seeking or receiving goods or services from the person or persons working there (even if members of the public are not always present).

The Order also gives the Department the power to make regulations in a number of areas including specifying premises or areas within them that do not have to be smoke-free. It is intended that these will include premises where a person has his home or is living either permanently or temporarily.

The Order proposes the creation of four new criminal offences:

- failing to display no-smoking signs;
- smoking in a smoke-free place;
- failing to prevent smoking in a smoke-free place;
- obstructing an authorised officer.

It also places a duty on district councils to enforce the smoke-free legislation and sets out the powers of authorised officers to enter certain premises.

Final regulations were published by the Department of Health, Social Services and Public Safety, on the 9th March 2007. **The Smoke-free (General Provisions) Regulations (Northern Ireland) 2007** specify the meaning of "enclosed" and "substantially enclosed" premises for the purposes of Article 3 of the Order, which provides that such premises must be smoke-free:

- Premises are 'enclosed' if they have a ceiling or roof and except for doors, windows and passageways they are wholly enclosed, either permanently or temporarily.
- Premises are 'substantially enclosed' if they have a ceiling or roof but there is an opening or an aggregate area of openings in the walls which is less than half of the area of the walls, including other structures that serve the purpose of walls and constitute the perimeter of the premises.
- In determining the area of opening or an aggregate area of the openings, no account is taken of openings in which there are doors, windows or other fittings that can be opened or shut.
- The definition of 'roof' includes any fixed or moveable structure or device which is capable of covering all or part of the premises as a roof, including for example a canvas awning.

The regulations provide requirements for the content and display of no-smoking signs in premises and vehicles. They also introduce penalty notice forms for use by the enforcement officers of district councils.

The question whether any premises are exempt from smoke-free legislation is addressed by the second set of regulations (see below). Specified exemptions include:

- private accommodation;
- designated bedrooms in a hotel, guest house, inn, hostel or members' club;

- designated rooms in residential care homes and nursing homes, hospices and mental health units;
- prisons, young offenders' centres and remand centres and certain PSNI facilities;
- specialist tobacconists;
- research or testing facilities.

Persons in control of premises who can rely on exemptions from smoke-free legislation for parts of their premises will be under no obligation to make provision for those who wish to smoke.

These regulations, **The Smoke-free (Exemptions, Vehicles, Penalties and Discounted Amounts) Regulations (Northern Ireland) 2007** also state that vehicles will not be exempt where they are used "for work by more than one person (even if the persons who work there do so at different times, or only intermittently)" – reg. 9(1)(b).

The regulations also set out the amounts of the fixed penalties for offences created by Articles 7 and 8 of the Order:

- Failure to prevent smoking in smoke-free premises may lead to a maximum fine on summary conviction of £2,500.
- Failure to display no-smoking signage may lead to a £200 fixed penalty or to a maximum fine on summary conviction of £1,000.
- Smoking in a smoke-free place may lead to a £50 fixed penalty of or to a maximum fine on summary conviction of £1,000.
- An offence of obstructing an authorised officer of a district council has also been created for which the maximum penalty on summary conviction will be £1,000.

Detailed guidance on the smoke-free legislation will be issued to all businesses in Northern Ireland during March or April 2007. The guidance will include free no-smoking signs (additional supplies of the signage and guidance will also be available free of charge from the environmental health departments of the district councils) and a sample smoke-free policy. Copies of the guidance will also be available on the website of the Department of Health, Social Services and Public Safety: http://www.dhsspsni.gov.uk . Free signage will also be available to download from this website when the detailed requirements are finalised. A full copy of the regulations can be found on the Department's website at www.dhsspsni.gov.uk/index/phealth/php/health_promotion/smoking_ni_order_2006.htm Further information can be obtained at the following url: http://www.spacetobreathe.org.uk/article.asp?aid=206#1

1.5 New Compensation Rates

Under the **Employment Rights (Increase of Limits) Order (Northern Ireland) 2007** the limits on awards that can be made by the Industrial Tribunal in unfair dismissal and redundancy payments cases have been raised. These are the annual increases which, since 1999, have been index linked. The cap on a week's pay, for the purposes of calculating statutory redundancy payments and the basic award for unfair dismissal, has risen this year from £290 to £310. The maximum compensatory award has risen from £58,400 to £60,600. The amount of guarantee payment, payable to an employee in respect of any one workless day (normally due to a lay-off), has risen from £18.90 to £19.60. The new rates apply wherever the relevant date falls after 4th February 2007. In the case of an unfair dismissal action the "relevant date" means the effective date of termination of the employment contract as defined by Article 129 of the Employment Rights (Northern Ireland) Order 1996. In relation to a guarantee payment it means the day in respect of which the payment is due.

The rates for National Minimum Wage rose from 1st October 2006, following the recommendations of the Low Pay Commission. For workers aged 22 and over the new rate is £5.35 an hour, up from £5.05. The development (or youth) rate, which applies to workers aged 18-21 inclusive, is now £4.45, formerly £4.25. The rate for 16 and 17

year olds also rose, to £3.30, formerly £3.00 an hour.

NMW rates will rise again on 1 October 2007. The adult rate will rise to £5.52 an hour, the development or youth rate to £4.60 and the rate for 16-17 year olds to £3.40 an hour.

In January 2007 the Department for Trade and Industry published a penalty notice policy document which states that a fine will be levied if minimum wage arrears have not been paid within 7 days of the service of an enforcement notice. The amount of the fine will be twice the current NMW rate per day for each affected employee.

National Minimum Wage is specifically exempted from the Age Discrimination legislation which came into force on the 1st October 2006. However a number of commentators believe that this is open to challenge. The payment of lower wages to younger workers is justified by the government as a way of helping younger people into employment or encouraging them to stay in education. While these may be legitimate social aims the question remains whether this is a proportionate means of achieving those aims.

From 1 April 2007 the standard rate of Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay will rise to £112.75 per week. The standard rate of Statutory Sick Pay will increase to £72.55 per week.

1.6 Disability Amendments

Major amendments to the disability discrimination regime came into operation on 1st October 2004. From that date there has no longer been an exemption for small firms; coverage has been extended to occupations and professions such as the police and prison officers; service providers including shops and banks must make reasonable adjustments to physical barriers to ensure disabled people can use their services. The legislation has been further strengthened and extended by the **Disability Discrimination (Northern Ireland) Order 2006** which became law on 14th February 2006. The definition of disability has been widened by Article 18 of the Order to provide protection for a broader range of people:

- The definition of disability is extended to cover those people diagnosed with the progressive conditions of HIV, multiple sclerosis, and most (though not all) forms of cancer, effectively from the point of diagnosis. Such people will now be deemed to be disabled.
- The removal of the requirement that mental illness should be "clinically well recognised". People in this category will, of course, still have to demonstrate that they have an impairment which has a substantial and long-term effect on their ability to carry out normal day-to-day activities.

