

Employment Law Update Workshop

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Equality Act 2010

Public Sector Equality Duty [PSED]

Duty requires a public authority in the exercise of its functions to “have due regard” to three key areas

- Eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the 2010 Act
- Equality of opportunity between individuals sharing a relevant protected characteristic and those who do not share a protected characteristic
- Foster good relations between individuals sharing a relevant protected characteristic and those who do not



PSED

Public authorities:

- Local and other public bodies listed within schedule 19 of the Act
- Other companies when conducting public functions

Public function defined as:

“a function of a public nature for the purposes of the Human Rights Act 1998”

PSED

Include:

- The extent to which, in carrying out the relevant function the Company is publicly funded, OR
- Is exercising statutory powers, OR
- Taking the place of central government or local authorities, OR
- Is providing a public service

PSED Protected Characteristics

Covers age, disability, gender reassignment, pregnancy and maternity, race (including ethnic or national origins, colour or nationality), religion or belief (including lack of belief), sex and sexual orientation.

Having due regard defined:

- Consciously thinking about the 3 key areas as part of the process of any decision making
- Duty must be fulfilled both before and at the time that a particular policy that might affect individuals/groups with protected characteristics is being considered by the public authority in question

PSED in Practice

- Considering the need to meet the needs of, and to remove or minimise disadvantages suffered by, individuals/groups with protected characteristics
- Encouraging such individuals to participate in public life or in other activities where participation is low
- Fostering good relations, tackling prejudice and promoting understanding between individuals who share a protected characteristic and others

PSED in Recruitment

May involve treating some individuals better than others, so far as is permissible under discrimination law, for example, utilising the positive action provisions [voluntary measures concerning recruitment and promotion effective April 2011]



Retirement Age (abolished October 11)

Abolishment of Default Retirement Age [DRA]

- Those already in place pre 6 April 2011 can continue if:
 - Notification issued prior to 6 April 2011
 - Date of retirement before 1 October 2011
 - Requirements of the statutory retirement procedure are met
 - Employer will have to justify the retirement age objectively and follow a fair procedure under ordinary dismissal rules
 - Retirement objectively justified dismissal for SOSR [s.98 Employment Rights Act]

Default Retirement Age

- 1 October 2011 default retirement age abolished.
- Maximum 12 months notice 5 April 2011 able to compulsorily retire employees on or before 5 April 2012
- Minimum 6 months notice on 5 April 2011 must ensure notice expires 5 October 2011 to avoid a penalty for short notice [8 weeks compensation]
- Revised draft Regulations provide no further requests can be made to continue working beyond retirement [65] on or after 5 January 2012
- Request to work beyond retirement must be made at least 3 months and no more than 6 months before notice expires, employee served 12 months notice on 5 April 2011 must make their request to work beyond retirement by 4 January 2012
- Employer can agree 6 month extension of retirement date without issuing fresh notice

Default Retirement Age

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Default Retirement Age

Government taken into consideration employer provided insurance or related financial services when the employee reaches the age of 65 or the State Pension Age [whichever is greater]. The exemption covers employer provided group risk insured benefits such as income protection, life assurance, private medical cover and sickness insurance.

Employer Justified Retirement Age [EJRA]

- Objectively Justifiable Reasons/proportionate response to a legitimate aim
- Case law around EJRA will develop
- EJRA currently used in exceptional circumstances where employer has retirement age of 65 or under, examples:
 - Emergency services where a significant level of fitness is required [fireman]
 - Partners within law firms
 - Exceptional mental fitness [pilot]
 - Workforce planning [business need to recruit, retain and provide promotion opportunities, succession planning]
 - Health and safety of individual employees, colleagues, general public

Employer Justified Retirement Age [EJRA]

Test of objective justification not an easy one to defend

- Assertions alone not enough
- Must have strong evidence to support the reason
- Must consider alternative, non-discriminatory ways of achieving same result
- Employer must show **OBJECTIVE** justification **NOT** **SUBJECTIVE** justification
- Dismissal older employee on grounds of retirement will be automatically unfair unless it can be objectively justified

Key Dates

- 5 April 2011 – last date on which retirement notices can be served
- 4 January 2012 – last date on which request can be made to work beyond retirement
- 5 April 2012 – last date notices of retirement expire
- 5 October 2012 – last possible date of retirement [agreed extension of 6 months 5 April 2012 new retirement date]

What Employers need to do?

