



## ANNUAL MEETING: THURSDAY 8 JULY 2010

### MEMBERS' BRIEFING NOTE

#### General Update / Changes since April 2010

#### 1. Vetting and Barring Scheme (VBS)

Came in force on 12 October 2009. The VBS put in place:

- The three barring lists (POCA, POVA and List 99) are replaced by the creation of two new barred lists administered by the Independent Safeguarding Agency (ISA), the 'Children's List and 'Vulnerable Adult's List'. Checks of these new lists can be made as part of an enhanced CRB check.
- Employers, voluntary organisations, social services and professional regulators have a legislative duty to refer to the ISA any information about individuals who may pose a risk to vulnerable children or adults.
- There will be criminal penalties for barred individuals who seek or undertake work with vulnerable groups and for employers who knowingly take them on.
- The eligibility criteria for Enhanced CRB checks have been extended to include anyone working in a regulated position.
- Standard CRB checks are no longer be available for those working in a regulated position with children or vulnerable adults.

Individuals were due to register with the ISA from 26 July 2010. However, the Home Office announced on 15 June 2010 that the VBS would be put on hold so that it could be remodelled to proportionate and common sense levels. Therefore, the ISA registration stage of the scheme has been stopped.

Nevertheless, the requirements introduced in October 2009 continue. The existing requirements concerning Criminal Records Bureau checks also remain in place and those checks must still be carried out where necessary.

#### 2. Political Restricted Posts

Changes implemented from 12 January 2010. The Local Democracy, Economic Development and Construction Bill received Royal Assent on 12 November 2009. Under Chapter 6, Section 30 of the Act there are minor amendments to the statutory provisions dealing with politically restricted posts. The Act has amended the Local Government and Housing Act 1989 by removing the requirement for local authorities to prepare and maintain a list of posts where the annual remuneration exceeds a specified salary. This removes political restrictions for all but the most senior members of local authority staff.

#### 3. Fit notes to replace Sick Certificates

The Social Security (Medical Evidence) and the Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 came in force on 6 April 2010. The MED3 sick notes previously used by GPs were replaced by the new "fit notes".

The main changes under the new system are:

- GPs can only certify the employee "not fit for work" or "may be fit for work", as opposed to "fit for work".
- The new "fit note" will contain the common types of changes employers can introduce to assist the employee returning to work.

Other changes to the system include:

- The maximum duration of a "fit note" issued during the first six months of a patients' health condition coming to the attention of the GP is reduced from six months to three months.
- A revised statement is not necessary if an employer is not able to facilitate the required adjustment.

#### **4. Additional Paternity Leave**

Came into force on 6 April 2010. This will allow fathers (or partners of the mother who will have joint caring responsibility) of children with an expected week of childbirth beginning on or after 3 April 2011 to benefit from up to six months' additional paternity leave if the mother returns to work before using her full statutory maternity leave entitlement. The additional paternity leave will be paid at the same rate that the remaining period of maternity leave would be paid at. Plans to increase paid maternity leave from 9 months to 12 have been put on hold so the last three months of maternity/additional paternity leave will remain unpaid.

#### **5. Right to request time off for training**

Came into force on 6 April 2010. This applies to organisations with 250 or more employees from this date; and from April 2011 this will be extended to organisation with 100 or more employees. It provides a legal right for employees to request time off to undertake training. The employer must give such requests due consideration but may reject them for good business reasons. The employer is not required to pay for the training or provide paid time off from work to undertake such training.

#### **6. Public interest disclosure**

Came into force on 6 April 2010. Tribunals are now able to refer claims to the relevant regulatory authority such as Serious Fraud Office or the Health and Safety Executive for further investigation if claimants indicate whistleblowing allegation on the tribunal ET1 form if they wish the issues to be referred to the appropriate regulator.

## **Equal Pay Focus**

### **1. Equal Pay and “Piggyback” Claims**

#### **South Tyneside Borough Council v McAvoy**

In our Member’s Briefing back in September 2009 we reported a case where male colleagues were able to ‘piggyback’ on their female colleagues equal pay claim against male comparators in another part of the organisation. The details of the Employment Appeal Tribunal (EAT) findings as presented in that briefing note are reproduced below. South Tyneside Borough Council were given leave to appeal the EAT decision and it was due to be heard by the Court of Appeal at the end of April 2010. However, a week before the case was due to be heard the parties settled out of court which means that the EAT decision stands as good law.

#### **McAvoy and others v South Tyneside Borough Council and others (EAT 0006/08)**

In the McAvoy case, the claims were part of the multiple equal pay claims brought under the Equal Pay Act 1970 against three Borough Councils in the North East.