Other provisions include:

- It will be unlawful for a district council to discriminate against its members in relation to the carrying out of official business.
- The introduction of a new positive duty on public bodies to promote equality of opportunity for disabled people, including the promotion of positive attitudes towards disabled persons and the encouragement of their participation in public life. Disability action plans will have to be submitted to the Equality Commission (see below).
- A requirement that all functions of public authorities (and not just "services" as now) should be covered by the Disability Discrimination Act. This would bring functions such as the decisions of Ministers, district councils, the police and other governmental organisations within the remit of the Act.
- The extension of the Disability Discrimination Act to cover some aspects of transport services.
- Power to provide for train accessibility including that of older trains. By 1st January 2020 all rail vehicles must be accessible; and to enable rail vehicle accessibility regulations to be applied to vehicles which are being refurbished.

- Larger private members' clubs (over 25 members) and qualification-awarding bodies are to be brought within the scope of the DDA.
- Discrimination in relation to the letting of premises. Provisions are included which enable people with disabilities to get reasonable adjustments, other than to physical features of the property, when dealing with landlords and managers of rented property (such as adjustments to their policies, practices or procedures, changes to a term of the letting or the provision of auxiliary aids and services). For example, a landlord, if requested to do so, might have to put correspondence, contracts or leases into large print for a visually impaired person.
- Extension of an existing procedure to help disabled people ask questions about alleged discrimination.

The Order clearly makes wide-ranging changes to the scope of existing legislation. It is to be brought into force gradually and contains many regulation-making powers which facilitate the making of detailed measures necessary to implement its provisions. The first Commencement Order was made in June 2006 but this did not bring into force any of the substantive changes outlined above. The second Commencement Order takes effect from 1st January 2007. **The Disability Discrimination (2006) Order (Commencement No.2) Order (Northern Ireland) 2006** brings into operation Article 5, requiring a public authority to have due regard, in carrying out its functions, to the need to promote positive attitudes towards disabled people, and the need to encourage participation by disabled people in public life. A public authority is defined in the same way as in Section 75 of the Northern Ireland Act (1998). Those authorities who were subject to the duty on the 1st January 2007 must submit disability action plans to the Equality Commission by 30th June 2007. Public authorities must also carry out a five-year review of their action plans and must report annually to the Commission on the progress they have made on implementation. The Commencement Order can be viewed at: http://www.opsi.gov.uk/sr/sr2006/20060470.htm

Further changes are likely to be introduced during 2007. A consultation exercise seeking views on three other areas was carried out by the Office of the First Minister and the Deputy First Minister, concluding on 25th September 2006. The areas involved were private clubs, premises, and the questions procedure. Draft regulations have been published. These are available on the website of the Office of the First Minister and Deputy First Minister – http://www.ofmdfmni.gov.uk

The Equality Commission is to produce a Guide for public authorities on promoting positive attitudes and encouraging participation in public life. Consultation on a draft of the Guide was carried out in October and November 2006. Copies of the document are available at http://www.equalityni.org

1.7 Fixed-Term Contracts

Fixed-term contracts continue to be commonly used in the public and voluntary sectors. New regulations governing the use of such contracts were introduced in 2002. These regulations give important rights to many employees including Crown employees and the police. Some parts of the regulations have applied since 1 October 2002, but the limitations on the use of successive fixed-term contracts have only recently come into effect.

The 10th July 2006 marked the start of the date from which continuously employed fixed-term employees may acquire permanent status by virtue of the **Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 (SR 2002 No.298)**. Under regulation 8 the use of successive fixed-term contracts is limited to four years, unless the use of further fixed-term contracts is justified on objective grounds. However, it is possible for employers and employees to increase or decrease this period or agree a different way of limiting the use of successive fixed-term contracts via collective or

workforce agreements. For the purposes of this part of the regulations, service accumulated after 10th July 2002 counts towards the four-year limit. There is no limit on the duration of the first fixed-term contract. Once the four-year period has expired, the provision of the contract that restricts its duration "shall be of no effect and the employee shall be a permanent employee" (reg. 8(2)) unless the use of a fixed-term contract can be "objectively justified" by the employer. Under regulation 9 an employee has the right to ask for a written statement confirming that their employment is permanent or setting out the reasons for the use of a fixed-term contract beyond the four-year period. The employer must provide this within 21 days. After 21 days the employee may seek a declaration from an Industrial Tribunal to the effect that he or she is a permanent employee.

Key points to note:

- The regulations apply to almost all temporary contracts of employment, including what were previously regarded as "task contracts" where the duration of the contract is defined by reference to the completion of a task (such as inputting the data, harvesting the crop, building the bridge) rather than the expiry of a period of time.
- The inclusion of these types of contract means that more employees may now be able to claim unfair dismissal rights, redundancy payment entitlements and notice pay under the Employment Rights (Northern Ireland) Order 1996.
- The 2002 Regulations apply to "employees" but not to workers or to trainees. For temporary employees the regulations have introduced a new right, similar to the discrimination rights, not to be treated less favourably than a comparable permanent employee.
- The recent blurring of the distinction between employees and workers means that many temporary agency employees might also be covered by the regulations (see below).
- The regulations provide employers with "get-out" clauses such as the objective justification of the continued use of a fixed-term contract but employers need to be careful which arguments they use because the reasons they give to an employee or the failure to give reasons when requested to do so may be used in a tribunal when an employee is making a claim that he or she has been treated less favourably than a permanent employee.
- Employers need to remember that they should use the statutory minimum discipline and dismissal procedure in relation to the expiry of a fixed-term contract.

1.8 LRA Flexible Working Arbitration Scheme

From the 25th May 2006 it has been possible to take advantage of the Labour Relations Agency's new arbitration scheme to resolve disputes over flexible working. This was introduced by the **Labour Relation's Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (SR 2006 No. 206)**. Arbitration is a method of dispute resolution where an independent third party makes a binding decision which is an alternative to a tribunal hearing. The process is confidential, quick, cost efficient, non-legalistic and informal and may prove attractive to both employers and employees. It is only available where both parties agree to its use. The Agency's arbitrators have been fully trained in the new jurisdiction and the scheme is up and running. Further information on the scheme can be obtained from the Agency's website: www.lra.org.uk

Research published in April 2006 into the effects of the family-friendly legislation introduced in 2003, has found that a large number of working parents are taking advantage of benefits such as flexible working. The Maternity and Paternity Rights and Benefits: Survey of Parents 2005 showed that nearly 50% of mothers and 31% of fathers worked flexible hours last year.

1.9 Health and Safety: Noise Regulations

On 6th April 2006 new noise regulations came into force. The **Control of Noise at Work Regulations (Northern Ireland) 2006 (SR 2006 No. 1)** revoke and replace the 1990 regulations. They implement Directive 2003/10/EC on Minimum Health and Safety Requirements Regarding the Exposure of Workers to Risks Arising from Physical Agents (Noise). The new regulations impose duties on employers and on self-employed persons to protect both employees who may be exposed to risks from exposure to noise at work and other persons at work who might be affected by that work. The main changes are the reduction by 5 decibels of the exposure levels at which action has to be taken, the introduction of a new exposure limit value and a specific requirement on health surveillance.

