

# MRS Field Seminar 2010

## Preparing for the Future: Legal Changes and Challenges

### An Employment Perspective



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# Agenda

- Session 1 - Recent Employment Cases and their Impact on Research

- Workers' Rights
- Monitoring online behaviour
- TUPE
- Retirement

- Session 2 - New Developments in Employment Law in 2010 and Beyond

- Equality Act 2010
- 'Fit' Notes
- Whistleblowers' Rights
- Right to time off for training
- Paternity Leave





# Session 1

## Recent Employment Cases and their Impact on Research





# Workers' Rights





# Employee, Worker or Self-Employed?

- Most individuals in paid work are either:
  - Employees
  - Workers
  - Self-employed individuals
- The existence of an employment contract is a major factor
- Understanding the employer/employee relationship is vital





# The Different Categories

- Employee

- contract of service

- Worker

- personally performs work or provides services but are not in business on their own account or in a client / customer relationship

- Self-employed

- contract for service



# Who is an Employee?

- An employee is someone who has entered into or works under a contract of employment
- To determine in common law whether there is a contract of employment, it is necessary to answer the following questions:
  - Control
  - Mutuality of obligation
  - Right to substitute labour
- Also:
  - Does the individual provide his or her own equipment?
  - Does the individual take any degree of financial risk?
  - Is the individual allowed to take paid holidays?
  - Is the individual subject to disciplinary proceedings?



# Who is a Worker?

- A worker is defined as an individual who:

- has entered into or works under a contract of employment or some other contract, and
- undertakes to do or perform personally any work or services for another party to the contract, but is not self-employed

- 3 key factors to consider:

- Does the individual have a contract?
- Is the individual obliged to personally provide services?
- Is the individual not involved in business on his or her account?





# What is Self-Employment?

- If an individual does not fall within either of the above categories, he or she is likely to be self-employed
- A self-employed individual is:
  - somebody who is neither employed nor a worker
  - engaged under an agreement traditionally referred to as a “contract for services”



# Why is the Distinction Important?

- Employees have greater range of rights
- In particular:
  - the right to claim unfair dismissal
  - the right to receive a redundancy payment
- Likewise, the employer has more duties to comply with in relation to employees
- Even when an organisation and individual agree that an individual is a contract worker, that individual may be treated as an employee



# Employees' Rights Only

- Written statement of Employment Particulars
- Itemised pay statement
- Guarantee payment
- Time off for public duties, Trade Union activities
- Maternity Leave and Statutory Maternity Rights
- Parental leave and time off to care for dependants
- Equal pay
- Minimum period of notice
- Written statement for reasons for dismissal
- Protection against unfair dismissal
- Redundancy - consultation, payments
- Statutory Sick Pay
- The right to be paid wages without deductions which are not properly authorised
- Paternity Leave
- Adoption Leave
- Rights under the Fixed Term Employees (POLFT) Regulations 2002
- Rights under the Transfer of Undertakings (POE) Regulations 2006
- Right to request flexible working





# Employees' and Workers' Rights

- Right to rest breaks and maximum working week under the WTR 1998
- Right to statutory annual leave (28 days)
- To be paid the National Minimum Wage
- Protection against unlawful deductions made from wages
- Right for part-time workers not to be treated less favourably than comparable full-time workers
- Right to be accompanied to a disciplinary or grievance hearing
- Protection for making a protected disclosure (whistleblowing)





# Employees', Workers' & Self-Employed Rights

- Right not to be discriminated against on the grounds of sex, race, disability, religion or belief, sexual orientation and age
- Subject access and other rights under the Data Protection Act 1998
- Rights under the Health and Safety at Work Act 1974



# Employment Status Case Studies

- Express & Echo Publications Ltd v. Tanton [1999] IRLR 367, CA
- Johnson Underwood v. Montgomery and O&K Limited [2001] IRLR 269, CA
- Belcher v. Autoclenz Ltd [2009] All ER (D) 134 (Oct)
- Jozsa v. Premier Groundworks Ltd [2009] (D) 22 (Apr)





# Monitoring Online Behaviour





# Should Online Behaviour be Monitored?

## ■ The issues:

- Individual's privacy
- Right to freedom of expression (Human Rights Act 1998)
- Increasing popularity of social media
- Business benefits?