The initial equal pay case concerned female claimants that were employed in jobs which were predominately (but not exclusively) undertaken by women. They had succeeded in persuading an Employment Tribunal that they were entitled to “productivity bonuses” paid to male comparators working elsewhere in the Councils and awarded arrears of pay.

Before the female claimants cases were decided, their male colleagues, working alongside them brought contingent equal pay claims, known as “piggyback” claims, arguing they should be entitled to equivalent payments using the female claimants as comparators, should they be successful in their claims.

In hearing the male colleagues complaints, the Employment Tribunal upheld their complaints and agreed that they should be awarded arrears of pay, however, this would be limited to the date on which the female claimants had presented their claims. This would mean that the male claimants would only be entitled to any arrears of pay that occurred after that date.

The Councils appealed arguing that the men should not be entitled to bring such piggyback claims at all.

The male Claimants cross-appealed arguing against the Employment Tribunal’s decision to limit their entitlement to arrears.

Rather helpfully, the EAT examined the case by reference to a simplified example of the case before them along the following lines:

Sarah and John are working alongside one another on the same work but John is being paid £9.00 per hour, while Sarah, by virtue of a previous successful employment tribunal claim by reference to the pay of Peter (who is doing a different job) is receiving £10. The EAT held that these facts clearly trigger the operation of the equality clause in the contract of employment.

Using the scenario above, the Councils argued that the pay disparity between Sarah and John was due to a genuine material factor other than the difference in sex i.e. that Sarah had become the beneficiary of an employment tribunal award and John had not. However, the EAT were of the view that the only reason that John could not also bring a claim was simply because both John and Peter are men. This means that “but for” John’s sex he would have been entitled to the same pay as Sarah.

The arrears awarded to Sarah represented pay, albeit paid late and only as a result of Sarah previously bringing an employment tribunal claim. The entitlement to that pay accrued to Sarah over the period for which Peter was an available comparator even though that entitlement was not recognised by the employer at that time. Therefore, the EAT stated that it would find it difficult to see why that particular pay should be excluded from consideration when deciding whether John has received equal pay to Sarah. John had been working alongside Sarah throughout the relevant period and if she had received the pay at the time it fell due, John too would have been entitled to its equivalent. **Therefore the EAT ruled that the male claimants were entitled to arrears for the full period that arrears were awarded to their comparators (up to six years backdated pay).**

This is a double blow to Councils – as a result of this decision our Councils need to be aware that where equal pay claims brought by women are settled, should they then fail to offer the same settlement terms to a male employee with a “piggyback” claim this could amount to discrimination under the Sex Discrimination Act 1975

## **2. Equal Pay and the need to justify disparity in pay**

### *Gibson & Ors v Sheffield City Council [2010] EWCA Civ 63*

At Tribunal, a number of groups of female employees, employed as cleaners, carers, care workers and school supervisors (formerly dinner ladies), claimed equal pay against male employees, employed as street cleaners and gardeners. Their basic pay was 33.3% and 38% respectively higher than that of the women. All the roles were rated as equivalent under the 1987 ‘White Book’ evaluation scheme.

The Tribunal found that the pay differential originated in the 1960’s when the productivity of the street cleaners and gardeners was below 100% performance. In order for the council to ensure suitable performance of these groups of employees, they introduced an incentive scheme that rewarded 100% performance with a bonus of 33.3% and 110% performance with 38%. Performance was monitored by foremen and supervisors using timesheets and measured against work study models.

Over time the performance increased to 100% performance for street cleaners and 110% performance for gardeners. This level of performance had been maintained and in the 1980’s during ‘stabilisation of the bonus scheme’, through an assessment of the previous 2 – 3 years of average productivity rates, the appropriate bonus rates were included into the employees salary with no separate entry on the payslips and no mention of the productivity requirements in the employees’ contracts of employment.

The council stated the reason for the introduction of the bonus scheme was to improve productivity, recruitment and retention within a group that were not performing to acceptable levels and where productivity could easily be monitored and assessed.

The Tribunal accepted that the reason behind the disparity in pay was not as a result of the employees’ sex. However, for the group of women who undertook roles of a similar nature, i.e. cleaners, where work was easily monitored and assessed, and productivity bonuses could have been applied in the same way, the Tribunal found in their favour, stating they should have had access to the performance bonus scheme. The Tribunal concluded that for those employed as carers, care workers and school supervisors, these roles were not easily monitored for productivity, and in some cases that would be counter-productive to the role. As such these groups were not entitled to the performance bonuses.

These groups of women employed as carers, care workers and school supervisors appealed and the EAT agreed with the ET’s findings that as the council had shown the reason behind

the disparity was due to an historical productivity incentive and not sex, they did not need to show objective justification for the pay differential.

