

Director of Legal Services :
David Tatlow

BRIEFING

THE EMPLOYMENT ACT 2002

The Employment Act 2002 received Royal Assent on 8 July 2002. The new Act introduces new rights regarding paternity and adoption leave, extends existing maternity rights, introduces Tribunal reform and statutory dispute resolution procedures, as well introducing new rights on flexible working. The new rights introduced under the Act will have effect from 6 April 2003.

1. STATUTORY LEAVE AND PAY

Part 1 of the Act deals with paternity, adoption and maternity rights.

A. Paternity leave

- ◆ Since 1999, all parents, including those of adopted parents have been entitled to 13 weeks' parental leave.
- ◆ Under the new Act, fathers and adoptive parents will have the right to two weeks' paid paternity leave, which will co-exist with the right to 13 weeks' unpaid parental leave.
- ◆ Statutory Paternal Pay (SPP), will be payable at the same rate as the lower rate of Statutory Maternity Pay (SMP) throughout the period of paternity leave.

- ◆ The current rate of SMP at £75.00 per week will rise to £100.00 per week from 6 April 2003.
- ◆ To qualify for paternity leave, an employee must have at least 26 weeks' continuous employment ending with (in the case of birth) the 15th week before the expected week of child birth (EWC) or (in the case of adoption) the week in which notification of being matched for adoption is given.
- ◆ Paternity leave must be taken within 8 weeks after the birth (or first day of the EWC, if later,) or placement for adoption. It is proposed that it may be taken as a two week block or a single one week block only.
- ◆ The employer will have no right to defer the leave.

B. Adoption leave

- ◆ Either adoptive parent may take 26 weeks' ordinary adoption leave, followed by 26 weeks' additional adoption leave. The parent not taking adoption leave will be allowed to take paternity leave.
- ◆ Adoption leave must commence on the date of the child's placement or

within 14 days before the expected date of the placement.

- ◆ To benefit from ordinary and additional adoption leave, the employee must have at least 26 weeks' continuous employment ending in the week in which notification of being matched for adoption is given.
- ◆ Statutory Adoption Pay (SAP) will be paid for the entire duration of ordinary adoption leave at the same rate as the lower rate of SMP.

C. Maternity rights

Under the new Act maternity rights have been extended and improved.

- ◆ Ordinary Maternity Leave (OML) rises from 18 weeks to 26 weeks.
- ◆ The lower rate of SMP will be extended from 12 to 20 weeks.
- ◆ The lower rate of SMP will be increased from £75.00 per week to £100.00 per week (or 90% of average weekly earnings, if lower).
- ◆ Additional Maternity Leave (AML) of 26 weeks starting after the end of OML will be available for women who have continuously been employed by their employer for 26 weeks ending with the 15th week before the EWC. The maximum length of statutory maternity leave (SML) will rise from the current maximum of 40 weeks to 52 weeks.
- ◆ An expectant mother must notify her employer of her pregnancy, her

EWC and the date on which she intends to start her maternity leave in/or before the 15th week before the EWC. However, she can change the start date of her OML on 28 days' notice.

- ◆ The employer must respond in writing to the employee within 21 days of receiving her notification. This response must state the woman's expected date of return.
- ◆ The minimum notice an employee must give if she intends to return to work earlier than the end of her OML (or if she is entitled to AML, the end of her AML), will increase from 21 days to 28 days.

2. TRIBUNAL REFORM

Changes to the Tribunal system are not contained in the new Act, however, the Act gives the Secretary of State the power to make regulations that will:

- ◆ Authorise Tribunals and the Employment Appeal Tribunal (EAT) to have regard to a persons' ability to pay when considering making an award of costs against him.
- ◆ Give Tribunals and the EAT the power to order a parties' representative to meet the costs incurred by that party, and/or another party by reason of the representative's conduct of the proceedings.
- ◆ Authorise Tribunals to order a party to pay another party for time spent preparing that other party's case.
- ◆ Introduce a fixed period of conciliation during which a Hearing

date cannot be fixed, and after which ACAS will have a power to conciliate.

- ◆ Allow cases to be determined without a Hearing in certain circumstances.
- ◆ Confirm that Tribunals may strike out weak cases at a Pre-Hearing Review.
- ◆ Consultation is due to take place over the winter, following which a package of measures will be introduced in 2003.

3. DISPUTE RESOLUTION

The new Act introduces new statutory dismissal, disciplinary and grievances procedures and enforcement provisions.

A. Major changes

- ◆ All dismissals, not just those relating to disciplinary matters, ie resulting from redundancy, poor performance or long term sickness etc; must be preceded by a meeting with the employee.
- ◆ There must be a Right of Appeal against all dismissals, including those dismissed for redundancy etc.
- ◆ All appeals must involve meetings at which the employee may explain his case. Appeals on paper will be a thing of the past.
- ◆ Employees who fail to raise written grievances may not bring claims about such issues. This will not prevent employees walking out and claiming constructive dismissal as

there are procedures for ex-employees to raise grievances.