- Review retirement notices already issued to check the proposed retirement date does not fall after 5 April 2012
- Amend employment contracts/handbook

Objective justification

Proportionate:

Action actually achieving aim

- Discriminatory effect significantly outweighs by the importance and benefits of the legitimate aim
- Employer should have no reasonable alternative to the action it is taking

Objective justification for employers

- Aim of saving money [higher pay than younger employee] not by itself a legitimate aim
- Employers not able to rely on generalised assumptions that lack factual foundation as evidence of justification
- Will have to provide valid evidence if retirement age is challenged
- Case law on objectively justified retirement rare/cases pending

Dealing with underperformance of employees over 65

- Employer must not discriminate on underperformance by disciplining or dismissing on grounds of age
- Must deal with through Company procedures in the same manner as an employee under 65 and underperforming
- Must follow a fair capability process focusing on the employees performance

Extended Paternity Leave

Extended Paternity Leave

- Qualification – continuous employment 26 weeks ending with the 15th week before the baby is due or in the case of adoption the end of the week in which the child's adopter is notified of being matched with the child

Available to employees who:

- Have or expect to have responsibility for the child's upbringing
- Are the biological father of the child or the mother's husband or partner

Extended Paternity Leave

Additional Paternity Leave and Pay allows up to 26 weeks leave to care for the new baby if:

- They are the father of a child due on or after 3 April 2011
- Their wife, partner or civil partner is pregnant and due to give birth on or after 3 April 2011
- Receive notification in writing that they are matched with a child for adoption on or after 3 April 2011
- Their wife, partner or civil partner are adopting a child from overseas and the child enters Great Britain on or after 3 April 2011
- The child's mother is entitled to statutory maternity leave, maternity pay or allowance or statutory adoption leave or pay



Extended Paternity Leave

- Remains in employment with the employer until week before the 1st week of additional paternity leave
- Maximum of 26 weeks
- Can be taken any time from 20 weeks from the date of birth, but must have finished by the child's 1st birthday
- Adoption, can be any time between 20 weeks and 52 weeks after the child starts living with the adopter



Extended Paternity Leave

Employers must receive notice in writing at least 8 weeks before the start of leave and include:

- Expected date of the child's birth or date of notification if being matched with a child
- Actual date of the child's birth or adoption placement
- Start date of the additional paternity leave and pay
- Relationship to the mother, and leave requested to care for the child
- Additional paternity leave – child's mother or adopter must have returned to work

Extended Paternity Leave

- No entitlement if spouse, civil partner or partner of the adopter are not jointly adopting the child
- Employer has right to insist the employee signs a self declaration certificate confirming intention to take paternity leave and are living with the child's mother in an enduring family relationship
- Employer suspects/evidence to suggest otherwise disciplinary/dismissal if substantiated
- Employee falsely claiming SPP liable to prosecution by HM Revenue and Customs

Bribery Act

Bribery Act Update

Bribery Act 2010 clarifies 4 offences:

- Making a bribe
- Receiving a bribe
- Bribing a foreign official
- Liability of companies [and their Directors] for the acts [or inactions] of their employees, agents and third parties [new offence]

Bribery Act Update

Penalties

- Individuals – unlimited fine and up to 10 years imprisonment
- Companies – unlimited fine and up to 10 years imprisonment for Directors and automatic debarment from public works contracts

What should you do?

Identify risks:

- Undertake specific risk assessment [likelihood of corruption arising]
- Individual circumstances of the Company and measures necessary for preventing and detecting bribery [risks linked to the nature or location of the companies activities]

What should you do?

Standards expected of a small private Company will differ from those of a large multi-national Company, each Company needs to apply stringent applicable standards

- Create/establish code/procedure of compliance prohibiting bribery and corruption
- Make the code/procedure clear and visible [including Company website]
- Communicate to all staff both at induction/update on regular basis

What should you do?

- Investigate agents and third parties
- Follow the money
- Training
- Reporting/whistleblowing
- Discipline
- Ensure everyone knows what you are doing

Bribery Act Update

Documents – dependent on the size of the Company Ethics and Compliance documentation should cover and include:

- Bribery and Corruption Policy
- Board level statements supporting the policy
- Code of business ethics
- Gifts and hospitality guidance/procedure

Bribery Act Update

Items for review:

- Gifts
- Hospitality, entertainment and expenses [an accepted part of business, question would be whether the gift or hospitality is lavish and as such is used to secure advantages therefore making it unacceptable under the 2010 Act]
- Travel
- Political contributions and lobbying
- Charitable donations and sponsorships

Bribery Act Update

- Facilitation payments
- Solicitation and extortion
- Sexual favours
- Unbilled services

List not exhaustive and only needs to be tailored to cover the elements required by an individual Company

Bribery Act Update

External controls:

- Ensure there are standard clauses in commercial contracts prohibiting bribery and corruption
- Undertake due diligence over business relationships and projects
- Consider how best to approach the use of agents and intermediaries if concerned with regard to compliance of the 2010 Act

Bribery Act Update

Response procedures:

- Helpline or alternative system of reporting concerns [whistleblowing]
- Proper investigation of all allegations
- Appropriate and consistent disciplinary procedures
- Regular review of policies and procedures

Agency Workers

Agency Worker Directive [AWD]

Included within Regulations:

- Basic pay
- Annual leave
- Rest breaks
- Bonuses linked to performance
- Access to job vacancies
- Access to communal facilities
- Prayer room
- Car park

Agency Worker Directive [AWD]

Not included:

- Genuinely self employed workers
- Bonuses for loyalty or long service
- Financial participation schemes
- Company cars
- Private medical insurance

Agency Worker Directive [AWD]

- “Equal treatment” relates only to basic working and employment conditions that would apply had they been directly recruited
- “Equal treatment” qualify as staff employed directly after 12 weeks in post

Agency Worker Directive [AWD]

Q: Is it the responsibility of the recruitment agency to comply with the Regulations?

A: Although agencies should take on the majority of the responsibility for compliance employers are obligated under the Regulations to provide the agency with information about their employees employment conditions. Dependent on which party a tribunal decides is responsible either the hirer or the agency, or both could be held liable for any breach.

Agency Worker Directive [AWD]

Q: Under the Regulations will all rights be triggered after 12 weeks in the same role?

A: Agency workers will have some rights from day one of the assignment such as access to shared facilities and amenities including canteens, workplace crèches, transport services, unless the employer can objectively justify not doing this.

Agency Worker Directive [AWD]

Q: If the agency worker changes role within the Company after twelve weeks [qualifying period] do they lose their entitlements or retain their basic rights?

A: They retain their basic rights as if they had continued in the same role after 12 weeks, unless the work or duties that make up the majority of the new role are substantively different. If the new role is substantively different, the agency has informed the agency worker in writing of the type of work required within the new role, the qualifying period is reset to zero. The agency worker will be entitled to equal basic working conditions after twelve weeks service within the new role.

Agency Worker Directive [AWD]

Substantively different will depend on factors such as:

- Skills and competences used
- Pay rate
- Location
- Line Manager
- Working hours
- Training required
- Specific qualifications required
- Equipment involved

Agency Worker Directive

The Regulations use the example of a warehouse using agency workers on a production line packing products for distribution. Moving from the production line to a packing role requires little training and uses the majority of the same skills, therefore, the roles are unlikely to be substantively different.

Agency Worker Directive

Q: Do self employed workers have the same rights under the Regulations?

A: In some cases they may be considered an agency worker. Self employed workers are not covered by the Regulations if the agency or hirer is considered to be a client or customer of the self employed person. If the individual, hirer or agency intend for the worker to be considered self employed there must be clear evidence within a written contract and in practice to that effect.

Agency Worker Directive [AWD]

Q: How long can an agency worker have between assignments without breaking continuity of service?

A: The agency worker can have a break of no more than 6 weeks between assignments with the same hirer without bringing continuity of service to an end. The 12 week qualifying period is paused during a break of 6 weeks or less.

Agency Worker Directive [AWD]

Absences during which the qualifying period will pause are:

- Breaks between assignments of not more than 6 weeks
- Jury service of up to 28 weeks
- Sickness absence of up to 28 weeks
- Annual leave
- Organisational shutdown
- Industrial action
- Maternity/paternity

Absences that fall outside of the above will normally have the effect of breaking service.

Agency Worker Regulations

Q: Can the employer limit the use of agency workers to assignments of less than 12 weeks?

A: Yes, if the assignment is genuinely less than 12 weeks, however, there will be occasions where shorter assignments will be deemed to be linked and can be added together to count towards the qualifying period. Assignments will be linked where there is a period of 6 weeks or less between them and where the gap between assignments is predetermined according to custom and practice.

Agency Worker Regulations

Employers will fall foul of the anti-avoidance provisions under Regulation 9/anti avoidance provisions to be effective the agency worker must have:

- Completed 2 or more assignments with the hirer
- Completed 1 or more assignments with the hirer and 1 or more earlier assignments with hirers connected to that hirer
- Worked in more than 2 roles during an assignment and have had at least 2 previous changes of role

The anti avoidance provisions apply only where there is a series of assignments or changes of role. Does not prevent a policy of using agency workers for assignments of less than 12 weeks if the same agency workers are not subsequently rehired for further assignments.

Agency Worker Regulations

What information must the employer provide to the agency to comply?

- Basic pay
- Overtime payments
- Shift/unsociable hours payments
- Risk payments for hazardous duties
- Bonus schemes and annual pay increments
- Vouchers that have monetary value
- Annual leave entitlement

Agency Worker Regulations

Q: Does the employer have to respond to a request from an agency worker asking for information to ensure they are receiving equal treatment?