1.10 Working Time Developments

Partly unmeasured time

The **Working Time (Amendment) Regulations (Northern Ireland) 2006 (SR 2006 No. 135)** implement the removal of the partly unmeasured time exemption from the Working Time (Northern Ireland) Regulations 1998 as from 6 April 2006. Workers who used to have some of their working time pre-determined but whose other working time was unmeasured or determined by the worker himself or herself will now come fully within the ambit of the regulations as regards limits on weekly working time and night working restrictions.

Rolled-up holiday pay

On 6th April 2006 the Department of Trade and Industry amended its regulatory guidance on rolled-up holiday pay, officially outlawing the practice. The move follows a European Court of Justice ruling on 16th March 2006, which stated that the practice of including holiday pay in workers' hourly rates rather than providing a set period of leave was unlawful. See *Caulfield v Hanson Clay Products Ltd (formerly Marshalls Clay Products Ltd)* in which the applicant was supported by the GMB union, *Robinson Steele v RD Retail Services Ltd (Case C-131/04)* heard together with *Clarke v Frank Staddon Ltd (Case C-257/04)*.

In October 2006 the Department for Employment and Learning re-issued its guidance on working time for employers in Northern Ireland. At page 20 it now states:

> *"Following an ECJ Judgement on 16 March 2006, Rolled-up Holiday Pay (RHP) is considered unlawful and employers should renegotiate contracts involving RHP for existing employees/workers as soon as possible so that payment for statutory annual leave is made at the time when the leave is taken."*

'Rolled-up' holiday pay refers to the practice of an employer agreeing with workers that their pay for annual leave is included in their hourly rate and paid as part of remuneration for working time, but not paid in respect of a specific period of leave actually taken – indeed the worker may not formally take any particular period of leave, but is treated as being on holiday when he or she is not working. The system is administratively convenient for employers where hours of work (and therefore amounts of pay) fluctuate throughout the year. However the system has been criticised as discouraging workers from taking holidays.

The ECJ has decided that the practice of rolling up holiday pay is not lawful under the Working Time Directive. Holiday pay must be paid in respect of a specific period during which the worker actually takes leave. The judgement is particularly significant because of the conflicting case law in the UK – in the *Marshalls* case the EAT and the Court of Appeal were inclined to allow employers to use rolled-up hourly rates of pay, but there is a Scottish Court of Session case (*MPB Structures Limited v Munro*) which ruled that the practice was unlawful.

Many employers were left wondering what the effect of this decision was likely to be on sums already paid to workers in respect of holiday through a system of rolled-up holiday pay. Helpfully, the ECJ judgement says that holiday payments made as part of a rolled-up rate in a transparent and comprehensible way may be

set off against payment for specific leave. It had been thought that there would also be the potential for large claims for backdated holiday pay going back as far as 1 October 1998 when the Working Time Directive was implemented in to domestic law by the Working Time Regulations. However, in 2005, the Court of Appeal held in *Inland Revenue v Ainsworth* that claims to enforce entitlement to holiday pay can only be brought under the Working Time Regulations and not as a claim for unauthorised deductions from wages. The effect of this is to limit a claim for backdated holiday entitlement to the most recent holiday year. However, *Ainsworth* has been appealed by the Inland Revenue and was listed for hearing in the House of Lords on 30 October 2006. Their Lordships took the decision to refer the case, which has now changed its name to *Commissioners of Her Majesty's Revenue and Customs v Stringer*, to the European Court of Justice. A ruling is possible before the end of the year. (The central issue in the case is whether an employee on long-term sick leave is entitled to holiday pay under the Working Time Regulations.)

Employers who currently use systems of rolled-up holiday pay would be best advised to change to a system which ensures that workers are paid in respect of specific periods of leave. Employers who have already paid sums to workers in respect of holiday pay in a transparent and comprehensible way as part of a rolled-up rate will be entitled to credit for such sums against payment due for a specific period of leave. This means that there is only likely to be a financial exposure as a result of the ECJ's judgement for those employers who have paid rolled-up holiday pay in a way which lacks transparency.

Rest breaks – UK in breach of the Working Time Directive

Readers may recall that the European Commission brought infringement proceedings against the United Kingdom at the European Court of Justice in respect of the implementation of the rest break provisions of the Working Time Directive. Their action followed a complaint by the trade union AMICUS. In particular it was claimed that the Government's guidance to employers should have been much stronger and that more should have been done to ensure that breaks were actually taken up by employees. The guidance stated "employers must make sure that workers can take their rest, but are not required to make sure that they do take their rest". This somewhat ambiguous guideline was interpreted by many employers as meaning that rest breaks could lawfully be denied. The Court has now ruled in the Commission's favour saying that the guidelines to employers "are liable to render the right of workers to daily and weekly rest periods meaningless because they do not oblige employers to ensure that workers actually take the minimum rest periods". Changes to the Guidelines, to secure more effective implementation of the rest break provisions were introduced by the Department for Employment and Learning in Northern Ireland in October 2006. Page 19 of the revised guidelines now states:

> *"If a worker is required to work for more than 6 hours at a stretch, he or she is entitled to a rest break of 20 minutes. The break should be taken during the 6-hour period and not at the beginning or end of it.*
> *The exact time the breaks are taken is up to the employer to decide.*
> ***Employers must make sure that workers can take their rest."***

In practical terms it seems likely that employers will have to put in place policies that ensure that workers take their breaks. Employers who do not inform workers of their right to breaks and fail to put in place systems that make sure that breaks are taken will be in breach of the Working Time Regulations.

The revised guidance is entitled: "Working Time Regulations: A Detailed Guide (Revised October 2006)". It is available to download at: www.delni.gov.uk/working_time_regulations_a_detailed_guide_(revised_october_2006)-42.pdf

1.11 Employment of Children under School Leaving Age

The **Employment of Children (Amendment) Regulations (Northern Ireland) 2006 (SR 2006 No. 212)** came into effect on 8th June 2006 and address the issue of the maximum number of hours which may be worked by school age children during term time. The Regulations give effect to EU Directive 94/33/EC and as such replace regulation 3 of the Employment of Children Regulations (Northern Ireland) 1996 which placed a limit on the number of hours a child could work in any week he/she is required to attend school. The new Regulations detail things such as:

- a maximum of 12 hours' work in any week the child is required to attend school;
- a maximum of 1 hour of working prior to the commencement of school;
- no more than 2 hours work on a Sunday;
- 2 weeks' holiday entitlement between 1st July and 31st August, and so on.