- ◆ Breach of the statutory procedure will be a breach of the employment contract.

B. Enforcement provisions

- ◆ If an employer fails to follow any aspects of the statutory dismissal procedures, this will render the dismissal automatically unfair. The requirement to have one year's continuous employment to bring an unfair dismissal claim is not affected.
- ◆ If an employer makes a procedural mistake in relation to a dismissal, but does not breach the statutory dismissal procedures, the mistake will not by itself render the dismissal unfair if the employer shows he would have decided to dismiss the employee had he not made the mistake. This effectively gives the Polkey defence statutory force.
- ◆ If an employee is found to have been automatically unfairly dismissed under the new rules, and a Tribunal order re-instatement (or re-engagement), the employee will also normally be awarded four weeks' pay subject to a cap, currently £250.00 per week.
- ◆ If a Tribunal concludes a relevant statutory procedure was not completed before proceedings began, wholly or mainly as a result of the failure by the employer to comply with such procedure, it must normally increase any compensation awarded by 10% and may increase it up to 50%.

- ◆ If a Tribunal concludes the statutory procedure was not completed before proceedings began, wholly or mainly as a result of a failure by the employee to comply with such procedure, it must normally reduce any compensation by 10% and may reduce it by up to 50%.
- ◆ Employers must provide employees with proper documentation of the new statutory procedures as part of the statement of employment particulars. The employee will usually be awarded two or four weeks' pay (subject to a cap) for the failure to provide proper documentation.

C. Procedures

The basic statutory procedures are as follows:-

i Dismissal and Disciplinary Procedures

a : Standard Procedure

Step 1 : Statement of grounds for action and invitation to meeting

- i. The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.
- ii. The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2 : Meeting

- i. The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.
- ii. The meeting must not take place unless the employer has informed the employee what the basis was for including the statement under Step 1(i), the ground or grounds given in, it and the employee has had a reasonable opportunity to consider his response to that information.
- iii. The employee must take all reasonable steps to attend the meeting.
- iv. After the meeting, the employer must inform the employee of this decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3 : Appeal

- i. If the employee does wish to appeal, he must inform the employer.
- ii. If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.
- iii. The employee must take all reasonable steps to attend the meeting.
- iv. The Appeal Meeting need not take place before the dismissal or disciplinary action take effect.

- v. After the Appeal Meeting, the employer must inform the employee of his final decision.

b : Modified Procedure (in the case of summary dismissal for gross misconduct)

Step 1 : Statement of grounds for action

The employer must set out in writing:

- i. The employee's alleged misconduct which has led to the dismissal.
- ii. What the basis was for the thinking at the time of the dismissal that the employee was guilty of the alleged misconduct.
- iii. The employee's right of appeal against dismissal.
- iv. Send the statement or a copy of it to the employee.

Step 2 : Appeal

- i. If the employee does not wish to appeal, he must inform the employer.
- ii. If the employee informs the employer of his wish to appeal, the employer must invite him to attend the meeting.
- iii. The employee must take all reasonable steps to attend the meeting.
- iv. After the appeal meeting, the employer must inform the employee of his final decision.

ii Grievance Procedures

a : Standard Procedure

Step 1 : Statement of Grievance

The employee must set out the grievance in writing and send the statement or a copy of it to the employer.

Step 2 : Meeting

- i. The employer must invite the employee to attend a meeting to discuss the grievance.
- ii. The meeting must not take place unless the employee has informed the employer of the basis for the grievance when he made the statement under Step 1 and the employer has had a reasonable opportunity to consider his response to that information.
- iii. The employee must take all reasonable steps to attend the meeting.
- iv. After the meeting, the employer must inform the employee of his response to the grievance and notify the employee of the right to appeal against that decision if he is not satisfied with it

Step 3 : Appeal

- i. If the employee does wish to appeal, he must inform the employer.
- ii. If the employee informs the employer of his wish to

- appeal, the employer must invite him to attend a further meeting.
- iii. The employee must take all reasonable steps to attend the meeting.
 - iv. After the Appeal meeting, the employer must inform the employee of his final decision.

b : Modified Procedure (where the aggrieved person is a former employer)

Step 1 : Statement of Grievance

The employee must set out in writing the grievance, and the basis for it, and send the statement or a copy of it to the employer

Step 2 : Response

The employer must set out his response in writing and send the statement or a copy of it to the employee.

iii All procedures

The following requirements to each of the procedures set out above (so far as applicable).

Timetable

Each step and action under the procedure must be taken without unreasonable delay.

Meeting

1. Timing and location of meetings must be reasonable.

2. Meetings must be conducted in a manner that enables both employer and employee to explain their cases.
3. In the case of Appeal Meetings which are not the first meeting, the employer should, as far as is reasonably practicable, be represented by a more senior manager than attended the first meeting (unless the most senior manager attended that meeting)

4. MISCELLANEOUS AND GENERAL

Part 4 of the new Act introduces a whole range of miscellaneous rights.

