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Shaun also sat on a working party advising the Government on law relating to "working status"

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

EMPLOYING FOREIGN WORKERS If you want to employ people from outside the UK, you have to first ensure that they are allowed to work here. We provide an overview of the rules governing the employment of foreign workers. [[more...](#)]

LONG SERVICE Employers do not have to justify a difference in pay between men and women if it is due to a length of service award. We look at a case that said that employers do, however, have to justify using length of service as a criterion in the first place. [[more...](#)]

CLIMATE CHANGE The religion or belief regulations include 'philosophical' beliefs. We look at a case in which the court concluded that a belief in man-made climate change could constitute a 'philosophical belief' for the purposes of the regulations. [[more...](#)]

IN BRIEF Under new rules agreed recently by EU ministers, parents will have the right to longer parental leave. We outline the main provisions. [[more...](#)]

Heptonstalls LLP's Employment Partner Shaun Pinchbeck has seen a significant increase in employers seeking advice on redundancy situations in the past 18 months:

"My aim is to explore with clients whether there is a way to avoid having to make employees redundant by considering whether there is an alternative such as reduced hours. In the event that there is no realistic alternative, my aim is then to guide clients through the process to try to minimise the consequences to the client and to minimise the risk of claims being brought. If you are in a situation where you are even contemplating the possibility of having to make redundancies, then seeking advice from the outset is something that I would urge employers to do as mistakes made at any stage of the process can prove costly".

Do not hesitate to contact Shaun if you have any queries on 01405 765661 or email shaun.pinchbeck@heptonstalls.co.uk

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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EMPLOYING FOREIGN WORKERS

If you want to employ people from outside the UK, you have to ensure they are allowed to work here under one of the various systems (depending on where the worker comes from) before you take them on. If they don't qualify and you employ them anyway, you could face a fine or even risk going to prison.

Who is allowed to work here?

- British citizens
- Members of the Common Travel Area - citizens of the UK, Channel Islands, the Isle of Man and Ireland
- Commonwealth citizens with the right of abode in the UK
- European Economic Area nationals (EEA is made up of 27 EU member states and Iceland, Norway and Liechtenstein) and Swiss nationals
- Individuals who are not EEA or Swiss nationals but who are family members of nationals from EEA countries and Switzerland (if the EEA or Swiss national is a lawful UK resident)
- Dependants of migrants who have entered the UK under one of the tiers of the points-based system (see below)

What is the points-based system?

The points-based system allows entry for non-EEA foreign workers under one of 5 tiers. To qualify, the worker has to have a minimum number of points, which are allocated according to their skills and qualifications. The number of points awarded and how they are scored depends on the tier under which the person applies.

So, for instance, an employer hiring someone under a Tier 1 visa does not have to apply for immigration permission before the individual starts work. Under Tier 2, however, the worker has to have a sponsor and employers have to register with the UK Border Agency for a sponsor licence in order to do that.

Once registered, the employer can issue certificates of sponsorship which act as work permits to foreign workers, without further approval from the UKBA.

What about "A8" workers?

If your prospective employee is from the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia or Slovenia (known as A8 workers), then the system is different in that they need to register with the Worker Registration Scheme (WRS) within a month of starting work for you.

It is the worker's responsibility to apply, but you must provide them with evidence of their employment and ensure that the registration is completed within the required timeframe. Once they are registered, you should keep a copy of the certificate. If the Home Office refuses to register them, you have to stop employing them straight away.

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Note that some A8 nationals are exempt from WRS registration, including those who:

- came to the UK before the WRS started (1 May 2004)
- have already worked in the UK for 12 months without a break

If a worker claims to be exempt, you must still ask for, copy and retain documentary proof of this. A8 nationals can apply for their certificate once they have worked in the UK for more than 12 months. The certificates are proof of their right to reside and work in the UK without restriction.

What about Romanian and Bulgarian workers?