Further information is available at:
www.opsi.gov.uk/sr/sr2006/20060212.htm

1.12 Gangmasters

The Morecambe Bay tragedy in February 2003 underlined the problem of exploitation of migrant workers by so-called "gangmasters" and prompted the introduction of legislation. The Gangmasters (Licensing) Act 2004 established the Gangmasters Licensing Authority (GLA) to set up and operate a licensing scheme for gangmasters operating in the agriculture, horticulture, shellfish gathering and associated food and fish processing and packaging sectors. The Act prohibits anyone from acting as a labour provider in the specified areas, without a licence. It also makes it an offence for a person to enter into an arrangement with an unlicensed labour provider. The Act gave the Department of Agriculture and Rural Development (DARD) the power to make regulations specifying circumstances in which a licence is not required. Two sets of regulations were made in 2006. The **Gangmasters (Appeals) Regulations (Northern Ireland) 2006 (SR 2006 No. 189)** establish an appeals procedure in relation to decisions taken by the GLA under the 2004 Act to refuse to grant a licence, to impose conditions to which a licence is subject, to modify or revoke a licence, or refuse to transfer a licence. The **Gangmasters Licensing (Exclusions) Regulations (Northern Ireland) 2006 (SR 2006 No. 340)** (with effect from 11th September 2006) make provisions in which a licence to act as a gangmaster is not required.

For further information, please refer to the websites below:
www.opsi.gov.uk/sr/sr2006/20060189.htm
www.opsi.gov.uk/sr/sr2006/20060340.htm

1.13 New Rules for Notifying Collective Redundancies to Government

The **Collective Redundancies (Amendment) Regulations (Northern Ireland) 2006 (SR 2006 No. 369)** bring effect to the European Court of Justice's decision in *Junk v Wolfgang Kuhnel C-188/03* [2005] *IRLR 310* on the proper timing of dismissal notices when a consultation procedure is underway. *Junk v Wolfgang Kuhnel* was a referral from Germany and concerned a care assistant who was given notice of dismissal before the consultation procedure was completed. The ECJ held that "redundancy" for the purpose of the Directive takes place when the notice of intention to terminate the employment is issued, not when that notice expires. Secondly, the ECJ held that an employer cannot make employees redundant (ie give notice) before the consultation procedure has been completed, because otherwise consultation could not be said to be "with a view to reaching an agreement" as required by the Directive. Further, notification of the projected redundancies to the relevant public authority must also take place before notice is given to employees.

The effect of the new regulations is to amend Article 221 of the Employment Rights (Northern Ireland) Order 1996 (from 8th October 2006) in relation to collective redundancies whereby in addition to the

existing duties an employer must notify the Department of Enterprise, Trade and Investment of his proposal before he gives notice to an employee to terminate his or her contract of employment in respect of any of those dismissals. In 2005, 64 employers proposed making collective redundancies, compared to 53 in 2004 and 91 in 2003.

Further information is available at:
http://www.opsi.gov.uk/sr/sr2006/20060369.htm

1.14 Information and Consultation of Employees

The **Information and Consultation of Employees Regulations (Northern Ireland) 2005** came into operation on 6th April 2005. The Regulations transpose a European Directive which establishes a right to new minimum standards for workforce communication and involvement in undertakings within individual EU Member States. Employees will have the right to be informed about the business's economic situation, employment prospects and about decisions likely to lead to changes in work organisation or contractual relations, eg redundancies, business transfers, etc.

The Regulations have applied to undertakings with 150 or more employees since April 2005. From April 2007 they will apply to undertakings with 100 or more staff. The Department will shortly be issuing updated summary guidance to all affected undertakings. The Regulations will extend to undertakings with 50 or more staff from April 2008.

PART 2 PROPOSALS LIKELY TO TAKE EFFECT IN THE NEAR FUTURE

2.1 Increases in Minimum Holiday Entitlement

Currently workers in Northern Ireland have a statutory entitlement to 4 weeks' paid annual leave under the provisions of the Working Time (Northern Ireland) Regulations 1998. However, the Regulations are silent on the question whether bank and public holidays should be given in addition to this and for some workers bank holidays are included in their entitlement. The Government outlined a commitment to make paid leave for bank holidays additional to annual leave entitlement in its 2005 Manifesto.

The Department for Employment and Learning undertook an initial consultation between 28th July 2006 and 19th October 2006 seeking views on the potential benefits and impacts of increasing the statutory entitlement. There are 8 bank holidays in GB and 10 in NI. On 29th January 2007, the Secretary of State announced an additional 10 days for Northern Ireland. This will be equivalent to an increase from 20 days to 24 days from 1st October 2007 and from 24 days to 30 days from 1st October 2008 (with pro rata entitlement for part-time workers).

A further consultation on draft regulations was announced in February 2007. A Departmental Response to the initial consultation was also published in February 2007. The response and consultation are available on the Department's website at www.delni.gov.uk. Research indicates that up to 2 million of the lowest paid workers in the United Kingdom would ultimately stand to benefit from 8 (or 10) days' additional leave entitlement. Women, part-time workers and those from the ethnic minorities would be likely to gain the most.

2.2 DEL Considering…..

In March 2006, the Department of Trade and Industry in Great Britain launched an employment relations strategy setting out proposed measures for the duration of the current Parliament. The document, entitled "Success at Work – protecting vulnerable workers, supporting good employers", includes proposals to do the following:

- Improve guidance material;
- Review dispute resolution mechanisms;
- Review employment agency regulations;
- Increase statutory holiday entitlement;
- Raise awareness of rights;
- Simplify employment law;
- Include pensions in statutory collective bargaining.

The Employment Rights Branch of the Department for Employment and Learning has announced its intention to consider the implications of these proposals for Northern Ireland.

2.3 Health and Safety – "so far as is reasonably practicable"

The United Kingdom is currently the subject of infraction proceedings brought by the European Commission (*Commission v United Kingdom C-127/05*) in relation to health and safety law. The well-known formulation under s.2(1) of the Health And Safety at Work Act 1974 (and its counterpart in Article 4(1) of the 1978 Order) states that it is the duty of every employer to ensure the health, safety and welfare at work of all his employees "so far as is reasonably practicable". The European Commission is contending that this is inconsistent with the European Framework Health and Safety Directive 89/391 which imposes liability on the employer for all events. The only exception allowed by Article 5(4) of the Directive is where occurrences are due to "unusual and unforeseeable circumstances beyond the employer's control or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care unless there are very special circumstances". The Commission is arguing that the domestic courts' interpretation of the United Kingdom

provisions allows an employer to escape liability if he can prove that the sacrifice involved in taking further measures – whether in money, time or trouble – would be greatly disproportionate to the risk. This balancing test applies in all cases, not just the very exceptional situations permitted by Article 5(4). According to the Commission, to allow consideration of the financial loss to the employer is contrary to the Directive. If successful, the challenge will result in a much higher standard of care being required of employers under the criminal law and is likely to lead to significantly higher rates of conviction for health and safety offences.

At the end of January 2007 the Advocate General gave an opinion in support of the British Government's position. He said, "the general duty laid down in the Directive does not extend so far as to require the employer to provide a totally risk free working environment. Both a literal and historical reading of the provisions of the Directive at issue argue against interpreting it in the way that the Commission suggests". The ECJ decision is due later this year.