## ■ Versus:

- Ease of access
- Social responsibility
- Productivity
- Breach of confidentiality
- Vicarious liability



# What Should be Monitored?

- Social media is a very broad term, which can cover a range of uses:
  - Communication
    - Blogs
    - Micro-blogging (e.g., Twitter)
    - Social networking (e.g., Bebo, Facebook, LinkedIn, MySpace)
    - Events (e.g., Meetup.com)
  - Collaboration
    - Wikis (e.g., Wikipedia)
    - Social news (e.g., NowPublic)
    - Opinion sites (e.g., epinions)
  - Reviews and opinions
    - Product reviews (e.g., epinions.com)
    - Business reviews (e.g., yelp.com)
  - Entertainment
    - Virtual worlds (e.g., Second Life)





# The Case For...

- Collaboration
- Communication
- Research
- Networking
- E-learning
- Online recruitment



# The Case Against...

- If employees/workers are spending time on social networking then how can they be working?
- Social networking and blogging sites are in the public domain
- Breach of confidentiality / leaking sensitive information
- Legal claims - defamation, bullying, harassment
- Vicarious liability
- Misrepresentation - profiles etc



# A Complete Ban?

- A complete ban on use of the Internet for personal during work time is certainly an option
  
- However, you should consider:
  - Practicalities of ban
  - How will you enforce it?
  - The benefit of using some social media, i.e. online collaboration, business networking
  - How will you deal with breaches?



# Best Practice Approach

- Introduce or update existing IT and Internet policies
- Specify which websites can and cannot be accessed during working hours and in the workplace
- Make it clear that any comments posted should be in a manner consistent with terms and conditions
- Comments must not bring employer into disrepute
- Do not share confidential or sensitive information
- State clearly how breaches of the policy will be dealt with
- Communicate policy
- Training and development





# Transfer of Undertakings



# A Reminder about TUPE

- TUPE applies to “relevant transfers”, i.e. business transfers and service provisions changes
- The new employer is automatically put in the same position as the old employer
- Collective agreements are honoured
- Duty to inform and consult
- If principal reason is transfer, automatic unfair dismissal unless ETO defence
- Substantially detrimental change may constitute dismissal
- Varying terms and conditions connected to TUPE transfer can only be for an ETO reason



# TUPE Service Provision Changes

## ■ Recent Case Law

- Kimberley Group Housing Ltd v Hambley and others Angel Services (UK) Ltd v Hambley and others - [2008] All ER (D) 408 (Jun)
- OCS Group v Jones and another - [2009] All ER (D) 138 (Sep)
- Love and others v Ward Hadaway Solicitors - [2010] All ER (D) 250 (May)





# Retirement





# A Reminder about Retirement

- Default retirement age in UK currently 65
  
- Duty to Consider Procedure
  
- Retirement dismissal ‘automatically’ unfair or fair
  
- Retirement dismissals automatically unfair if employer fails to:
  - Notify employee of his intended retirement date and of his right to request not to retire
  - Consider request to work beyond retirement
  - Consider an appeal



# Recent Developments

- Review of the default retirement age currently being undertaken
- Review originally planned for 2011, brought forward to 2010 to reflect “change in economic circumstances” since retirement provisions originally introduced in 2006
- Widely anticipated that the default retirement age will be either raised to a higher age (possibly 70) or abolished altogether
- New Coalition Government has stated that the default retirement age “will be phased out”
- May mean that the retirement age will be raised initially to a higher age before being abolished
- Unlikely that any changes will be implemented before April 2011





# Break





# Session 2

## New Developments in Employment Law in 2010 and Beyond





# Equality Act 2010



# What is it?

- Replaces 9 laws and more than 100 regulations
- Designed to make it easier for employers to understand discrimination legislation
- Will harmonise and extend existing UK discrimination legislation
- Majority of the provisions expected to come into force in October 2010
- Many provisions to be implemented in stages to allow organisations time to prepare





# Key Provisions

- The Act identified 9 ‘protected characteristics’:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation



# Other Employment-Related Provisions

- Banning pay secrecy clauses
- Extending positive action
- Expanding Employment Tribunal powers
- New definition of direct discrimination to cover ‘associative’ and ‘perceived’ discrimination
- Extending employers’ liability for 3<sup>rd</sup> party harassment beyond sexual harassment
- Allowing claims for multiple discrimination based on two, but no more, different types of discrimination
- Banning pre-employment questionnaires