You also have to check whether workers from Romania and Bulgaria (known as A2 workers) have the right authorization to work. This involves two stages. As the prospective employer, you must first apply for a work permit. Once that has been approved, you must apply for an accession worker card.

The worker can only start working for you once both stages have been completed and an accession worker card has been issued. The card is not transferrable and restricts the individual to the job specified on the card. Once the Bulgarian or Romanian national has spent 12 months working in the UK, they may apply for a registration certificate as evidence of their right to reside and work in the UK.

What is the civil penalty scheme?

To ensure that employers comply with the immigration rules, the government introduced a civil penalty scheme in February 2008. As a result, employers who flout the rules can be fined up to £10,000 for each illegal worker that they employ.

In addition to this scheme, employers can face a criminal charge of "knowingly employing" an illegal migrant worker. This will be used in more serious cases including rogue employers who knowingly and deliberately use illegal migrant workers, often for personal financial gain. This carries a maximum two year custodial sentence and/or an unlimited fine.

What is a statutory excuse?

It is in your interest, therefore, to make sure that the migrant workers you employ are eligible to work in the UK. Checking the documents of prospective employees before you hire them provides you with what is known as a "statutory excuse", which may prevent you from having to pay a civil penalty.

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What checks should you make?

Even if you think that a potential worker has the right to work in the UK, you should still check their documentation (stipulated by the UK Border Agency on their website <http://www.ukba.homeoffice.gov.uk/>) to ensure it is all in order by:

- checking the likeness of the photograph against the person in front of you
- checking the date of birth is consistent with their appearance
- checking that the document has not expired
- checking that there are no endorsements on it saying the person is not allowed to do the work you are offering.

When you have checked the person's documents and are satisfied that they are genuine, you must save and store them securely to ensure that the information cannot be altered, deleted or overwritten.

If you want to employ people from outside the UK, you have to ensure they are allowed to work here under one of the various systems (depending on where the worker comes from) before you take them on. If they don't qualify and you employ them anyway, you could face a large fine and/or risk going to prison for up to two years for knowingly employing an illegal worker.

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LONG SERVICE

Although the law requires employers to pay men and women equally for work rated as equivalent under a valid job evaluation scheme, they do not have to justify a difference in pay if it is due to a length of service award. In **Wilson v Health and Safety Executive**, the Court of Appeal has now said, however, that employers can be required to justify the "use" of a length of service criterion "as well as its adoption in the first place".

What happened?

Ms Wilson (a band 3 inspector) made an equal pay claim in July 2002, comparing herself with three other inspectors in the same band. Although their jobs had all been rated as equivalent in a job evaluation study carried out in 1995, the male inspectors were paid more than her partly because they received length of service increments after ten years in the job. Ms Wilson argued that the employer could not justify the length of service payments because staff were fully proficient at their job after three years.

The tribunal decided that the length of service criterion had a disparate impact on female employees, but that because of the decision by the European Court of Justice (ECJ) in **Danfoss**, the HSE did not have to justify it.

Ms Wilson's appeal to the EAT was then stayed until the ECJ had come to a decision in the similar case of **Cadman v HSE**. It said that although employers did not, as a general rule, have to justify length of service as a pay policy objective they would have to if a worker provided evidence that cast "serious doubts" on whether it was appropriate.

The EAT then decided that tribunals should be allowed to look at whether an employer could justify the way the length of service criterion had been applied, but that claimants had to provide evidence that raised really serious doubts about its use.

The Court of Appeal has now said, as a result of the decision in **Cadman**, that employers can be required to justify the "use of a length of service criterion as well as its adoption in the first place". But when does the burden of proof pass to the employer? The Court of Appeal has said that the test of "serious doubts" which the ECJ applied in **Cadman** was only a preliminary test to act as a filter on claims before a trial. It was not applicable, therefore, once the trial had taken place and liability had been found.

In order to pursue a case, the Court said that employees would have to show that they had evidence that the general rule (that a length of service criterion did not have to be justified) did not apply. That evidence would have to create "serious doubts" in the minds of the tribunal that the adoption or use of the length of service criterion was not justified and/or was disproportionate.