PART 3 CONSULTATION PAPERS; CODES OF PRACTICE; REPORTS; GUIDANCE

3.1 Codes of Practice on Union Recognition and Industrial Action Ballots

The implementation of the Employment Relations (Northern Ireland) Order 2004 has necessitated revisions and additions to the **Codes of Practice** issued by DEL. Two new codes have been issued, as outlined below. The 2004 Order was gradually brought into operation during the course of 2004 and 2005, and was fully in force by 8th January 2006. It made important changes to the arrangements for statutory recognition of trades unions and enhanced the legal protection for workers who were intimidated or unfairly dismissed. Employers and unions are prohibited from engaging in "unfair practices" which might influence the result of a recognition or de-recognition ballot and the Industrial Court has been given greater powers.

A new Code of Practice entitled **Access and Unfair Practices during Recognition and Derecognition Ballots** came into force on 19th March 2006. This replaces the earlier 2001 Code on access and contains additional provisions relating to unfair practices. The Code gives practical guidance about the issues which arise when an employer receives a request by a union to be granted access to his workers at their workplace and/or during their working time. The overall aim of the Code is to ensure that the union can reach the workers involved and to help the employer and the union arrive at agreed arrangements for access which take full account of the circumstances of each individual case. The second purpose of the Code is to help the parties avoid the commission of unfair practices. Ballots usually take place because the parties cannot agree the way ahead and the atmosphere is often acrimonious. The Code aims to encourage reasonable and responsible behaviour by both the employer and the union when undertaking campaigning activity during this period and to promote a spirit of co-operation. Individuals should not be exposed to intimidation, threats or other unfair practices when deciding how to cast their vote. The law provides protection for workers who campaign either for or against recognition. Employers must refrain from offering cash or non-cash inducements; threats to dismiss or take disciplinary action or take action short of dismissal (lower performance mark, etc); coercion or undue influence. For the consequences of ignoring the legal provisions see the case of *ASDA v GMB 2006*, where ASDA was ordered to pay £850,000 for offering illegal inducements to workers to quit the GMB union. Workers were offered a 10% pay rise. A Tribunal ordered the company to pay each worker the sum of £2,500.

A second code – **Industrial Action Ballots and Notice to Employers** – has also been issued by DEL, coming into force on the same day, 19th March 2006. This revises and supersedes the 2002 Code of the same title. The new Code updates the practical guidance given to trades unions and employers and aims to promote the improvement of industrial relations and good practice in the conduct of trade union industrial action ballots.

Both Codes are available to download at http://www.delni.gov.uk

3.2 Working Time Developments

Future of the opt-out

The future of the opt-out from the 48-hour maximum working week is one of the most hotly contested issues in European labour law at present. Matters have come to a head because of recent European Court of Justice decisions which make it quite clear that on-call time which is spent on the employer's premises is working time and counts towards the 48-hour maximum working week permitted by the Directive. This is particularly relevant to the health care and emergency services sectors. These decisions could potentially lead to much greater use of the opt-out, which allows an

individual worker to agree with his or her employer, to work longer than the statutory maximum of 48 hours a week. Continued use of the opt-out is opposed by the European Commission, which has put forward proposals to abolish it or to impose much tighter controls on its operation. These have been resisted by the United Kingdom. It now looks as though the opt-out is here to stay. In June 2006 Secretary of Trade Alistair Darling secured the retention of the opt-out during negotiations held in Luxembourg to try to secure a compromise deal. He made it clear that it was unacceptable to end the right of UK workers to volunteer to work longer hours if they wished to do so. He claimed that over 1 million British workers would lose out on paid overtime; there would be higher costs for businesses forced to take on extra workers and a negative impact on British industry – claims hotly disputed by the TUC.

On 25th October 2006 the Finnish presidency unveiled yet another compromise plan (the fifth presidency to do so) proposing further limits on the opt-out, namely that it must be entirely voluntary and that there should be no discrimination against a worker who refuses to agree to an opt-out or who withdraws consent. There would be an absolute maximum of an average of 60 hours per week to be calculated over a 3-month reference period. However, at a special meeting of EU Labour ministers on 7th November 2006 these proposals were rejected – they were opposed by 5 countries (some on the grounds that they did not go far enough).

The Commission believes that 23 of the present 25 member states are currently in breach of the working time rules and has indicated that it intends to commence infringement proceedings against them.

3.3 Industrial Court

The Industrial Court is the body responsible for considering claims for recognition and de-recognition of trades unions under the statutory procedures (amongst other things). The Court's Annual Report for the year 2005-06 was published in the Autumn of 2006. During the period under review, the court had another quiet year and was called upon to consider only two new applications. It also reported on a case commenced in 2004, *AMICUS and Atlas Communications*. At an initial hearing the Court decided that a postal ballot should take place and appointed an independent scrutineer to conduct it. Electoral Reform Services duly conducted the ballot. The number of votes supporting the proposed recognition as a percentage of the bargaining unit was 59.4%. The Court therefore declared that AMICUS be recognised by Atlas Communications as entitled to conduct collective bargaining on behalf of "all engineers and stores employees…. excluding managers in both stores and engineering departments". The next stage in the statutory process afforded the parties a 30-day period in which to negotiate with a view to reaching agreement on a method by which they would conduct collective bargaining. The parties were unable to reach agreement and the union requested further assistance from the Court. The Chairman of the Court met with both parties to encourage a voluntary agreement on the method of bargaining. This proved successful and an amicable recognition agreement was reached by the parties (without the method of bargaining having to be formally decided by the Court).

The two cases initiated in the period under review were *AMICUS v Samina (UK) Ltd (IC 29/2006)* and *BFAWU v Doherty and Gray (IC 30/2006)*. In both cases the union's application was rejected at an early stage.

The report is available on the re-vamped website for the Industrial Court at: http://www.industrialcourt.gov.uk/final_version_of annual_report.pdf
Decisions of the Industrial Court from 2006 onwards are now included in the Law Society's Libero database accessible via the Society's website: http://www.lawsoc-ni.gov

3.4 Health and Safety Executive Guides

Risk assessment guidance

The Health and Safety Executive has published a revised risk assessment guide featuring examples which spell out what practical steps need to be taken for effective risk assessment. The guide, entitled "Five Steps to Risk Assessment" was originally published in 1993. It has been revised and simplified to make it accessible and easy-to-read for ordinary business people rather than health and safety experts. It provides advice and tips on five key elements to an effective risk assessment:

- identifying the hazards;
- deciding who might be harmed and how;
- evaluating the risks and deciding on precautions;
- recording the findings and implementing them; and
- ensuring that they are reviewed at regular intervals.

