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Welcome to the latest issue of our free
employment law update. In this month's issue:

IS THERE A WAY TO EQUAL PAY? When
the Equal Pay Act came into force over 30
years ago, no one could have predicted how
complicated the law would be to implement -
for both employers and employees. We
provide an overview of some of the most
recent developments. [[more...](#)]

WHAT ARE YOU IMPLYING? Given some
recent court decisions, it has been far from
clear when agency workers could claim to
work under an implied contract, giving them
employee status. We look at a case that finally
clarifies the situation. [[more...](#)]

REMEMBER TO PROTEST If an employer
unilaterally varies their employee's contract,
the employee should protest if they do not
agree with it. We look at a case that
reinforces this point. [[more...](#)]

IN BRIEF Contrary to a decision by the
Employment Appeal Tribunal, the Court of
Appeal has now said that employers can take
expired warnings into account in disciplinaries.
[[more...](#)]

Heptonstalls have created a very
useful summary to guide you through
the key points of current employment
legislation. This covers key qualifying
periods and limits including a schedule
of forthcoming changes.

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IS THERE A WAY TO EQUAL PAY?

When the Equal Pay Act came into force over 30 years ago, no one could have predicted how complicated the law would be to implement - for both employers and employees. We provide an overview of some of the most recent developments.

Who is the employer?

The law says that women and men should be paid equally for doing the same or similar work, or work of equal value, if:

- they work for the same employer
- they have terms and conditions that are broadly similar, but work in different places
- they work for different employers, but have a "single source" that sets their pay and conditions

In **Armstrong v Newcastle upon Tyne NHS Hospital Trust** the Court of Appeal said that women in one hospital Trust could not compare themselves with men in another because although they all worked for the NHS, they had different employers and different places of work. Even when their employers merged, they still did not have common terms and conditions. The women could not, therefore, point to a single source of pay with their comparators that accounted for the inequality in pay between them.

What is the effect of a job evaluation scheme?

Once a job has been rated as equal with another job by a valid analytical job evaluation scheme, a woman cannot bring an equal value claim against her employer with a man in a higher grade (unless she can show the scheme is somehow invalid), as the scheme has already rated the men's jobs as having a higher value.

The case of **Redcar and Cleveland BC v Bainbridge 2007** makes clear, however, that the woman can bring an equal pay claim on the basis that she is in a job that is rated the same as or higher than a man. Job evaluations must be kept up to date to take into account changes in jobs over time that affect the value of the jobs.

Can the employer justify the difference in pay?

Crucially, tribunals have to decide whether the pay difference between the woman and man is due to sex discrimination and, if it is, whether the employer can justify the difference with a genuine material factor (GMF) defence.

If an employer can prove that the reason for the pay difference had nothing to do with sex discrimination then they have a valid GMF defence, and the woman's claim will fail.

If the employer cannot come up with a GMF defence, then they have to objectively justify the difference in pay. In **Chief Constable of West Midlands Police v Blackburn and Manley**, the court decided that the employer was justified in making additional payments to staff who worked nights even though it had an adverse impact on women.

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It said that the fair aim of additional reward for the unsocial hours and the "social, psychological and other stresses" that night work created outweighed the small (in this case) discriminatory impact.

Whether a difference in pay is justified can change over time. For example the EAT in **Joss v Cumbria County Council** said that although a productivity scheme introduced for roadworkers was genuine at one point, it had become a sham by the time the women lodged their claims because it was no longer really being used to improve productivity.

What time limits apply?

The Equal Pay Act says that claims must be brought within six months of the end of the woman's employment. **Joss v Cumbria County Council** looked at what should happen when a woman changes her job or her terms and conditions during a period of continuous employment.

The EAT said that agreed variations to terms do not trigger the time limit, but changes implemented by new written contracts agreed by the employee (even if they are quite small), do trigger it.

Can employers use pay protection?

When an employer introduces a new pay system they often provide short term protection for employees who will lose pay as a result. In general pay protection is not unlawful as it may not have an adverse impact on women (or even if it does it can be justified).

In **Surtees v Middlesbrough DC** the EAT held that if there was no admitted pre-existing inequality in pay due to sex discrimination, the Council could justify pay protection as a necessary component for introducing a new equalised pay system. This is because, in certain circumstances, the objective or aim can outweigh the adverse gender impact of the pay protection.

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WHAT ARE YOU IMPLYING?

