

Updates for Introductory Scots Law: Theory & Practice

Chapter 1 – the Scottish Legal Framework and Sources of Scots Law

Pages 19-23 and 68-70: The institutions of the European Union

On 1st January 2007, Romania and Bulgaria entered the European Union as its newest members. Consequently, the membership of the European Union has increased from 25 member states to 27. This means that some changes to the institutional framework of the European Union were necessary.

Council of Ministers/European Council

The Council is, of course, the most powerful institution of the European Union. All 27 member states will be represented on this body. At the regular meetings of the Council, it is normal practice for a country's foreign minister to attend. Often, however, the minister with a responsibility for a particular policy area e.g. finance, transport or the environment will attend the meetings depending upon the topic to be discussed. At the European Council meetings, the Head of Government e.g. the Prime Minister or the President will represent the relevant member state.

The European Commission

There are now 27 European Commissioners as result of the most recent wave of enlargement.

The European Court of Justice

The number of judges will increase to 27 from the previous 25 in order to represent each member state of the European Union. Eight Advocates-General will continue to assist the judges. The **Court of First Instance** will also now consist of 27 judges.

The European Parliament

35 MEPs from Bulgaria and 18 MEPs from Romania will now join the Parliament, taking the total number of members to 785. The next European parliamentary elections will take place in 2009.

Pages 31-33: The Law Officers of the Crown in Scotland

The Lord Advocate and the Solicitor-General for Scotland

Lord Boyd of Duncansby QC resigned from his post as Lord Advocate on 4th October 2006. His Lordship had been made a life peer in 2006 and it is intention to play a greater role in the House of Lords at Westminster. His successor, Elish

Angiolini QC is the first woman to hold this position. Mrs Angiolini was formerly the Solicitor-General for Scotland. Her replacement as Solicitor-General is John Beckett QC. Both Mrs Angiolini and Mr Beckett were sworn in to their respective offices at an installation ceremony in Edinburgh on 12th October 2006.

The Advocate-General

The first Advocate-General for Scotland, Lynda Clark QC, who became a life peer in 2005 (taking the title Baroness Clark of Calton), resigned her UK Government post in January 2006 in order to take up a judicial appointment as a Senator of the College of Justice. Baroness Clark's successor as Advocate-General is Neil Davidson QC who had served as Solicitor-General at the Crown Office before he, in turn, was succeeded by Elish Angiolini.

Pages 48-47 and 59-60: The House of Lords and the Privy Council

A very significant set of reforms will be introduced in 2009 when the Constitutional Reform Act 2005 comes into force. This will mean that the judicial powers of the House of Lords will finally cease to exist and a completely independent Supreme Court for the United Kingdom will come into existence. The new Supreme Court will hear criminal and civil appeals from England, Wales and Northern Ireland. It will also hear civil appeals from the Inner House of the Court of Session and it will assume responsibility for devolution and human rights cases from Scotland which are currently heard by the Privy Council. **Thus, the Privy Council will cease to have any jurisdiction over Scottish legal matters from 2009 onwards.**

The Supreme Court will be located at Middlesex Guildhall in London and the existing Law Lords will become the first judges to sit in this new court. The Law Lords will then become known as Justices of the Supreme Court and they will cease to be members of the House of Lords. Under the new arrangements, the Lord Chancellor will no longer be the most senior judge in England and Wales and a President and a Deputy President of the Supreme Court will be appointed in his place.

The Lord Chancellor will, however, remain an important office of the British State in that the holder will continue to be a Minister of the Crown and the Speaker of the House of Lords.

When a vacancy arises amongst the Justices of the Supreme Court, a selection commission will appoint a new member to the Court. This commission will consist of the President and the Deputy President of the Supreme Court sitting together with members of the various judicial appointments bodies for England, Wales, Northern Ireland and Scotland.

The creation of a Supreme Court was necessitated by the introduction of devolved government in the United Kingdom and the steadily increasing importance of human rights. In other countries, for example, the United States there is a very clear separation of powers as regards the different branches of government i.e. the Executive, the Legislature and the Judiciary – something which has been quite obviously lacking in the British parliamentary system. Currently, the House of Lords is both part of the Legislature and the highest court in the land for civil appeals from Scotland. Clearly, it is absolutely critical that the Judiciary is seen to be completely independent from political interference and considerations and the creation of a Supreme Court is an attempt by the British State to guarantee judicial independence.

