



Workforce Planning Issues – a wee update from England

HPMA Scotland 2010

9 September 2010

A Bit About Capsticks...



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- Healthcare law specialists – it's all we do
 - 25 years in healthcare in England
 - Offices in London, Birmingham and, shortly Leeds
 - Employment team provide full-service employment and HR advisory advice to over 150 health and social care bodies

Recent Workplanning Themes from our NHS HR clients



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- Maximising Efficiencies
 - Identifying the “Quick Wins”
 - Reforming Agenda for Change?
 - Downsizing and the R word
 - MARS

The Quick Wins?



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- Addressing temporary/agency/locum staffing
 - Sickness and Performance
 - Reviewing long-service retirement awards
 - Directors foregoing bonuses
 - Junior Doctors and EWTD

Reforming Agenda for Change?



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- Westminster White Paper encouraging more local terms and conditions but how to achieve and is it desirable?
 - Contractual status of Agenda for Change
 - Contractual variation by
 - individual agreement
 - collective bargaining
 - dismissal and re-engagement
 - Is there the appetite and what about Equal Pay?

Relying on existing Agenda for Change flexibilities



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- The pay progression system – managing the gateways
 - Reviewing local terms and conditions (AfC section 19)
 - Foundation Trust flexibilities – Annex K

Downsizing and Redundancy



English NHS Trusts looking at what can be achieved short of collective/individual redundancy:

- Flexibilities on job description and place of work
- Using the default retirement age (before it's abolished!)
- Using temporary pools while longer-term suitable alternative employment is identified

Is there life on MARS? (1)



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- MARS – Mutually Agreed Resignation Scheme
 - Published 2 September 2010 by Department of Health
 - New Section 20 of Agenda for Change
 - Allows voluntary resignation schemes for a limited period – mid-September to end October 2010
 - Severance packages at generally half contractual redundancy rate

Is there life on MARS? (2)

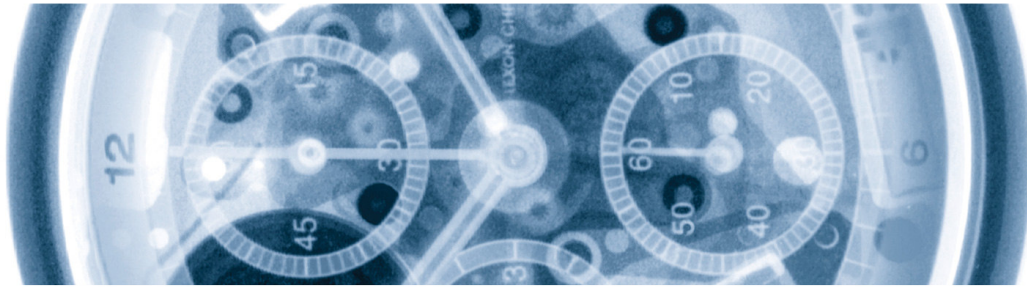


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- Trusts may choose – not compulsory
 - Local MARS must be approved by Strategic Health Authority and HM Treasury
 - Eligibility criteria for local schemes:
 - not voluntary redundancy but genuine resignation
 - not to manage out poor performers
 - not to fall foul of equality law
 - Severance payments subject to clawback

Is there life on MARS? (3)



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- Very early days
 - Trusts may struggle to get eligibility criteria approved if they overlap with planned redundancy processes
 - May be low take up if compulsory redundancy anticipated and/or employee concern at obtaining re-employment
 - Best scenario is a win-win for employees wanting to move on and employers keen to avoid redundancies



Afternoon session – Employment Law Update

HPMA Scotland 2010

9 September 2010

Outline of the Afternoon



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- The Equality Act 2010
 - Age discrimination update
 - Topical cases



The Equality Act 2010

9 September 2010

The Equality Act - Introduction



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- Single largest piece of anti-discrimination legislation the UK has known
 - Harmonises multiple pieces of primary and secondary legislation
 - Strengthens the law to support progress on equality
 - In some instances extends existing protection
 - Applies to the provision of goods and services and public procurement, as well as employment

Implementation dates



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- Royal Assent was **8th April 2010**
 - The majority of the Act will come into force on **1st October 2010**
 - Public sector duties, dual discrimination claims, socio-economic duties, gender pay gap information, positive action in recruitment still under consideration

Equality Act: Main Changes



Harmonising and simplifying discrimination law



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- Nine Protected Characteristics:
 - Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.
 - Harmonisation of the law across all protected characteristics for simplification.
 - Still some differences across some protected characteristics.