The 11-page guide is available at:
http://www.hse.gov.uk/risk

A guide to health and safety for charities and the voluntary sector

A new Health and Safety Executive publication has been produced, providing guidance for the voluntary sector on issues such as working in charity shops, driving and transport, fire safety, fundraising, lone working, moving and handling, violence at work, supervision and training. Each chapter deals with a specific health and safety subject and gives a general introduction, followed by a series of practical case studies taken from actual events. It explains legal duties, how to manage health and safety and how to assess risks.
It is available at:
http://www.hse.gov.uk/pubns/books/charity.htm

Slips and trips

The Health and Safety Executive has recently updated its guidance on slipping and tripping at work. It is available at
http://www.hse.gov.uk/slips/index.htm

3.5 Information Commissioner's Guide on Employee References

A user-friendly guide has been produced by the Information Commissioner's Office to help employers understand how the Data Protection Act applies to employee references. The guide also contains good practice recommendations to help employers decide when employment references should and should not be released. The guidance highlights that in most cases individuals have a right to a copy of information held about them and warns that employers who refuse to provide it may be in breach of the Data Protection Act. However if there is confidential information in a reference then an exemption may apply. The guidance is available from:
http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/subject_access_and_employment_references.pdf

3.6 Report on the New Tribunal Rules

A survey carried out by the Employment Lawyers' Association in Great Britain into the changes to tribunal rules introduced there in 2004 (and in Northern Ireland in April 2005) suggests that the new rules are unpopular and ineffective. Eighty-one percent of those surveyed thought it was wrong to stop employees from lodging claims because they had failed adequately to complete the required paperwork. This view has been supported by a series of Employment Appeal Tribunal decisions which have allowed such claims to succeed. The report also indicates that fixed period conciliation by ACAS (the sister body of the Labour Relations Agency) has not been used properly by the parties to genuinely discuss settlement but is viewed simply as a "lull in the proceedings". The report notes the decline in the number of applications to tribunal but suggests that it may be for reasons unconnected with the tribunal reforms and points out that the reduction is likely to be temporary given the introduction of age discrimination legislation in October 2006.

3.7 CIPD Report on Statutory Dispute Resolution Procedures

A CIPD survey published in January 2007 has found that the statutory dispute resolution procedures have made managing conflict at work more complex and have failed to reduce

the burden on the tribunal system. The report is entitled "Managing Conflict at Work" and it asserts that conflict at work costs the average employer around 350 days of management time annually. In addition, the average firm can expect annual costs associated with tribunal claims of around £20,000, rising to £210,000 for firms employing 10,000 or more people.

3.8 Migrant Workers

Many organisations in Northern Ireland now employ migrant workers. There are a number of sources of information to help both migrant workers themselves and also employers in the quest to ensure that such workers integrate into the workforce. These include:

- Your Rights in Northern Ireland: A guide for migrant workers. This is published by the Law Centre (NI) and is available in several languages at: http://www.lawcentreni.org/Publications/Publications.htm#Migrant%20workers
- Code of Practice on the Avoidance of Race Discrimination and the Elimination Of Illegal Working. This is a statutory Code of Practice admissible in evidence in Industrial Tribunal proceedings. It is published by the Home Office and available at: http://www.ind.homeoffice.gov.uk/lawandpolicy/preventingillegalworking/codeofpractice
- Business in the Community Northern Ireland has published a voluntary Code of Practice on Employing Migrant Workers available on their website: http://www.bitcni.org.uk
- Information and guidance is also available from the European Employment Service (EURES) through DEL. The website is http://www.eures-jobs.com

A considerable number of employment rights publications are now available in a range of languages from both the LRA and DEL.

3.9 DEL Flexible Working Survey

In March 2007 the Department for Employment and Learning published its Flexible Working Survey for 2006 in which almost 1,000 respondents participated. The main findings include:

- 90% of employers claim they provide one or more flexible working practices to their employees;
- Smaller business (5-9 employees) were more likely than larger business (50+ employees) to have no flexible working practices;
- Part-time working was the most common type of flexible working practice with 86% of employers making use of it;
- Next most common was working flexi-time (28%);
- Least common were working annualised hours (8%) and working from home (4%);
- 75% of employers who do not provide flexible working said it was due to the nature of the work or was not practicable;
- 50% of employees stated that they were currently satisfied with their current working arrangements.

The report compares findings in 2003 with those for 2006 and concludes, "rates of change are small and it is possibly too soon to be able to observe whether there have been any significant changes as a result of the introduction of the right to request flexible working arrangements". The report is available at: http://www.delni.gov.uk/fwp-comparison-2003-2006

PART 4 SIGNIFICANT CASELAW DEVELOPMENTS

4.1 Agency workers

Many employment rights, including the right to claim unfair dismissal under the Employment Rights (Northern Ireland) Order 1996, are granted only to "employees". In recent years, tribunals have often been called upon to consider the employment status of "agency" workers whose services are provided to "end users" by employment agencies. These are often known as triangular employment relationships. When the end-user no longer wants the worker's services and the arrangement is terminated, the worker may wish to claim that he or she has been unfairly dismissed.

In England, in *Dacas v Brook Street Bureau (2004)* the Court of Appeal advised that in such a case the tribunal should consider the possibility of there being an implied contract of employment between the worker and the end user. The court was split over the minimum elements necessary to establish such a contract. In the case, the majority of the Court of Appeal gave a clear indication that on the facts there had been an implied contract between Mrs Dacas and the end user, Wandsworth Council, despite the fact that her contract with the agency expressly stated that she was an employee of neither the agency nor the council and despite the fact that the agency had the obligation to remunerate, while the Council had control over her day-to-day work.

The case undoubtedly led to some confusion and clearly concerned many end users who had been blissfully unaware that they might legally be the employer of temporary agency staff placed with their organisation, even where this expressly contradicted what was provided in a written agreement.

In *Cable and Wireless plc v Muscat* [2006] *EWCA Civ 220* the Court of Appeal has made it clear that Dacas was correctly decided and the guidance it provided was unimpeachable. Mr Muscat was informed by his company in 2001 that he must become a "designated contractor" (rather than an employee, as previously) if he wished to continue working for the employer. Mr Muscat agreed and set up a purpose-built company, which then supplied his services to the employer. In 2002, following a transfer of the business, he was told that his services must now be provided via an employment agency. He entered a contract with the agency, which expressly stated that he was not to be regarded as an employee of Cable and Wireless. The contract made provision for the work being carried out by a substitute (though this was never in fact done). Cable and Wireless continued to provide him with a lap-top, a mobile phone and other equipment.He was described as an employee in the company's departmental structure and arranged his annual leave to suit the company. In December 2002 the company ceased to use his services and he brought an unfair dismissal action against it.

The tribunal, as directed in Dacas, looked at the reality of the situation, and held that there had been an implied contract of employment between Mr Muscat and Cable and Wireless, which had lasted until December 2002. The EAT upheld the Tribunal's decision, again following the guidance given in Dacas. This approach was confirmed as correct by the Court of Appeal, concluding, "We find it hard to imagine a case in which a worker will be found to have no recognised status at all, either as an employee of someone or as a self-employed independent contractor".