# Fit Notes



# What are they?

- Statement of Fitness for Work introduced 6<sup>th</sup> April 2010
- Replaces previous 'sick note' scheme in operation since 1948
- Aim is to enable GPs' to provide employer and employee with simple, clear and practical advice
- Designed to facilitate an earlier return to work



# Main Features of the 'Fit Note'

- GP may advise that the employee is either:
  - 'unfit for work', or
  - 'may be fit for work, taking into account the following advice'
- The 'advice' may suggest that the employer consider:
  - a phased return to work
  - altered hours (not necessarily a reduction in working hours)
  - amended duties
  - workplace adaptation
- GP can add information on functional effects of employee's condition and what may facilitate a return to work
- No option for a GP to advise that someone is fully fit for work
- Maximum period a sick employee can be signed off for per statement reduced from 6 to 3 months. 28 week SSP entitlement remains the same



# Dealing with a 'Fit Note'

## ■ Unfit for work:

- should be dealt with in exactly the same way as old process where GP has advised the patient to refrain from work for a period of time

## ■ May be fit to work:

- Employers should consider the GP's advice and any recommended actions that could help assist the employee in returning to work
- Talk to employee to discuss options
- If required, consider seeking further advice from GP or OH specialist
- Any agreement should be confirmed in writing

## ■ 'Reasonable adjustments' (Disability Discrimination Act 1995)





# Whistleblowing



# What is Whistleblowing?

## ■ Primary legislation:

- The Employment Rights Act 1996
- Public Interest Disclosure Act 1998

## ■ Occurs when a worker in good faith reports the actual or prospective improper actions of his or her organisation or colleagues

## ■ The worker could disclose the improper action:

- internally within his or her organisation using a set procedure
- to one of a number of external regulators
- more widely if neither of the other options is appropriate



# Who is Covered by the Legislation?

- Employees, ex-employees, apprentices, certain agency workers, homeworkers and medical professionals
- Workers who work or worked under a contract, whether express or implied, whereby the worker undertakes to do or perform personally any work or services for another party to the contract
- Trainees on work experience programmes
- However, the genuinely self-employed, volunteers, the intelligence services and the armed forces are currently not covered





# Qualifying Disclosures

## ■ Employment Rights Act 1996 states a qualifying disclosure as:

- A criminal offence has been, is being or is likely to be committed
- A person has failed, is failing or is likely to fail to comply with any of their legal obligations
- A miscarriage of justice has occurred, is occurring or is likely to occur
- The health or safety of any individual has been, is being or is likely to be endangered
- The environment has been, is being or is likely to be damaged
- That information tending to show any of the above matters has been, is being or is likely to be deliberately concealed

## ■ Reasonable belief

## ■ Confidentiality





# Protected Disclosures

- For a whistleblower to be protected under the Public Interest Disclosure Act 1998, the disclosure needs to be both a qualifying disclosure and a protected disclosure
  
- Protected disclosures are made in good faith:
  - to an employer
  - to the person responsible for the breach or failure
  - to a legal advisor in the course of obtaining legal advice
  - to a prescribed regulator
  - as an external disclosure
  - in an exceptionally serious case to a third party, such as the police or a newspaper





# How to Deal with Protected Disclosures

- Best practice to implement a whistleblowing policy:
  - Internal resolution
  - Loss of protection of the Public Interest Disclosure Act 1998
  - Help to detect problems
- Any internal policy should:
  - confirm the employer's commitment to tackling allegations of failures
  - explain the protection offered to whistleblowers
  - knowingly making false accusations is unacceptable - disciplinary action
  - set out the procedures to be followed
  - set out a designated person to whom failures should be reported
  - indicate the proper way to raise concerns outside the organisation in exceptional circumstances (e.g., to a regulatory body)
  - assurance that allegations will be treated appropriately, investigated promptly and (if requested) confidentially
  - victimisation or harassment of a whistleblower will be disciplinary offence





# Right to Time off for Training





# The Law

- Three key Acts:

- The Education and Skills Act 2008

- The Apprenticeships, Skills, Children and Learning Act 2009

- New section 63D in the Employment Rights Act 1996





# Young People

- Certain young employees have the right to paid time off during normal working hours for study or training
- Right available to employees aged 16 or 17 who are not in full-time secondary or further education and who have not attained a certain standard of academic achievement specified by the Government
- 18 year olds have the same right if they began current study or training prior to their 18th birthday
- No exemption for small firms and no qualifying period of service for the employee
- Must be to undertake study or training that leads to a relevant qualification
- Should also enhance the individual's employment prospects
- Employer does not have to pay for the training



# Apprentices

- Apprenticeships, Skills, Children and Learning Act 2009 creates a structure for the creation and pursuit of apprenticeship schemes
- Provides that an apprenticeship agreement between an apprentice and their employer will be treated as a contract of service (i.e., as an employee) not an apprenticeship
- Also provides for the right to request time off for training and study
- The purpose of the study must be to improve the employee's effectiveness in the employer's business and the performance of the employer's business
- It does not have to be intended to lead to a qualification



# Other Employees' Right to time off for Training

- Currently applies to employees in all organisations with at least 250 employees. Right will be extended to cover employees in all businesses from 6 April 2011
- Purpose of the study must be to improve the employee's effectiveness in the employer's business and the performance of the employer's business. It does not have to be intended to lead to a qualification
- Eligibility requirements
- Right to request time off to train or study will operate in the same way as the right to request flexible working, i.e. statutory procedure
- An employee may bring a tribunal claim if their employer has not complied with the correct procedure or their employer's decision is based on incorrect facts
- The tribunal may make an order for the employer to reconsider the application or may order the employer to pay compensation to the employee
- Employees are protected from being subjected to a detriment or being dismissed because they have exercised their right to time off for training





# Paternity Leave



# Additional Paternity Leave Regulations 2010

- New right to Additional Paternity Leave (APL) became law in April 2010
- Will apply to parents of babies born on or after 3 April 2011 or notified as being placed for adoption on or after 2 April 2011
- Minimum period of APL will be 2 weeks and maximum period 26 weeks
- The APL period for a newborn child must start after the child is 20 weeks old and end before the child's first birthday
- The right to APL will be on top of the existing 2 week paternity leave and pay entitlement on the birth or adoption of a child
- When the APL legislation comes into effect, the existing 2 week paternity leave and pay entitlement will become known as ordinary paternity leave and pay





# Entitlement to APL

- Employees will be entitled to 26 weeks' APL for the purpose of caring for a newborn child or a newly adopted child if all of the following apply:
  - the child's mother has ended her statutory maternity leave and has stopped receiving statutory maternity pay
  - the employee has been continuously employed by the employer for at least 26 weeks
  - the employee has responsibility for the upbringing of the child
  - the employee is either the biological father of the child, married to, the partner of or the civil partner of the child's mother but not the child's biological father
  - the employee has produced evidence of their entitlement to APL
  - the employee has given notice



# Additional Statutory Paternity Pay

- The following conditions must also be met in order for an employee to be entitled to additional statutory paternity pay (ASPP):
  - the child's mother or adopter must have been entitled to Statutory Maternity Pay (SMP), Statutory Adoption Pay (SAP) or Maternity Allowance (MA)
  - the child's mother or adopter must have a certain amount of their entitlement to SMP, SAP or MA remaining prior to the start of the ASPP period
  - the number of weeks for which ASPP will be paid to the employee will depend on the remaining number of weeks of SMP, SAP or MA
  - the employee's average weekly earnings are not less than the lower earnings contribution limit for National Insurance purposes
- An employee will be entitled to 26 weeks' unpaid additional paternity leave if he or she fails to satisfy the ASPP conditions





# Evidence Requirements

- Self-certified evidence
- The father's/partner's employer will be responsible for checking that the father/partner is entitled to APL
- A checklist is being developed by HMRC



# Other Rights and Rules

- At least 8 weeks' notice required
- Right to change the start date of the APL period
- The employer must notify the employee the date on which APL will end
- All terms and conditions of employment, excluding remuneration, will continue to apply during APL period
- An employee returning from APL is entitled to return to the same job on the same terms and conditions
- An employee will also be entitled to benefit from any improvement in working conditions that he or she would have been entitled to had he or she not taken APL
- KIT Days
- The weekly rate of ASPP will be the standard rate or 90% of the employee's average weekly earnings, whichever is the lesser amount



# THE END

Any further questions?