Chapter 2 – The Law of Contract

Pages 80-82: Sponsiones Ludicrae or ludicrous promises (gambling contracts)

As a result of Section 335 of the UK Gambling Act 2005, which is expected to come into force on 1st September 2007, the doctrine of sponsiones ludicrae or ludicrous promises in relation to gambling contracts will be repealed. Section 335(1) simply states that “The fact that a contract relates to gambling shall not prevent its enforcement.” It is little surprise that the UK Parliament has introduced such a measure given the Government’s enthusiasm for Super Casinos and a greater toleration shown towards gambling activities by members of the general public.

It will be recalled that the doctrine of sponsiones ludicrae has long been an important and well established principle of the Scots Law of Contract that those individuals who become involved in gambling agreements had no effective legal remedy should a dispute arise between the parties (**see, for example, Ferguson v Littlewoods Pools (1996)**). This important reform effectively consigns cases about gambling contracts to the history books and means that such agreements will, in the future, be legally binding upon the parties.

The Scottish civil courts will, of course, continue to refuse to give an effective remedy to parties where the dispute involves social and domestic agreements.

Pages 131-133: Contracts for heritable property

Moves towards greater use of standard term contracts in conveyancing has continued apace and many firms of solicitors appear to be adopting these types of arrangements which will hopefully mean that the sale and purchase of heritable property will be greatly speeded up.

Examples of standard missives and the accompanying documentation for the various areas of can be viewed by accessing the following website:

www.lawscot.co.uk

Pages 165-176: Unfair terms in consumer contracts

The Unfair Terms in Consumer Contracts Regulations 1999 has been used successfully to challenge the widespread practice whereby banks and credit companies impose hefty charges on consumers who either fail to make monthly payments on time or who exceed the terms of an overdraft agreement. Previously, it was not uncommon for a bank or credit card company to impose penalties of anything between £25 to £35 on those consumers who were late making their monthly repayments.

Consumers are now being actively encouraged by organisations like the Office of Fair Trading to reclaim many of the extortionate charges imposed on them in the past and compensation could run into thousands of pounds.

There is no problem in theory with the concept that a creditor can impose a penalty on a debtor who fails to fulfil a contractual duty when required to do so. There is a problem, however, if the penalty imposed is unfair and disproportionate (Schedule 2 of the Unfair Terms in Consumer Contracts Regulations 1999).

The same types of arguments outlined above have also been used by consumers to challenge the practice by lenders to charge very high redemption penalties when individuals switch mortgages between various lenders in order to get a better deal or rate of interest. Previously, many consumers have been put off switching their current mortgage to another lender because their existing lender will charge them an excessively high charge (effectively a penalty). As a result of a combination of investigations by the Financial Services Authority and the threat of legal action, many lenders have surrendered to the inevitable have stopped this dubious practice. The good news is that those consumers who were hit with penalty charges in the past are being encouraged to reclaim these from a variety of lenders.

In the case of **Murray v Leisureplay (2005)**, the English Court of Appeal stated that clauses which impose a penalty upon the contract breaker will not be capable of enforcement if it can be demonstrated that the sum payable on breach is "extravagant or unconscionable". Although this case involved a penalty clause in an employment contract, the underlying rationale of the court's decision that excessive penalty charges will not be capable of enforcement against a contract breaker has been used successfully to attack exorbitant banking charges.

Chapter 5 – the Law of Business Organisations

Page 395: Company Law Reform

The Companies Act 2006 has now completed its passage through the UK Parliament and will come into force on 1st October 2008. This is the single, biggest piece of legislation to be passed by Westminster running to a staggering 1400 sections.