They subsequently appealed to the Court of Appeal who found that the ET and EAT had erred in their judgement. The ET and EAT had established that the reason behind the original decision to implement the bonus scheme was not as a result of the employees sex but was with regard to performance and the ability measure productivity. This established there was in fact no direct discrimination behind the disparity. However, they failed to give proper consideration to the matter of indirect discrimination.

The CA stated that where strong statistical evidence exists to indicate a disparity in pay between one group of predominantly female employees and another group of predominantly male employees, this indicates the disparity is 'tainted by sex'.

Indirect discrimination occurs where a practice, criterion or provision (PCP) is applied without reference to any 'protected characteristic' (in this case sex) but the application results in a detriment to one 'protected characteristic' group. In the case at hand, the PCP of the productivity measured bonus scheme was applied for a non-sex based reason. However, it resulted in a clear disparity in pay between male and female employees employed in roles rated as equal. This disparity is still capable of being objectively justified but Sheffield City Council must be given the opportunity to raise such a defence.

The case has been remitted to Tribunal for the consideration of the issue of whether the indirect discrimination can be justified.

This is a warning to all employers that just because the origins of a difference in pay were not as a direct result of sex, if the impact is that there is a strong statistical pay difference between male and female employees you will need to be able to objectively justify the ongoing disparity.

### **3. Equal Pay – the cost to Councils and Employment Judges sitting alone**

*Barker and others v Birmingham City Council (ET 1305819/06) and Birmingham City Council v Barker and others (EAT 0447/09)*

In April 2010 the Tribunal finally heard the equal pay claims raised by Barker and approximately 4000 female colleagues working in 49 different jobs including cleaners, cooks, care assistants and teaching assistants, against Birmingham City Council. The women were employed on the same pay grade as men but were excluded from a performance and productivity bonus scheme paid to the men.

The claims were originally submitted to the Tribunal in 2006 but due to a number of Pre-Hearing Reviews (PHR's) and Case Management Discussions (CMD's) most of which required some rescheduling, the Tribunal was only able to hear the case and reach its decision recently.

The Tribunal found that the bonus scheme had the effect of rewarding the men for turning up to work and doing their jobs properly, not for any exceptional performance or productivity. The effect of the scheme, allowing these men to earn up to 75% more than the female claimants, was clearly discriminatory. The Tribunal ruled in favour of the claimants.

The case has attracted significant press attention due to the indicated cost to the Council which is rumoured to be upwards of £400 million. Birmingham City Council have indicated their intention to appeal the Tribunal's decision.

However, the potential cost to the Council of this decision is not the only point of interest related to this case and to our Councils.

The Tribunal was due to hear a PHR into the issue of whether the Council could mount a Genuine Material Factor (GMF) defence. This had been scheduled for a 30 day hearing. Shortly before the PHR was due to take place the parties were informed by the Employment Judge that he intended to sit alone rather than as a full Tribunal including two lay members. All parties raised concern over how a PHR was to be conducted. The Council raised an appeal to the EAT against the Employment Judge's decision to hear the PHR alone.

The Employment Judge's decision to sit alone was not outside the operating protocols of the Tribunal but it was contrary to the usual practice of the Tribunal when hearing PHR's to determine the GMF defence in major equal pay claims and also contrary to the expectations of the parties.

The Employment Judge presented a number of reasons for why he would sit alone for the PHR. His reasoning included the Tribunal's operating protocols allowing such an approach even when there is a presumption of full Tribunal and the limited value that lay members would contribute to this matter and the delays and costs that would occur if they should seeking to include lay members.

On appeal, the EAT held that the reasons for the Employment Judge's decision were flawed, and that the usual practice of hearing such an issue with lay members was sound; and that the right decision at the time would have been to direct a hearing by a full tribunal. However, the EAT also concluded, (having made an enquiry to the Birmingham Tribunal) that the effect of substituting such a decision would be to necessitate a substantial adjournment – it would have been impossible to find two lay people to sit on a 30 day prehearing at such short notice and due to the workload at the Birmingham Tribunal, any postponement in order to find two lay people who could sit for 30 days would result in a delay of at least six months and in reality this was probably closer to a year. The claimants indicated that due to the already significant delays experienced as part of this case, they were not happy with such a delay. The EAT concluded that while they upheld the principles of the concerns that formed the basis of the appeal, the lesser of the two evils was to allow the Employment Judge's decision to sit alone to stand. Therefore, the EAT dismissed the appeal.

Despite the ultimate outcome of this appeal it is a clear indication that Employment Judges should carefully consider the circumstances, including the complexity of the case and the expectations of the parties before deciding whether to sit alone.

#### **4. Equal Pay and establishing appropriate comparators**

##### *City of Edinburgh Council v Wilkinson and others (EAT 0002/09)*

The female claimants were employed in a variety of roles based in school, hostels, libraries and in social work and originally on APT&C (Blue Book) terms and conditions. They submitted an equal pay claim using male comparators employed as refuse collectors, gardeners, grave diggers and road workers originally employed on Manual Workers (Green Book) terms and conditions.