Finally, the onus of proving justification remained with the employer. "The employee has only to show that there is evidence from which, if established at trial, it can properly be found that the general rule ... does not apply. This does not amount to a switch in the burden of proof; it is merely a sensible evidential requirement to ensure that the complaint has some prospect of success. ... It makes good sense that there should be such a requirement to avoid unnecessary claims".

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CLIMATE CHANGE

The Employment Equality (Religion or Belief) Regulations 2003 cover not just religious but also "philosophical" beliefs. In **Grainger plc and ors v Nicholson**, the Employment Appeal Tribunal (EAT) has concluded that a belief in man-made climate change could constitute a 'philosophical belief' for the purposes of the regulations.

What happened?

Mr. Nicholson worked for Grainger plc until 31 July 2008 when he was dismissed from his position as Head of Sustainability on grounds of redundancy. He claimed that his dismissal was unfair and contrary to the 2003 regulations because of his strongly held philosophical beliefs about climate change and the environment.

The tribunal said its job was not to analyse his beliefs as such or to judge their "validity" by some objective standard, but to decide whether they fell within the regulations. And it decided that Mr. Nicholson's beliefs about climate change did amount to a "philosophical belief" as he had "settled views about climate change" and acted on those views. His beliefs, therefore, went "beyond mere opinion". The EAT said that it had to decide how far, if at all, the "belief" had to be similar to a religious belief to satisfy the regulations and what, if any, limits should be placed on the words "philosophical belief". It identified the following criteria:

- The belief must be genuinely held
- It must be a belief and not an opinion or viewpoint
- It must be a belief as to a weighty and substantial aspect of human life and behaviour
- It must attain a certain level of cogency, seriousness, cohesion and importance
- It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

It then added that the belief:

- should have a similar status or cogency to a religious belief
- could be a one-off (in that it did not govern the entirety of the person's life), that was not necessarily shared by others, such as pacifism or vegetarianism, provided it satisfied the above criteria
- did not need to constitute or "allude to a fully-fledged system of thought", as long as it satisfied the criteria above

Relying on these qualifications, the EAT indicated that if established, Mr. Nicholson's alleged philosophical belief in climate change would most likely be characterised as a political belief. That, however, was no reason to exclude it from the scope of the regulations, as long as it was genuinely held. This approach would not allow people holding racist or homophobic political philosophies to succeed, however, as such views would not satisfy the criterion of being "worthy of respect in a democratic society."

The EAT therefore upheld the tribunal's decision that Mr. Nicholson's asserted belief was capable of being a "belief" for the purposes of the 2003 regulations, but that, unlike religious belief, it would have to be subjected to "evidence and cross-examination directed [as] to the genuineness of the belief". [[Back to contents](#)]

IN BRIEF

Under new rules agreed recently by EU ministers, parents will have the right to longer parental leave.

The revised Directive on Parental Leave will give each working parent the right to at least four months leave after the birth or adoption of a child (up from the current entitlement of 13 weeks). At least one of the four months cannot be transferred to the other parent – meaning it will be lost if not taken - in order to encourage fathers to take their leave.

Other main changes include:

- Employees applying for or taking parental leave will be protected from any less favourable treatment for doing so
- Employees returning from parental leave will have the right to request changes to their working hours for a limited period. Employers must consider the needs of the employee as well as the company when considering their request
- Governments and employers will be obliged to assess the specific needs of parents of adopted children and children with a disability or long-term illness
- The new rights will apply to all workers including fixed-term, part-time and agency workers, although member states can impose a one year qualification period.

The issue of pay during parental leave has been left to member states to resolve.

The Framework Agreement on parental leave, on which the Directive is based, was signed by the European social partners (businesses and unions) on 18 June 2009 and revises an earlier agreement from 1995.

Once the new Directive has been formally adopted (sometime in the next few months), member states will then have two years to transpose the new rights into national law.

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