Direct Discrimination



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- “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”
 - Discrimination by “**association**” and “**perception**” are now covered in all strands except marriage/civil partnership.
 - Some unexpected consequences of the wider test?

Pregnancy and Maternity (1)



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- “A person (A) discriminates against a woman if, in the protected period relating to a pregnancy of hers, A treats her unfavourably – (a) because of the pregnancy, or (b) because of illness suffered by her as a result of it” or if A “treats her unfavourably because she is on compulsory maternity leave” or “because she is expecting or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.”

Pregnancy and Maternity (2)



So what's new?

- Restates existing law, but there is a new concept of “unfavourable” rather than “less favourable” treatment.
- A comparator is not required but will still play a useful role when assessing the evidence as to the reason for the treatment.

Widening Discrimination Law

Combined discrimination (1)



Dual characteristics

“A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.”

Widening Discrimination Law

Combined discrimination (2)



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- Direct discrimination may be brought on a “combination” of two grounds. Will this make it easier for a Claimant to succeed?
 - Estimated that 7.5% of existing claims would include multiple discrimination and may increase claims by 10%
 - Not applicable to marriage/civil partnership or pregnancy/maternity

Third Party Harassment



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- Protection from harassment in employment
 - Most protected characteristics, exceptions
 - Pregnancy and maternity
 - Marriage and civil partnerships
 - Extended to harassment based on perception and association
 - 3rd Party Harassment – e/er fails to act – occurs on
 - At least two occasions
 - Involve three incidents by different third parties
 - What this means in practice / what practical steps can be taken that are ‘reasonably practicable?’

Disability Rights (1)



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- Concept of indirect discrimination
 - Indirect claims, a “reference to persons who share a protected characteristic is a reference to persons who have the same disability” -how will “the same disability” be defined? – perhaps limited scope?
 - No change to reasonable adjustments claims.

Disability Rights (2)



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- New concept of “reason relating to” – getting around *London Borough of Lewisham v Malcolm [2008] HL*

“A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B’s disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim”.

- A comparator will not be necessary.
- Employer's knowledge of disability is required.

Disability and Health Questionnaires (1)



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- Employers will be unable to ask questions about health or disability before making a job offer.
 - There are a few exceptions.
 - This is not a freestanding right but will affect the burden of proof in direct discrimination cases.
 - EHRC can investigate; only EHRC can enforce
 - Questions about past levels of sick leave are likely to be unlawful.

Exceptions apply to questions necessary for:

- Arrangements for interviews
- Carrying out functions *intrinsic to the work concerned*
- Monitoring diversity
- For taking positive action (limited exception)
- Where disability is a GOR

Disability and Health Questionnaires (3)



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- At what stage should employers seek health data to comply with any reasonable adjustment issues?
 - Is it still lawful for employer to ask candidate on recruitment form if disabled and so can apply through the “Two Ticks” automatic interview scheme?
 - Is it lawful if health information is requested prior to interview but only seen by Occupational Health pre-interview and only disclosed to HR after the interview?

Tribunal Recommendations



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- The Tribunal will have a power, once they have found discrimination, to make a recommendation “that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate – (a) on the complainant; (b) on any other person”.
 - Current limited power to make recommendations but rarely made. Will the wider power lead to an increase?
 - Tribunal cannot enforce, but can increase compensation if there is a failure without reasonable excuse to comply.

Up in the Air



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- Gender pay gap information – power to make regulations – currently a voluntary basis for private section
 - Not supported by Conservatives during national election
 - Positive action in recruitment or promotions – must be “as qualified”, not treated more favourably, and proportionate; very narrow
 - Socio- economic duty – public sector bodies to have regard to inequalities outcomes when making decisions of a strategic nature in exercise of functions

Equality Act: Case Studies



Case Study 1



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- You have been approached by a clinical team leader on one of the wards.
 - A member of staff is receiving racist comments from several members of the family of one of the patients who are refusing to have this member of staff care for their mother. The family are being very rude to the member of staff and threatening to make a complaint.
 - What advice would you give? Would this advice differ if the member of staff worked in the community delivering services in people's home?