Given some recent court decisions, it has been far from clear when agency workers could claim to work under an implied contract, giving them employee status. The Court of Appeal has now said in **James v Greenwich Council** that tribunals cannot imply contracts if the express contracts already fully explain the relationship between the parties.

What happened?

Ms James had worked for the Council as an agency worker since September 2001. In 2003 she changed agencies to get a higher rate of pay.

Her new Temporary Worker Agreement stated that she was a self-employed worker in relation to each assignment and that she had no contract of employment with the "end user".

After a period of sick leave in 2004, she was told she was no longer needed as the agency had sent a replacement. She claimed unfair dismissal, arguing that, as she had worked for the Council for more than a year, she had an implied contract with them.

The tribunal, however, disagreed. It pointed to the fact that the Council did not pay her, nor provide her with any benefits. She was not subject to their disciplinary and grievance procedure, and when she was off sick, she did not have to tell the Council.

And the EAT agreed emphasizing that "the mere passage of time is not sufficient to require any such implication". It said that tribunals should only imply contracts in situations when it could point to "some words or conduct" to show that the worker was working "not pursuant to the agency arrangements but because of mutual obligations binding worker and end user which are incompatible with those arrangements."

And the Court of Appeal agreed. It said that the only express contractual relationship was between Ms James and the employment agency (as she recognised when she changed agencies to get a higher wage) and between the Council and the agency.

Nor was there any need for the tribunal to imply a third contract between Ms James and the Council as the express contracts fully explained the relationship between the two. In conclusion, it said that the question of whether an "agency worker" is an employee of an end user must be decided in accordance with common law principles of implied contract and, in very extreme cases only, by exposing sham arrangements.

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REMEMBER TO PROTEST

If an employer unilaterally varies their employee's contract, the employee should protest if they do not agree with it. Otherwise, they will very probably be assumed to have acquiesced, a point reinforced by the Employment Appeal Tribunal (EAT) in **GAP Personnel Franchises Ltd v Robinson**.

What happened?

Mr Robinson's contract stated that he was to be provided with a company car for which he could claim 25 pence per mile and that he would be given a month's advance notice of any significant changes.

He was then paid 15 pence per mile when he submitted his claim form in February. On querying this, he was informed that the 25 pence rate only applied to the use of private, not company, cars. He continued to claim the lower rate, but lodged a tribunal claim for breach of contract and unlawful deduction of wages when he resigned in July 2006.

The tribunal said that Mr Robinson was contractually entitled to the higher rate because to lawfully deduct the lower rate, the company would have had to agree a variation of his contract with him, which it had not done. It said that although Mr Robinson had apparently acquiesced for six months, that did not mean he had lost the right to sue for damages.

Equally the EAT was in no doubt that, for the first month at least, Mr Robinson was contractually entitled to receive 25 pence per mile. Again, however, the question was whether, by failing to protest, he had acquiesced. The EAT said that the fact that the unilateral variation was a "fait accompli" was neither here nor there, as every unilateral variation could be described in that way.

Nor was it fatal to the company's claim that Mr Robinson had not protested because he did not want to lose his job. Likewise the fact that the company had not given him one month's notice of the change.

Given the tribunal's comment that Mr Robinson would have lost the right to resign after acquiescing for six months, it said that the tribunal should therefore have concluded that he had affirmed the contract sometime during that period.

As such, the EAT said that the company was only in breach for the first month as Mr Robinson knew that it would continue to pay him at the rate of 15 pence per month after that.

It remitted the case to a new tribunal to decide on the factual question about whether Mr Robinson continued to work under protest after submitting his first month's expenses.

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IN BRIEF

Contrary to a decision by the Employment Appeal Tribunal, the Court of Appeal has now said in *Airbus v Webb* that employers can take expired warnings into account in disciplinarys.

Mr Webb was summarily dismissed for gross misconduct, but reinstated on appeal and given a final 12-month written warning. Three weeks after the warning expired he was found watching television with four other employees when he should have been working.

Although all the men were disciplined, Mr Webb was the only one to be dismissed. He said that was unfair because his employer had obviously taken his expired warning into account when coming to their decision.

The Court of Appeal said that tribunals were not required by previous case law to hold that "a previous spent warning should be ignored for all purposes." An expired warning was simply one factor to be taken into account in deciding whether the employer had acted reasonably or not.

In this case, the company had shown that the reason for dismissal was the later misconduct and not the expired final warning and was therefore fair. However, the court warned that employers should not rely on expired warnings "as a matter of course".

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