One of the biggest reforms introduced by this Act will mean the imposition of far stricter controls on company directors. Until now, the law regulating the conduct of directors has been weak and ineffective. A very good example of the weakness of the law in this area is the decision in the **Marquis of Bute's Case (1892) 2 Ch.100**. The Marquis of Bute became the President of the Cardiff Savings Bank when his father, the previous holder of the office, died. The striking thing about this appointment was that the Marquis was then a mere six months old. He was not a particularly diligent or active officer of the company and this was evidenced by the fact that he attended just one board meeting in 38 years of his having held the office of President. Later, the bank got into legal difficulties owing to a lack of proper control in relation to certain loans which had been approved. Despite the fact that the Marquis was President of the bank and should have been aware of what was going on, Stirling J held that he was not liable for certain irregular lending practices that were common within the company.

Hopefully, the new controls will mean that directors will be held more easily to account by the company which they are supposed to be serving and the members of the company.

The new Companies Act will not bring in any radical reforms affecting the way in which these businesses are formed or their status in the eyes of the law i.e. separate legal personality.

Chapter 6 – Introduction to the Law of Employment Part 1

Pages 427-431: Employees

A number of cases have demonstrated the dangers for employers who use agency workers. It was previously thought that such workers were either employed by the Recruitment Agency which supplied them to various organisations or that these individuals had self-employed status.

In **Bunce v Postworth Ltd t/a Skyblue (2005)** (before the English Court of Appeal) and **Royal National Lifeboat Institution v Bushaway (2005)** and

Astbury v Gist Ltd (2005) (both the latter cases before the Employment Appeal Tribunal), it was held that any business which uses workers supplied by an agency may be regarded as the employer of these individuals. Clearly, businesses which are in the habit of using agency workers will have to be very careful in this regard.

Pages 431-434: Vicarious liability

The issue of vicarious liability has come before the courts once again. The House of Lords in **Majrowski v Guy's and St. Thomas' Hospital NHS Trust [2006]** has ruled that an employer can be vicariously liable when an employee bullies or harasses a fellow employee. In the above case, Mr Majrowski was subjected to bullying and harassment by his manager, Sandra Freeman. Subsequently, Mr Majrowski brought a claim against the Hospital Trust, but this was rejected at first instance because the employer was not deemed to have been negligent. On appeal, however, Mr Majrowski was able to use the Protection from Harassment Act 1997 to argue his case. The House of Lords agreed with him and it would now appear, in England and Wales at least, that employers can be liable for acts of bullying and harassment committed by their employees even when there is no evidence of negligence on an employer's part.

Pages 438: The Working Time Regulations and annual holiday leave

In January 2007, the UK Government announced that workers would have their minimum holiday entitlement increased from 20 days per year to 28 days. This increase in holiday entitlement will, however, be brought in gradually and workers will be able to take full advantage of these new rights by 1st October 2008. In the interim period, workers on 20 paid holidays per year will see an increase in their minimum holiday entitlement from 1st October 2007 onwards. Workers will not, however, be entitled to paid leave for bank and public holidays. Paid leave for bank and public holidays will continue to be a matter of contract to be negotiated between employer and employees.

Page 438: The National Minimum Wage

From 1st October 2006, the levels of the national minimum wage are as follows:

- £5.35 per hour for workers aged 22 years and older
- A development rate of £4.45 per hour for workers aged 18-21 inclusive
- £3.30 per hour for all workers under the age of 18, who are no longer of compulsory school age.

Statutory Maternity Leave (New addition to text):

From 1st April 2007, those employees expecting to give birth to a child will be entitled to take 39 weeks' paid maternity leave. This is an increase from the previous figure of 26 weeks. The Labour Government is on record has having stated that it wishes to bring in a right to 12 months' paid maternity leave by the end of the current Parliament (by 2010 at the latest).

Statutory Maternity Pay (SMP) (New addition to text):

From 1st April 2007, there are significant changes being made to the payment of the above. Female employees expecting babies on or after 1st April 2007 will now be entitled to claim **39 weeks'** statutory maternity pay. The current entitlement, which ends on 31st March 2006, is 26 weeks' pay. For the first six weeks of maternity leave, employees will be entitled to receive 90% of their average weekly wage with no upper limit. The remaining 33 weeks will be paid at either the standard rate or a rate equal to 90% of the employee's average weekly wage (whichever is the lower figure). It should be noted that, from 1st April 2007, SMP will increase from £108.85 to £112.75 per week.