A. Flexible Working

- ◆ For the first time, both men and women will have a statutory right to request a change to their contract so they can look after a young or disabled child.
- ◆ From April 2003, employees with at least 26 weeks' continuous employment will be entitled to ask to vary the number of hours they work, when they work and how they work to enable them to care for a child.
- ◆ Applications for flexible working may be made at any time up to 14 days before the child's sixth birthday (or if a child is disabled, its 18th birthday). The employee will have to state their eligibility to make the application.
- ◆ The onus will be on the employee to detail the desired changes and

propose a start date in writing. They will also have to explain what affect, if any, the change would have on the employer and how this might be dealt with.

- ◆ Within 28 days of receiving an application, the employer will have to fix a meeting with the employee to discuss matters. The employer will then have to give a decision within 14 days of the meeting. If a decision is unfavourable, the employee will have a right of appeal.
- ◆ One application may be made in any 12 month period, so if the appeal is unsuccessful, the employee will have to wait a year before re-applying.
- ◆ Employers will be able to refuse applications for flexible working where they have a clear business reason, eg where it would lead to additional costs or would have a detrimental impact on quality of performance or the ability to meet consumer demand. There are prescribed grounds for refusing a request.
- ◆ There is no right to revert to the old working pattern when the child grows up.

B. Fixed Term Work

- ◆ The new regulations give fixed term employees the right not to be treated less favourably than comparable permanent employees.
- ◆ A fixed term employee will be able to present a claim to an Employment Tribunal where the less favourable treatment is on the

grounds that the employee is fixed term and is not justified on objective grounds.

- ◆ The fixed term employee will be compared with a comparable permanent employee. Both individuals must be employed by the same employer and must be engaged in “the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills”. If there is no comparator throughout the establishment at which the fixed term employee work, or is based, a comparator at another of the employer’s establishments may be used.
- ◆ Less favourable treatment may relate to levels of pay, pension and other benefits, as well as qualifying periods for benefits and access to permanent employment.
- ◆ When determining work there has been less favourable treatment the “pro rata principle” will generally apply. This means the fixed term employee should receive such proportion of the comparator’s pay and benefits as is reasonable having regard to the length of his contract and the terms on which the pay and benefits are offered.
- ◆ Less favourable treatment in respect of a particular contractual term might be objectively justified if “the term of the fixed term employee’s contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee’s contract of employment”.

- ◆ Less favourable treatment might be objectively justified in the “traditional sense”. It might be possible to justify not offering an employee engaged on a short term contract a particular benefit, eg a company car if the costs of providing the benefit for such a short period is high and the employee’s needs can be met in some other way, eg a car allowance.
- ◆ A fixed term employee who considers he has been treated less favourably than a comparable permanent employee has the right to ask his employer for a written statement of reasons for the treatment, which must be provided within 21 days.
- ◆ If an employee still considers he has been treated less favourably, he may present a claim to the Employment Tribunal. To ensure fixed term employees are not treated less favourably regarding access to permanent employment, they have the right to be informed of available vacancies in the establishment.
- ◆ A new “anti abuse”, rule provides that if an employee has a fixed term contract renewed, or he is re-engaged on a new fixed contract, when he has already been continuously employed for a period of at least four years (not including any period before 10 July 2002), the renewal, or new contract, takes effect as a permanent contract. If at the time when the contract was renewed, or the new contract was entered into, there is an objective justification for continuing to employ the individual on a fixed term basis, this rule will not apply.
- ◆ A fixed term employee who considers he should be regarded as being a permanent employee under the anti abuse rule has the right to ask his employer for a written statement concerning his status. His employer must respond to the request within 21 days, with either such a statement or a statement giving reasons why the employee’s contract remains fixed term. If the employee is dissatisfied with the response, he may then apply to an Employment Tribunal for a declaration that he is a permanent employee.
- ◆ A dismissal for a reason connected with an attempt (or belief or suspicion that there will be an attempt) to exercise a right under the regulations will be automatically unfair. The normal rule requiring one year’s continuous employment to bring an unfair dismissal claim will not apply in this case.

C. Equal Pay Questionnaires

- ◆ Questionnaires similar to those used in sex, race and/or disability discrimination claims will be used in equal pay proceedings.

D. Union Learning Representatives

- ◆ Union Learning Representatives are a type of lay union representative whose main function is to advise union members about their training, educational and developmental needs.
- ◆ The new act will provide statutory rights for such representatives to take reasonable time off to carry out their duties and undertake relevant training, and also to take

time off the access the services of
such a representative.

**For further advice on this paper, please
Contact:**

Jag Hayre, Head of Legal (Employment) on:-

Tel: 0121 303 4277

Fax: 0121 303 1323

E-mail: jagdeep.hayre@birmingham.gov.uk