A: Yes, the employer must respond within 28 days in writing and set out:

- All relevant information about the employment rights for comparable employees
- Any reasons/justification for the agency workers treatment in relation to those rights

Agency Worker Regulations

Q: Can agency workers claim unfair dismissal?

A: No, the Regulations do not introduce a new right for agency workers to claim unfair dismissal.

Agency Worker Regulations

Q: Are agency workers entitled to bonuses?

A: After the 12 week qualifying period entitled to same terms and conditions including bonus

Express exclusion of bonuses that do not relate to an individual's performance example:

Employer makes profit and provides all employees with a bonus in recognition of their contribution and promote loyalty the agency worked is not eligible where there is no recognition of individual contribution

Where bonus is dependent on directly recruited employees meeting targets around quality or quantity of work the agency worked would be entitled to bonus payments.

Employers must set out clear policies on whether or not bonuses are paid and under what conditions.



Agency Worker Regulations

Q: Does the employer have to conduct performance appraisals with agency workers?

A: No, the Regulations do not extend the right to performance appraisals.

TUPE

TUPE

Ten things you need to know

1. What is it?

TUPE [Transfer of Undertakings Protection of Employment Regulations 2006] protect employees rights where the business or service in which they are employed is transferred to a different entity. Continuity of service from their starting date is preserved and all existing terms and conditions are protected.

2. When does it apply?

When a business or part of a business is transferred as a going concern [except where the transfer is purely a share sale] OR
A service or provision is outsourced or assigned [outsourced from the NHS to the private sector]

TUPE

3. How does it affect the employer/employee

Where TUPE applies both parties must consult with employees/representatives and inform of any measures that may result from the transfer [changes to work or conditions]

4. Employee Liability Information

The transferor must disclose specified information to the transferee [Employee Liability Information]

Transfer results in substantial changes in conditions which disadvantage the employee, employee can resign and claim constructive dismissal



TUPE

5. Can you get around it?

No, careful planning, contract drafting can put the employer in the best possible position. Employees cannot contract out of their rights under TUPE but can object to the transfer. This would automatically end their employment on the date of transfer

Neither party can agree that TUPE does not apply and will not change the legal position in which TUPE applies or the employees transfer

TUPE

6. Employee Liability Information

- Names and basic employment data on all transferring employees
- Must be provided at least 14 days before the transfer. Can be agreed for the information to be provided earlier
- Information includes employment costs/current and potential tribunal claims/disciplinarys
- Contractual indemnities [due diligence] must be as watertight as possible

TUPE

7. Pensions [transfers within private sector]
 - Transfers not involving the public sector employees impose limited requirements. Transferee is required to meet certain minimum standards
8. Pensions [transfers involving the public sector]
 - Where employees are or were public sector employees prior to the transfer more complicated. Transferee must provide a broadly comparable pension to the public sector pension

TUPE

9. Contractual changes

- New employer wishes to harmonise contractual terms following transfer
- Only allowed limited circumstances
- Context of redundancies or a fundamental reorganisation
- Proposed changes must be consulted/agreed/and how they are communicated must be carefully considered and managed

TUPE

10. Dismissals

- Dismissals connected to a TUPE transfer automatically unfair
- Potentially fair if dismissal is for ETO [Economic, Technical, Operational] reason entailing redundancies
- Genuine redundancy constitutes an ETO reason but existing employees as well as transferring employees will often need to be included in the risk pool

Increases

Increases

- **Statutory Adoption Pay [from 3 April 2011]**
 - 2 weeks at £128.73
- **Statutory Maternity Pay [from 3 April 2011]**
 - First 6 weeks at 90% of salary, 33 weeks at £128.73 = 39 weeks of pay in total
- **Statutory Paternity Pay [from 3 April 2011]**
 - 2 weeks at £128.73

Increases

- **Compensation Limits [from 1 Feb 2011]**
 - A week's pay increased to £400 (from £380)
 - The maximum compensation for Unfair Dismissal is £68,400 (from £65,300)
 - This means the maximum award for Unfair Dismissal is £80,400 (basic award plus compensation)
- **Lower Earning Limit (LEL) [from 1 April 2011]**
 - To £102 (from £97)
- **Statutory Sick Pay (SSP) [from 11 April 2011]**
 - To £81.60 (from 79.15)

Increases

- **National Minimum Wage (NMW) [from Oct 2011]**
 - Standard Adult Rate (aged 21 and above)
 - £6.08 per hour
 - Development Rate (aged 18 to 20)
 - £4.98 per hour
 - Young Workers Rate (older than school leaving age to 18)
 - £3.68 per hour

Increases

- **Apprentice Minimum Wage [from 1 Oct 2011]**
 - Under the age of 19 and those aged 19 and over in the first 12 months of their apprenticeship
 - £2.60 per hour