Statutory Maternity Allowance (SMA) (New addition to text):

Those employees who are not entitled to receive statutory maternity pay may, subject to conditions, qualify for the above benefit. Employees expecting to give birth to babies on or after 1st April 2007, will now be entitled to receive statutory maternity allowance for 39 weeks rather than the previous limit of 26 weeks. The employee is paid at a standard rate or at a rate equal to 90% of her average gross weekly earnings. She will receive whichever is the lower rate.

The qualifying conditions for payment of SMA are:

- an individual has been employed and/or self-employed for at least 26 weeks in the 66 weeks up to and including the week before your baby is due. This 66 week period is known as the Test Period. Part weeks are counted as full weeks; and
- she has earned on average at least £30 or more a week over any 13 weeks in the Test Period. If such an individual is registered as self-employed, she will be regarded as having an amount of earnings if she have paid Class 2 contributions or hold a Small Earnings Exemption certificate.

It should be noted that, from 1st April 2007, SMA will increase from £108.85 to £112.75 per week or 90% of the employee's average weekly wage whichever is the lower figure.

Statutory Paternity Pay (New addition to text):

From 1st April 2007, this will also increase from £108.85 to £112.75 or 90% of the employee's average weekly wage whichever is the lower figure.

Statutory Adoption Pay (New addition to text):

From 1st April 2007, this will increase from £108.85 to £112.75 or 90% of the employee's average weekly wage whichever is the lower figure.

Flexible working (New addition to text):

On 1st April 2007, the law governing the right to request flexible working patterns is extended to cover those employees who care for spouses or partners, adult relatives and adults residing at the same address as the employee.

Employers should be especially careful here because the term "adult relatives" has a very wide definition and includes any of the following individuals:

- ★ a mother;
- ★ a father;
- ★ an adopter;
- ★ a guardian;
- ★ a special guardian;
- ★ a parent-in-law;
- ★ a step-parent;
- ★ a son;
- ★ a step-son;
- ★ a daughter;
- ★ a step-daughter;
- ★ a brother;
- ★ a step-brother;
- ★ a brother-in-law;
- ★ a sister;
- ★ a step-sister;
- ★ a sister-in-law;
- ★ an uncle;
- ★ an aunt;
- ★ or grandparent.

Adult relatives could also include adoptive relationships and relationships of the full blood or half blood or, in the case of an adopted person, such of those relationships as would exist but for the adoption.

Pages 450-451: Statutory Redundancy Pay

On 1st February 2007, the maximum weekly wage that can be claimed in relation to a redundancy payment is £310 (an increase from £290 previously). Therefore, the maximum award which could be claimed is £8,400 (20 years x 1½ x £310) – an increase of £300 on the previous figure. It should be recalled, however, that an employee seeking a redundancy payment must have two years' continuous service with the same or an associated employer in order to qualify under the scheme.

From 1st February 2007, the maximum weekly wage will increase from £290 to £310. So the formula to be used for calculating the maximum payment for redundancy pay will be 20 years x 1½ x £310 = £9,300.

Pages 466-467: Unfair dismissal

The Basic Award

From 1st February 2007, the maximum weekly wage that can be claimed will increase from £290 to £310 for calculation of the basic award. It should be recalled that the employee can only receive compensation up to a maximum of 20 years' service – anything above 20 years will not be counted.

In the case study using Helen Smith as an example, she would still only be entitled to receive a basic award of £6,875 because her weekly wage was £250 and, thus, is in no way affected by the upcoming increase from the previous maximum of £290 to £310. It is worth remembering that you if you earn a weekly wage that is less than the new statutory maximum (of £310), the redundancy payment will be based on the lower figure (£250 in Helen Smith's case). After 1st February 2007, when the latest increase to £310 takes effect, Helen Smith's basic award will continue to be unaffected.

The Compensatory Award

The compensatory award for unfair dismissal from 1st February 2007 will be set at a limit of £60,600 (from £58,400 in 2006). The maximum award may be much greater in health and safety cases, whistle-blowing cases and discrimination cases.

