



In The Know

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Business wrong to always see red about employment regulations

A new Chartered Institute of Personnel and Development (CIPD) Work Horizons report, '*The economic rights and wrongs of employment regulation*' concludes that the knee-jerk opposition of much of the business lobby to many employment laws betrays an underlying bias against employment regulation which at times flies in the face of economic evidence.

While the report supports the coalition government's better regulation agenda, it questions the case for the kind of wholesale 'drive to deregulate' advocated by sections of the business lobby. It highlights evidence showing that the UK still has the third least regulated labour market in the world according to the OECD and that rising numbers of employment tribunal claims are to a significant degree the result of an increase in multiple claims and the impact of the recession.

The report concludes that the prime focus of regulatory reform should be on streamlining the red tape that accompanies regulation rather than on watering down the substance of existing employee rights and entitlements.

ICO publishes new statutory Code of Practice on data sharing

The Information Commissioner's Office (ICO) has published a new statutory Code of Practice designed to help businesses and public sector bodies share people's personal information appropriately.

The ICO's [Data Sharing Code of Practice](#) covers both routine and one-off instances of data sharing, but points out that the code isn't really about 'sharing' in the plain English sense. It's more about different types of disclosure, often involving many organisations and very complex information chains; chains that grow ever longer, crossing organisational and even national boundaries.

The Code includes good practice advice aimed at all organisations that share personal information – such as a group of retailers exchanging information about former employees who were dismissed for stealing or two neighbouring health authorities sharing information about their employees for fraud prevention purposes. It also gives advice on when and how personal information can be shared, as well as how to keep it secure.

Low Pay Commission remit published

The Government has written to the Low Pay Commission (LPC) setting out its remit for their 2012 Report asking it, in particular, to focus on youth employment and to consider whether the national minimum wage regulations might be simplified.

The LPC will continue to monitor, evaluate and review the National Minimum Wage (NMW) and its impact, and review the levels of each of the different minimum wage rates. However, as part of its remit the Government has asked the independent body to pay particular attention to: (i) young workers, including those in apprenticeships and internships, to reflect on-going concerns about the position of young people in the labour market; (ii) whether the NMW regulations can be made even simpler and easier to administer; (iii) the best way to give businesses greater clarity on future levels of the NMW. The LPC will report to the Prime Minister and the BIS by the end of February 2012.

Changes to European Works Councils take effect

The [Transnational Information and Consultation of Employees \(Amendment\) Regulations 2010](#), implementing changes set out in the recast European Works Councils Directive, came into force on 5 June 2011. The recast European Works Councils Directive aims to enhance the working of European Works Councils (EWCs), by improving the effectiveness of information and consultation of employees.

Changes introduced by the amending Regulations include tightening the definition of a transnational issue that can be considered by an EWC, creating a new right for members of EWCs and special negotiating bodies to receive necessary training, creating an obligation for the central management to provide an EWC with the means required to fulfil its duties and increasing the maximum penalty for a breach of the Regulations from £75,000 to £100,000.

Effect of collectively agreed terms following TUPE transfer

In *Parkwood Leisure Ltd v Alemo-Herron and others*, the Supreme Court held that there should be a reference to the ECJ to establish whether the Acquired Rights Directive (ARD) precludes national courts from giving a 'dynamic' as opposed to a 'static' interpretation when determining the contractual rights which transfer, including those in collective agreements.

The employees were originally employed by the London Borough of Lewisham in its leisure service department. Their contracts provided that their "*terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the National Joint Council for Local Government*". The employees were eventually TUPE transferred to a contractor, Parkwood Leisure Ltd, who were not a party to the yearly pay negotiations and who did not award the resulting pay increases for the period 31 April 2006 to 31 March 2008.

An employment tribunal dismissed the claims applying a 'static' interpretation, i.e. the new employer is only bound by collectively-agreed terms that apply at the date of transfer, but the EAT preferred the 'dynamic' approach, i.e. give transferring employees the right to benefit from future pay rises or other changes agreed between the unions and the old employer, or an employer's body, which form part of a collective agreement incorporated into their contractual terms, after the transfer. The Court of Appeal (CA), however, agreed with the tribunal ruling that transferees are not bound by any collective agreement made after the transfer. Now, the Supreme Court has decided that there should be a reference to the ECJ to establish whether the ARD precludes national courts from giving a 'dynamic' interpretation to transferring contractual rights. In the meantime, the CA judgment remains as the prevailing precedent.

Employer liable for negligent misstatement in e-mail

In *McKie v Swindon College*, the High Court ruled that an ex-employer was liable to one of its former employees for the civil wrong of negligent misstatement, when it made careless, untrue comments about him in an e-mail to his new employer, which led to his dismissal.

Mr McKie worked for Swindon College from 1995 to 2002. After periods of employment with two other Colleges he became director of studies at the University of Bath in May 2008. The HR director at Swindon College, sent an e-mail to the University of Bath, stating that Mr McKie would never be re-employed because of very real safeguarding concerns for students, that there were serious staff relationship problems during his employment and it believed that similar issues had arisen with a subsequent employer. The University of Bath dismissed Mr McKie because of the email.

The evidence, including that of several of Mr McKie's former colleagues, demonstrated that the contents of Swindon College's e-mail were "largely fallacious and untrue". As the information arose from the employment relationship a duty of care existed even though six years had passed since Mr McKie had left. It was therefore fair, just and reasonable to impose a duty of care on the ex-employer. Furthermore, the College must have realised that its e-mail might have an impact on the employee's employment, so the damage caused was eminently foreseeable. The College had committed the civil wrong ('tort') of negligent misstatement, which caused Mr McKie's dismissal and was therefore liable.