In 1996 both sets of employees transferred under TUPE to the newly formed City of Edinburgh Council, from its preceding two councils (Lothian Regional and Edinburgh District) which ceased to exist.

In 1996, negotiations for a move from separate APT&C and Manual Worker Terms and Conditions to 'Single Status' with a single set of terms and conditions and a single negotiating body for both groups of employees started. This was agreed and implemented in England &

Wales in 1997 giving rise to the 'Green Book' and finally agreed and implemented in Scotland in 1999 giving rise to the 'Red Book'.

In the instructions for implementation, and transition arrangements, of the Red Book, it clearly stated that Manual Worker pay points would be equated to salary points for APT&C workers and that this arrangement would continue until such time as councils conducted a Job Evaluation exercise to move all employees to the new Red Book salary structure. To assist with this transition the pay structures from Green and Blue Books would be incorporated into the Red Book on a temporary basis. The Green and Blue Books ceased to exist on 1 July 1999.

A Prehearing Review (PHR) was convened to consider the issue of whether the claimants could rely on their identified comparators.

At the PHR the Tribunal identified the requirements that would allow the claimants to rely on their comparators as:

The Equal Pay Act 1970 requires:

- the employees to be employed at the same establishment;
- of if employed at different establishments, that common terms and conditions of employment are generally observed.

Article 141 of The EEC Treaty (Treaty of Rome) states that:

'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.' This gave rise to the following issues:

- Were the claimants and comparators employed in the same service?
- Were they employed in circumstances where their pay and conditions were attributable to a single source?

The Tribunal established that the Council was a 'body corporate' with statutory duties and powers with no division between statutory and non-statutory work merely a functional division. The claimants were employed in a range of departments including Children's and Families, health and Social Care, and Services for Communities. The comparators predominantly worked in Services for Communities. The claimants and comparators all appeared to have a notional work base location but their contracts of employment included a clause requiring them to work across many locations, some of which overlapped between the two groups.

The Tribunal concluded that the claimants and comparators were not employed at the same establishment as their work base locations were different and distinct entitled. However, common terms and conditions did apply as the Red Book had been brought in in its entirety with the use of transitional arrangements.

This established, under the Equal Pay Act, that the comparators were valid.

The Tribunal also concluded that a broad brush, common sense approach was required to the question of 'same service'. In answering this point, the Tribunal asked whether the idea of them being in the same service offended against common sense – as it did not they were employed in the same service.

The final point considered was whether there was a single source of terms and conditions. This was determined as a question of fact. The Council was responsible for negotiating pay. It did not matter that the pay differentials dated back to the pre-TUPE terms and conditions of the group, or the fact that they had originally been employed on Green or Blue Book terms and conditions. The Council was in a position to rectify the pay differential and had not done so. The Council was the single source.

This established, under the Treaty of Rome, that the comparators were valid.

The Council appealed the decision of the PHR that there were common terms, the claimants and the comparators were employed in the 'same service' and that the Council was the 'single source' of terms and conditions. In addition one group of claimants cross appealed the PHR finding that they were not employed at the 'same establishment'.

At EAT many of the Tribunal's finding of fact were agreed with. However, the EAT disagreed with the finding that the claimants and comparators were not employed at the same establishment. They stated that the Tribunal had taken a very narrow approach and the EEC Treaty and ECJ rulings in similar matters indicated a purposive approach needed to be taken in order to provide protection to those for whom the Equal Pay Act was designed to protect.

Accordingly the EAT in rejecting the Council's appeal and upholding the claimants cross appeal, found that:

1. The claimants and comparators were employed at the same establishment.
2. Even if this were not the case, the Red Book provided common terms and conditions that applied to both groups of employees.
3. The claimants and comparators were employed in the 'same service'.
4. The Council was the 'single source' for deciding the terms and conditions of both groups as they undertook pay negotiations and had within their remit the power to address the pay inequality by undertaking the Job Evaluation exercise.

This establishes the comparators as appropriate.

The case has been remitted to Tribunal for a decision as to whether there is an equal pay case to answer.

While this case was and is to be heard within the Scottish legal system, the principles still apply in England and Wales. In 1997 the 'Green Book' replaced the APT&C (Purple Book) Terms and Conditions and the Manual Worker (White Book) Terms and Conditions. The same agreements regarding implementation and transition arrangements were included in the Green Book as were subsequently included in the Red Book. Further instruction was given to Councils requiring that job evaluation exercises and the full adoption of Green Book Terms and Conditions be complete by 2004.

Therefore, Councils still operating Purple or White Book employment conditions should take note of this decision and should consider action to rectify this situation.

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