The Additional Award

This Award becomes relevant in unfair dismissal cases when an Employment Tribunal makes a reinstatement or re-engagement order against the employer in favour of the dismissed employee (**see O'Donovan v Central College of**

Commerce (ET Case No. S/103652/2002). However, an employer cannot be compelled to take back the dismissed employee and, if this proves to be the case, the Additional Award becomes relevant. Effectively, the employee will have to go back to the Tribunal and alert it to the employer's failure to comply with the reinstatement or re-engagement order. The Tribunal will then award additional compensation to the employee. From 1st February 2007, the weekly wage will increase to £310 and the additional award will be set between £7,540 and £15,080. In other words, an employee could be awarded between 26 to 52 weeks' pay with the weekly wage being set at £310.

Pages 472-474: Unfair dismissal on the grounds of misconduct

In **Tesco Stores Ltd v Pryke (2006)**, the employee, a driver for Tesco, was driving a company lorry when the vehicle overturned at a roundabout. The driver was dismissed from employment by reason of misconduct despite having an exemplary safety record. Subsequently, the driver took a claim to the Office of Employment Tribunals where he won his claim and got the Tribunal to issue a Reinstatement Order. Tesco appealed against this judgement to the Employment Appeal Tribunal.

Held: the original Tribunal had committed an error in law by applying its opinion or view concerning how the employer should have handled the investigation which led, ultimately, to the employee's dismissal. It should be remembered that employers should be given a certain amount of leeway by Tribunals as to how they handle situations such as this. By all means the employer's decision to dismiss an employee with an exemplary safety record may appear to be rather harsh, but it is still a reasonable response given the health and safety concerns raised by the incident. In other words, the Tribunal erred in law when it decided that the employer's decision to dismiss this employee was too harsh. Dismissal was just one of the band or range of reasonable responses that a reasonable employer was entitled to select in response to this particular situation.

Clearly, however, the reasonable employer will carry out a proper investigation to establish the facts and then, if necessary, commence the internal disciplinary procedure (which should be fully compliant with the relevant statutory provisions i.e. the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004).

Pages 474-475: Dismissal for activities outside the work-place

A popular misconception continues to circulate amongst employees that you cannot be dismissed from employment for misconduct committed outside of working hours or for other types of behaviour indulged in during your spare time. Two recent cases have highlighted the fact that an employer may be able to dismiss an employee for activities which take place outside employment but which have a negative impact on the employee's service.

In **Pay v Lancashire Probation Service (2003) EAT/1224/02/LA** an employee was fairly dismissed by reason of activities that he participated in questionable activities which took place outside of working hours. It will be remembered that Pay, the employee in question, was a Probation Officer with special responsibility for sex offenders. Pay, in his spare time, performed as part of a circus act which had strong sexual overtones. His involvement in these types of activities was regarded as constituting gross misconduct by the Probation Service, his employer, which was extremely concerned how this would impact on his work with convicted sex offenders. Consequently, Pay was dismissed and the dismissal was held to be fair.

In a decision which at first seemed to sit at odds with **Pay** (above), an employee's outside activities were not deemed to be sufficient grounds for his dismissal by his employer.

In **Redfearn v Serco t/a West Yorkshire Transport Services (EAT0153/05/LA)**. The employer dismissed Mr Redfearn on health and safety grounds because of his membership of the racist British National Party (BNP). The Employment Appeal Tribunal ruled that Redfearn's dismissal could be an example of racial discrimination. It is also worth considering that had this employee completed a year's continuous service with his employer then he would also have had the right to lodge a claim for unfair dismissal – whether or not such a claim would have been successful is purely a matter of speculation. The English Court of Appeal has now overruled the decision of the Employment Appeal Tribunal and reinstated the original decision made by the Employment Tribunal by ruling that Redfearn could be lawfully dismissed on health and safety grounds owing to his BNP membership which might lead to violence being caused in the work-place. Redfearn's dismissal was **not** an example of unlawful, racial discrimination committed by the employer as previously stated by the Employment Appeal Tribunal.

Statutory disciplinary and grievance procedures (New addition to text)

Since 1st October 2004, every employer in the United Kingdom must have a set of standard grievance and disciplinary procedures which comply with the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004. Failure to follow these procedures may have very serious consequences for both the employer and the employee at any subsequent Employment Tribunal proceedings. The aim behind the introduction of these procedures in 2004 was to reduce the number of claims before Employment Tribunals by promoting dispute resolution in the work-place.