However, there are some indications that the tide may have turned and in two recent EAT cases the concern has been to apply the brakes to Dacas and Muscat. In *James v Greenwich Council* [2006] *UKEAT/0006/06/ZT*. The EAT stated that the passage of time is not of itself enough to imply into existence a

contract of employment between an agency temp and an end-user, even where the contract continues for longer than originally intended. This often happens simply because it is convenient for everybody concerned and does not automatically mean that the nature of the relationship has changed. Nor does it mean that an agency is legally obliged to supply this particular worker to this particular end-user. If the agency worker sought to assert employee status then it was incumbent upon her to demonstrate how mutuality of obligation had evolved. There must be some words or conduct which would enable a tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed and that the reality of the relationship is only consistent with the implication of the contract between the worker and the end user.

In the second case, *Cairns v Visteon* [2006] *UKEAT 0494/06/2911* the court examined the possibility of two parallel contracts of service between the worker and the agency and the worker and the end-user.

Another case to raise questions about employment status is *Hawley v Luminar Leisure Ltd* [2006] *EWCA Civ 18*. Mr Hawley was assaulted outside a nightclub by a doorman and suffered serious permanent brain damage. The doorman was not employed directly by the nightclub but had been supplied by another company, ASE Security Services Ltd to whom the nightclub had subcontracted door duties. The Court of Appeal upheld the finding of the High Court that the nightclub exercised sufficient practical control over the doorman to make it the "temporary deemed employer" for the purposes of vicarious liability. The case may be seen as part of the developing trend to find that an implied contract of employment has arisen, even after a relatively short relationship between agency worker and end-user.

4.2 Length of Service

An important decision on the use of length of service criteria to justify pay disparity was handed down by the European Court of Justice on 4th October 2006 in the case of *Cadman v Health and Safety Executive (C-17/05)*. The case is being heralded as a victory by both employers and unions! The case was brought by a Manchester health and safety manager who discovered that male colleagues at the same grade in the Health and Safety Executive were being paid up to £9,000 more. All of these colleagues had longer experience than she had – one had 25 years more. Mrs Cadman, who had taken time off as maternity leave, argued that the fact they had more experience did not mean they should be paid more if they were doing the same duties. She claimed that women would be unable to achieve the same length of service as men because of domestic circumstances such as pregnancy and maternity leave and therefore women were being denied the opportunity to earn as much as their male counterparts. A victory for Mrs Cadman (who was supported by her union, Prospect) would have meant that employers would have been forced to pay the same rates to every worker of the same grade, no matter how long their experience. It would have had particular implications for the public sector where incremental scales based on length of service remain common.

The Court has ruled that women who take time out for maternity leave have no automatic right to equal pay with men who have greater length of service and that an employer does not have to show a special justification for using the criterion of length of service. The Court acknowledged that:

> *"…rewarding, in particular, experience acquired which enables the worker to perform his duties better constitutes a legitimate objective of pay policy. As a general rule, recourse to the criterion of length of service is appropriate to attain that objective. Length of service goes hand in hand with experience, and experience generally enables the worker to perform his duties better. The employer is therefore free to reward length of service without having to establish the importance it has in the*

performance of specific tasks entrusted to the employee."

The CBI has hailed this part of the judgement as a victory for commonsense which recognises that employers need to be able to reward the knowledge and skills that grow with experience. It seems that the judgement will not require radical changes in workplace practices. In many cases employers will be able to continue to rely on the length of service criterion to defend equal pay claims, provided they can establish that the higher pay attributable to length of service is intended to reward experience and/or encourage better performance.

The Court has acknowledged that there may be situations in which recourse to the criterion of length of service must be justified by the employer in detail. This is the case where the worker provides evidence capable of giving rise to serious doubts about the appropriateness of the use of the criterion. Prospect has responded to this part of the judgement by saying that it enshrines in law the right of workers to challenge pay inequality where employers unreasonably use length of service to defend pay differences. The Equal Opportunities Commission has expressed the view that the decision reiterates the general rule that where a pay practice results in a difference in pay between men and women doing equal work, the employer must be able to show that it is justified by a legitimate aim and that the means of achieving it are appropriate and necessary.

The significance of this decision may not be confined to equal pay cases. It may also have implications for the new age discrimination regulations where questions are raised regarding pay progression based on length of service. Under the Employment Equality (Age) Regulations (Northern Ireland) 2006 the use of length of service to justify additional pay or benefits may constitute age discrimination, unless it can be objectively justified. This ECJ decision will no doubt be relied upon to argue that the practice can be justified in this way by employers reluctant to abandon their service-based benefits.

4.3 Payment of Bonuses – Maternity Leave

Hoyland v ASDA Stores Ltd [2006] *CSIH 214*
The applicant was on maternity leave from June to December 2002. The employer operated a "discretionary" bonus scheme to reward contribution to the business. Bonuses were reduced pro rata in respect of absence in excess of 8 weeks in the bonus year. Mrs Hoyland's were reduced in respect of her maternity leave and she claimed sex discrimination. The case went to the Scottish Court of Session (the equivalent of our Court of Appeal) on the specific question of whether this particular bonus fell within the Sex Discrimination Act. As the so-called "discretionary" bonus was in fact regulated by the contract of employment it was not open to challenge under the Act (Section 6(6) SDA). Mrs Hoyland had originally brought her claim also under the provisions of Article 141 of the EC Treaty but that claim had been thrown out at EAT stage on the basis that the payment at issue related to a period when she was on maternity leave, and that therefore, on the authority of Gillespie, she was not entitled to full pay including the bonus for that period.

4.4 Requests to Work Part Time

The potential for two quite separate and distinct legal actions must be borne in mind here. The right to request flexible working was introduced in Northern Ireland by the Flexible Working (Eligibility, Complaints and Remedies) Regulations (Northern Ireland) 2003. As noted earlier the right to have a request for flexible working arrangements seriously considered by an employer has been extended to carers of adult dependants (from April 2007). An employer can only refuse the request if he or she believes that one or more specified business-related grounds applies (including burden of additional costs; reduced ability to meet customer demand; inability to re-organise work among existing staff or recruit additional staff, etc.).

In addition to the specific statutory right to request flexible working, employees who are refused requests for part-time work, job-sharing and the like, may claim that they have been indirectly discriminated against, contrary to Article 3(1) of the Sex Discrimination (Northern Ireland) Order 1976. It is then up to the employer to show that the refusal can be objectively justified. Significant damages can be awarded should the case succeed. The potential for such claims has been demonstrated in the (English) Court of Appeal during the year under review.

Hardys & Hansons plc v Lisa Lax [2005] *IRLR 276 CA*
The claimant was a retail manager with a brewing company. During her maternity leave the firm carried out a reorganisation and subsumed her post into a newly created post. On her return, the claimant requested a job share but this was refused and she was made redundant from her old full-time post. Ms Lax claimed both indirect discrimination and unfair dismissal. The employer accepted that there had been indirect discrimination by virtue of the requirement to work full time and its disparate impact on women with small children but claimed objective justification for its failure to grant the request. This was rejected by the Employment Tribunal who awarded £60,000 compensation.