Case Study 2



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- You are approached by a manager who is interviewing for a new member of staff for a community team.
 - One of the candidates has declared they have a disability. They meet the essential criteria for the job and are being interviewed.
 - The manager has asked for some advice about the interview and what questions can they ask as they are worried whether the candidate will be able to do the job.
 - What advice do you give?

Case Study 3



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- A member of staff calls you for advice.
 - They work in a community team and one of their patients has a partner who is of the same sex.
 - This member of staff is asking not to visit this patient as due to their own religious beliefs they feel uncomfortable about going into this patient's home.
 - What advice do you give this member of staff ? Are there any issues to consider on behalf of the patient?



Age Discrimination Update

9 September 2010

The Default Retirement Age (DRA)



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- Announcement in July 2010 that DRA set to be abolished by October 2011
 - Compulsory retirement provisions set to be phased out from April 2011
 - Consultation on reform running to October 2010 but key proposal is requirement to demonstrate objective justification in most retirements

Objective Justification



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- Equality Act definition – “a proportionate means of achieving a legitimate aim”
 - Some recent examples – at what age should you retire
 - *Partners in an English law firm?*
 - *Dentists in the German health service?*
 - *Firefighters in Frankfurt?*



Topical Case Law

9 September 2010

Damages awards



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- Edwards v Chesterfield Royal Hospital NHS Foundation Trust
 - Gibb v Maidstone & Tunbridge Wells NHS Trust
 - Brown v Careham Hall

Edwards v Chesterfield



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- Consultant trauma and orthopaedic surgeon summarily dismissed for gross misconduct
 - Unable to obtain permanent employment in NHS
 - Claim for damages in High Court:
 - Hearing conducted in breach of contractual disciplinary procedure
 - Defects in the procedure led to misconduct finding and thus his inability to find alternative work
 - Trust's breach of contract caused career long losses in excess of £4 million

Edwards and Chesterfield decision



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- High Court held damages should be limited to loss of earnings for period of employment whilst contractual disciplinary procedure followed, plus pay in lieu of notice
 - Court of Appeal said in principle employee can recover damages in respect of any losses suffered
 - Damages will depend on employee showing that if procedure followed would not have been dismissed – a high hurdle
 - Remoteness of loss and mitigation
 - Importance of following contractual disciplinary procedure

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- Chief Executive of the Trust
 - Left in October 2007 before publication of critical report by Healthcare Commission
 - Settlement package of £250K approved by Remuneration Committee
 - £75K payment in lieu of notice
 - £175K compensation payment
 - Dept of Health instructed Trust to withhold compensation payment

Rose Gibb cont



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- Ms Gibb brought High Court claim
 - HC held compensation payment ultra vires and “*irrationally generous*”
 - CA disagreed.
 - Trust could take into account a number of factors
 - “Profligate expenditure” by public body not beyond reach of courts
 - But courts should not retake financial and management decisions lying “*within the powers and purposes of the Trust*”

Stigma Damages? Brown v Careham Hall



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- Care home assistant manager dismissed for gross misconduct and given poor reference. Future employment fell through as a result
 - ET increased compensation by 30% for breach of best practice
 - But claim for stigma damages in respect of unfavourable reference dismissed

Dismissing for unproven allegations: A v B (EAT 2010)



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- A a career civil servant for B a public authority
 - Accused of child abuse in Cambodia by police in a limited disclosure to B
 - B dismissed on basis of it, citing loss of trust and confidence

A v B continued



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- Fair dismissal as
 - B had subjected police allegations to close scrutiny
 - B had taken A's explanations into account
 - It was not reasonable to expect B to undertake a fresh inquiry
 - B entitled to be "jealous of its public reputation"

NB the limits of "trust and confidence" dismissals

In other news....



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- Working while on sick leave – McCann v Clydebank College (EAT 2010)
 - Dismissal in employee's absence – Bashir v Sheffield Teaching Hospital NHS Foundation Trust (EAT 2010)