Despite the laudable aim, the introduction of these procedures has caused great anxiety to employers and employees alike by complicating matters in a way that was never intended. To this end, the UK Government's Department of Trade and

Industry has announced its intention to hold a review of the operation of these grievance and disciplinary procedures and recommendations should be forthcoming sometime in Spring 2007.

Chapter 7: Discrimination in Employment

Jurisdiction of Employment Tribunals in relation to overseas employment (New addition to text)

Generally speaking, British Employment Tribunals do not have the power to hear cases involving discrimination where the acts in question have been committed outside the United Kingdom (**see O'Connor v Contiki Travel [1976]**). However, in the case of **Saggar v Ministry of Defence [1985]**, the English Court of Appeal has ruled that an Employment Tribunal can have jurisdiction to hear a claim for discrimination if the employee worked previously or subsequently for the same employer in the United Kingdom. The ruling stresses that the whole duration of the employee's employment should be looked at rather than by simply isolating when and where the discrimination took place.

Pages 489-513: Race Discrimination

On 6th April 2006, the Commission for Racial Equality's Race Discrimination Code of Practice came into force. This is the first update of the code since 1983 and provides plenty of useful information to employers and employees as regards the issue of racial discrimination.

Pages 503-504: Gender Reassignment

On 27th April 2006, the European Court of Justice ruled in the case of **Richards v Secretary of State for Work and Pensions** that a person (Richards) who was born male and then underwent gender reassignment to become female was entitled to claim a pension that would have been payable to a woman at age 60. The individual in question had suffered less favourable treatment and the UK Government's insistence that it would only begin to pay a pension to the individual in question from her 65th birthday onwards was an example of discriminatory treatment. In other words, the pensions authority was continuing to treat Richards as a man and was not taking into account the fact that gender reassignment had taken place.

In any case, the situation has improved for any person having undergone gender reassignment as s/he will now be issued with an official gender recognition certificate which means that they will be entitled to receive a pension from the date that such a certificate was issued.

Pages 514-521: Equal Pay

In **Newcastle upon Tyne Council v Allen & ors (2005)**, the Employment Appeal Tribunal has ruled that compensation for injury for hurt to feelings or other non-financial losses cannot be awarded in terms of the Equal Pay Act 1970. It will be recalled, of course, that such types of awards can be made to a successful claimant who brings a discrimination action under the Sex Discrimination Act 1975.

Pages 521-528: Disability discrimination

One of the weaknesses of the Disability Discrimination Act 1995 is the fact that, unlike other equality legislation, the issue of transferred discrimination is not recognised. This type of discrimination occurs when a non-disabled person i.e. a parent or a carer of a disabled person experiences less favourable treatment from an employer because of his/her responsibility for a disabled person. An employer may refuse to grant flexible working arrangements to such a person which would permit him/her to look after the disabled person in question.

Under race relations legislation, for example, a white person who is married to an Afro-Caribbean person would potentially be able to claim that they had suffered discriminatory treatment if their employer was aware of this fact and treated him/her less favourably as a result.

No such protection exists for the carers or relatives of disabled people. To this end, questions have now been raised about the compatibility of the Disability Discrimination Act with European law (i.e. the Equal Treatment Framework Directive 2000/78/EC in particular). In July 2006, the Croydon Employment Tribunal referred the matter to the European Court of Justice as a result of the case of **Coleman v Attridge Law**. It will be interesting to see how the European Court of Justice approaches this issue.

Disability discrimination in relation to the provision of goods and services

The Reading Employment Tribunal made a very significant decision by finding that an organisation with no presence in the United Kingdom could be in breach of the Disability Discrimination Act 1995 in the way that it provided services. Most people are, of course, aware that the Act penalises those employers who discriminate against disabled employees. The Act also protects disabled people if they experience discrimination in relation to the provision of services.

In **Latif v Project Management Institute (2007)** the Claimant (Latif), who works as an IT Project Manager for a global company, had decided to undertake an internationally recognised professional course known as the Project Management Professional (PMP) qualification. The qualification is administered by a body called the Project Management Institute which is a not-for-profit organisation

based in the United States. Candidates must pass a very demanding four hour, multiple choice examination which they sit at a variety of centres in their home country. Latif sat her examination in Edinburgh.