In the Court of Appeal the court ruled that the "band of reasonable responses" used in unfair dismissal cases is not relevant to discrimination claims. The correct test is an objective one – the tribunal must weigh the needs of the business against the discriminatory effect of the refusal in order to decide whether the refusal was justified and necessary in all the circumstances and proportionate. The court recommended that at least a basic economic analysis of the business and its needs should be provided. In this case the brewery had failed to provide this and the tribunal was entitled to conclude that there had been insufficient exploration of the possibilities for job-sharing and that the employer's objections had been overstated.

British Airways v Starmer [2005] *IRLR 862EAT*
A pilot working for British Airways applied to transfer from full- to half-time working under the company's policy on flexible working. Her request was rejected although BA did offer three-quarter time working. The claimant was not satisfied with this and made a claim of indirect discrimination. BA put forward a number of reasons to justify the refusal, including the training costs involved in recruiting extra pilots; an existing ban on recruitment; the detrimental effect on service and performance. BA also claimed that relatively inexperienced pilots such as Ms Starmer, returning from a period of absence, who then flew only 50% of the time, could create a safety risk. All of these reasons were rejected by the tribunal. The EAT ruled that insufficient evidence of the safety concerns had been put forward. The reliance of the company on safety issues was a retrospective justification which had not formed part of the contemporaneous decision-making process. The other issues, whilst they did point to some additional costs for the airline, were not unreasonable burdens when weighed in the balance with the detriment to the claimant. Amidst considerable publicity and public interest in this case, British Airways announced its intention to appeal – a course of action it abandoned in March 2007.

It is clear from these decisions that employers must be able to produce convincing evidence as to why a flexible working request cannot be granted. All options must be fully considered and carefully documented. Any justification for refusal must be cogent and convincing and must involve at least a "basic economic analysis of the business and its needs". An employer cannot assume that just because a request involves a degree of extra cost or inconvenience then refusal can be justified.

4.5 Contracts of Employment – the Status of Staff Handbooks

For some 35 years the accepted view has been that policies and information contained in staff handbooks or works rule books were rarely to be regarded as terms of the employment

contract. This principle has been turned on its head by the case of *Keeley v Fosroc International Ltd* [2006] *EWCA Civ 1277*. In this case, the Court of Appeal, overturning the decision of the EAT, ruled that a clause in a staff handbook providing for an enhanced redundancy payment was a contractual term which could be enforced by the employee. The fact that the provision was part of a document which also contained non-contractual matters (such as statements of principle and practice) did not prevent it from being incorporated into the claimant's contract of employment, since it was clearly contractual in nature. The provision stated that all employees with over 2 years' service would receive an enhanced redundancy payment, which would be tax-free. The handbook did not state how the payment was to be calculated, merely that this would be discussed during consultation. Fosroc accepted that there was however a set formula for the calculation. The handbook did not state that it had contractual effect, although it was referred to in the contract of employment. The Court decided that the fact that the handbook was essentially a collection of policies did not prevent the enhanced redundancy provision from having contractual effect. Something as important as this to the overall employment package could be construed as a term of the contract even if "couched in terms of information or explanation… or described as discretionary".

Previously, arguments about entitlement to enhanced redundancy payments have often been formulated in terms that entitlement is based on "custom and practice". The test for this is that entitlement to the payments is "certain, notorious and reliable", which is a high threshold to satisfy. This argument will now often be unnecessary if employees can argue that the payments are part and parcel of their express contract terms. The clear message is that any handbook or policies which contain entitlements capable of being considered part of the employment contract should expressly be stated not to form part of that contract, in order to avoid a court applying that construction.

The employer is appealing to the House of Lords, with some prospect of a decision before the end of the year.

4.6 On-call Working

As noted earlier, one question which has arisen with some regularity is the issue of when a worker is "at work" for the purposes of National Minimum Wage. Are on-call workers entitled to be paid minimum wage? Exactly the same issue arises in relation to the Working Time Regulations and claims often combine the two jurisdictions. There have been a number of important recent cases, including two European Court of Justice working time cases which say that that time spent on call must be regarded in its entirety as working time if the worker is required to be at the workplace. See *SIMAP* [2000] *IRLR 845; Landeshaupstadt Kiel v Jaeger* [2003] *IRLR 804.*

A recent application of these principles is to be found in the case of *MacCartney v Oversley House Management* [2006] *UKEAT/0500/05*. The claimant was employed as the resident manager of a care home earning £8,750 p.a. plus a rent free flat. Each week she worked 4 consecutive days on a 24-hour on-call basis. She lodged claims in relation to daily rest periods and National Minimum Wage. Her claims were upheld by the EAT. Taking into account the recent ECJ decisions the EAT found that on-call constituted working time, even though she was permitted to rest and sleep in the flat provided by her employer at her place of work.

4.7 National Minimum Wage – Accommodation Charges

Much publicity was given to a national minimum wage case involving many hundreds of holiday camp workers who had been charged £6 per fortnight towards electricity and gas in accommodation supplied by their employer. This was the case of *Leisure Employment Services Limited v Commissioners for Her Majesty's Revenue and Customs* [2007] *EWCA Civ 92* decided on the 16th February 2007.

The workers in this case were seasonal staff employed as bar staff, shop assistants, receptionists, security staff and such like in LES resorts in various parts of the country. It was possible for these employees, at their own choice, to be accommodated on site, in shared caravans or chalets. As a condition of occupation, the employee was required to pay to LES £6 per fortnight for the supply of heat and light to his caravan or chalet. The caravans and chalets receive heat and light by the same means as the rest of the buildings on the resort. They were not separately metered, nor was the sum charged an accurate, or indeed any, estimate of the cost of the energy actually consumed.

It is a clear principle of the minimum wage regime, underlined in regulation 9 of the Regulations, that the required wage should be paid in money and not by way of benefit in kind. The employer should not be permitted to make compulsory deductions from pay for the provision of goods and services, so as to bring the worker's pay below the minimum level. Almost the only exception to that prohibition is that the employer may make deductions from the worker's pay in respect of the provision of living accommodation for the worker. That exception is itself limited in terms, so that the deduction is only permitted to reduce the total remuneration to a fixed level below the minimum wage.

LES applied the total permitted deduction for accommodation, so that workers were paid the amount of the minimum wage less the accommodation charge. However, if the £6 per fortnight was added to the accommodation charge, that took the total package below the statutory minimum. The issue in the appeal was, therefore, whether the legislation requires the £6 charge to be taken into account in calculating the permitted accommodation deduction; or alternatively forbids a charge of this type from counting against the minimum wage.

The Court of Appeal ruled that the position had to be assessed on the basis that the employee had in fact made use of the accommodation offered by the employer. Once he did that he was then obliged to take the service from his employer, and was obliged to make the payment for that service. That payment was plainly made under a requirement imposed on the employee by the employer. Since the employer had already exhausted the permitted charge in respect of accommodation, the additional charge of £6 could not be counted towards the workers' earnings for the purpose of satisfying the national minimum wage legislation.

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