In preparation for the examination, the Institute recommends that candidates use its textbook known as the Project Management Body of Knowledge (the PMBOK Guide). Latif who is visually impaired attempted to find an electronic copy of the textbook for her exam preparation, but she was unsuccessful. The Institute attempted to send Latif electronic versions of the book, but she was either unable to open these files or could not read them. Latif found herself having to take a range of measures to cope with the demands of the examination e.g. by employing a student to prepare the materials in question for use by her. The Claimant sat the examination in Edinburgh and did pass it, but she faced considerable difficulties on her road to success which the Institute did very little to alleviate. The Employment Tribunal was very much of the view that just as employers are expected to put in place reasonable adjustments for disabled **employees, the Institute was also under a similar duty in relation to exam arrangements.** The Institute had not been reasonable where Latif's disability was concerned and, consequently, she had been placed at a significant disadvantage when preparing for the examination.

The Project Management Institute has appealed to the Employment Appeal Tribunal, but companies or organisations without a physical presence in the United Kingdom will have to be very careful in the future how they provide services.

Pages 537-540: Religious discrimination

Since the Employment Equality (Religion or Belief) Regulations 2003 came into force on 2nd December 2003, discrimination and harassment on grounds of religion or belief in large and small workplaces in England, Scotland and Wales, both in the private and public sectors, has been unlawful.

A number of cases have been brought under the Regulations and one of the most high profile was **McNab v Glasgow City Council (2006)** at the Glasgow Employment Tribunal. David McNab is a Maths teacher at St. Paul's Roman Catholic High School in Glasgow. Mr McNab, who is an atheist, applied for the promoted post of Head of Guidance in the School. The Council decided not to proceed with Mr McNab's application and he was not given an interview for the post. The reason given by the Council was that certain holders of posts in Catholic schools e.g. Guidance Teachers and Head Teachers had to obtain approval from the Roman Catholic Church authorities. Basically, the system of approval in Roman Catholic Schools means that an employer will be able to insist that certain job applicants or an existing employee seeking promotion to a certain post (such as Mr McNab) must be prepared to support and promote the

moral teachings of the Roman Catholic Church. Mr McNab claimed that he had suffered discrimination on the grounds of his atheism (his beliefs) when the Council refused to proceed with his application for the post and he brought an action against the Council under the Employment Equality (Religion or Belief) Regulations 2003. The City Council, in its defence, relied on Regulation 7 of the Employment Equality (Religion or Belief) Regulations which also allows organised religions, for example, the Church of Scotland or the Roman Catholic Church to apply genuine occupational requirements to employment where it is necessary to comply with religious doctrine or where it is appropriate to do so given the nature of the post.

Held: by the Glasgow Employment Tribunal that Mr McNab had suffered discrimination and, consequently, he was entitled to receive £2,000 in compensation from his employer. The City Council has since appealed to the Employment Appeal Tribunal in order to have the Tribunal's judgement overturned. The Council, as part of its appeal, is claiming that there is a genuine need for posts such as Guidance Teachers to be approved by the Church.

This case has caused much interest because it would seem to undermine the system of approval which operates in Roman Catholic Schools. A number of points need to be clarified here. Firstly, the Roman Catholic Church is not Mr McNab's employer – he is employed by the Council. Under the Education Acts, however, the Council is legally obliged to make sure that certain post-holders in Catholic schools have been approved by the local Church authorities. Secondly, it has been observed that the Council encountered difficulties in the first place because its system for approving job applicants and existing employees was not carried out in a consistent fashion. Those individuals predicting the imminent end of the system of approval in Catholic schools are likely to be disappointed. At the Employment Appeal Tribunal hearing, Mr McNab's counsel claimed that the Council had failed to demonstrate that his client had not been approved by the Church.

Age Discrimination (New addition to text):

A very significant piece of legislation was introduced to the already crowded area of anti-discrimination law on 1st October 2006. The Employment Equality (Age) Regulations 2006 now ensure that it will be unlawful for employers to discriminate against individuals on the grounds of a person's age.

The new Regulations apply to recruitment policies and procedures, terms and conditions of employment, promotion and training opportunities and termination of the employment relationship.

Practically speaking, this will mean that employers will have to be especially careful when recruiting workers to their organisations. Any advertisements which

seem to favour one age category over another should be discouraged. There has been much speculation in the popular press in relation to the Regulations about the legality and advisability of such tried and tested phrases like “Mature person sought for post” or “Dynamic individual preferred”. Only time and litigation will tell whether such phrases are likely to be consigned to the dustbin of recruitment practice. One thing is certain, responsible employers should definitely err on the side of caution to avoid expensive and unnecessary law suits by emphasising the skills that a successful applicant should possess.

An employer will be entitled, however, to refuse to employ or hire an individual who is within six months of the organisation’s normal retirement age or within six months of the person’s 65th birthday if the organisation does not stipulate a normal retirement age.

What kinds of individuals do the Regulations cover?

The Regulations cover a wide range of workers and they are not simply confined to the protection of employees. Agency workers, casual workers, independent contractors, job applicants and office holders (this category includes company directors) will receive protection under the new legislation.

What kind of protection do the Regulations offer?

The Regulations are very similar to older pieces of UK anti-discrimination legislation e.g. the Sex Discrimination Act 1975 and the Race Relations Act 1976 in the sense that they prohibit less favourable treatment by an employer on the grounds of a person’s age which would amount to any of the following types of discrimination:

- direct discrimination;
- indirect discrimination;
- harassment;
- and victimisation.

These concepts should be familiar to anyone who has previously studied the area of anti-discrimination law in the field of employment.

Genuine Occupational Requirements

Interestingly, an employer may be able to justify less favourable treatment of an individual on the grounds if this can be objectively justified and is a proportionate way of achieving a legitimate aim. This type of justification which an employer

may choose to use is known as a Genuine Occupational Requirement (GOR). In practice, however, an Employment Tribunal or a court will scrutinise very closely any arguments used by an employer that one of its policies, procedures or a criterion amounts to a GOR.

There are also situations where the law will permit differences in treatment between different age groups. The National Minimum Wage Act 1998, for example, will continue to operate as before meaning that workers can be paid different minimum wage rates depending on their age.

An employer would be well advised to remember three important aspects of the Regulations:

- Any attempt to justify or defend behaviour which amounts to victimisation and harassment will simply be untenable;
- Vicarious liability applies here i.e. employers can be held responsible for the discriminatory behaviour of their employees; and
- There is no limit placed on the amount of compensation that an Employment Tribunal or court can award to a successful applicant who brings an age discrimination claim.

Termination of the employment relationship

It should go without saying that any attempt to terminate a worker's contract with an employer on the grounds of age will be regarded as unlawful discrimination. So, for example, a deliberate attempt by an employer to target all the younger workers for redundancy in order to retain the services of older workers would be a very dubious policy in terms of the Regulations.

Speaking of redundancy, it will now be unlawful to cap redundancy benefits at the age of 65 and the practice of reducing redundancy payments for those aged over 64 will now be discontinued.

Retirement

The first thing to say about retirement is that there is no automatic right conferred on workers to continue working beyond the age of 65. An employer who insists that an individual retire on his/her 65th birthday will not be breaking the law. Admittedly, there is a requirement placed on the employer to consider requests by an individual to be permitted to work beyond the age of 65. There has been a suggestion that, in the light of the Regulations, organisations should now consider abolishing a retirement age of 65.

Earlier retirement ages, however, may well breach the Regulations and an employer will have to be able to justify on objective grounds a requirement that someone should be compelled to retire before his/her 65th birthday.

In any case, an employer has a legal duty to give an individual six months' notice of his/her impending retirement and must inform the individual of the right to submit a request to be considered for continued employment with the organisation. In practice, the well-prepared employer will hold a meeting with the individual in question well before the age of retirement in order to discuss the possibility of continuing to work for the organisation. This is not simply a matter of courtesy on the employer's part as a failure to consult with an individual may mean that an employee could argue that s/he has been unfairly dismissed from the date of the retirement.