

# Employment Law Essentials

**M R S**

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# Introduction

- Preventing illegal working
- Status
  - Workers
  - Employees
- Unfair dismissal
- Equality Act
- Health & Safety of lone workers

# Preventing Illegal Working

# The Immigration System

- Immigration Rules
  - Visitors
  - Students
  - Workers
  - Partners and family members of British nationals
- EEA nationals (and their family members)

# The Points Based System

- Points Based System (PBS) introduced in 2008
  - 80 immigration categories consolidated.
- Tier 1 (General) formerly HSMP (closed)
  - Investor, Entrepreneur and Exceptional Talent
- Tier 2 (Skilled workers) replacing WP scheme
- Tier 4 (Students)
- Tier 5 (Youth Mobility & Temporary Workers)



# Why worry about immigration issues?

# Employers' responsibilities

- All employers have responsibility to prevent illegal working
- Penalties for employers:
  - Civil penalty = max **£10,000 penalty** per employee found working illegally.
  - Criminal offence = max **2 years imprisonment, or an unlimited fine or both.**

# Fines in Action

- Attorney General Baroness Scotland has been fined £5,000 for not keeping a copy of her housekeeper's documents.



# Loss of PBS Licence

- UKBA will normally suspend a Licence to sponsor non-EEA migrant workers if illegal working is detected
  - No more migrants can be sponsored in Tier 2 or 5
- Does not matter where illegal working takes place within the organisation
- If a cleaner is found to be working illegally and the licence is suspended, the CEO of the same organisation will not be able to extend their permission to live and work in the UK
- Impact on family if employee's permission cannot be extended

# Employers Protecting Themselves

# Checking regimes

- The checks that employers should make (or have made) to ensure that their employees are entitled to work in the United Kingdom depend on the initial date of employment for each individual:
  - Staff employed before 27 January 1997
  - Staff employed from 27 January 1997 to 30 April 2004
  - Staff employed from 1 May 2004 to 28 February 2008
  - Staff employed from 29 February 2008

# Statutory Defence – 3 Step Test

- For those employed from 29 February 2008
- 3-step test for checking docs for every new job applicant you may be considering employing
- Following 3-step test = statutory defence
- Ensures employer will not be convicted for unknowingly employing a person illegally



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# Statutory Defence – 3 Step Test

1. Get 'em
  - One/combo of docs in list A or B
2. Check 'em
  - Photographs
  - Dates:
    - ◆ Birth dates, endorsement dates, right to work
  - Names:
    - ◆ If different request Marriage Certificate, divorce decree, deed poll
3. Save 'em
  - Front cover, ID page, endorsement page
  - Keep for 2 years after they stop working for you

# Follow Up Checks

- UKBA Employer's Checking Service
- Do follow up checks where:
  - employee is subject to immigration control, and
  - permission to work is time-limited.
- Follow specified steps and keep a record of the date of checks each time.
- You **MUST** carry out follow up checks at least once every 12 months where a document or documents you are relying on show permission to remain which is time-limited.

# Avoiding Discrimination

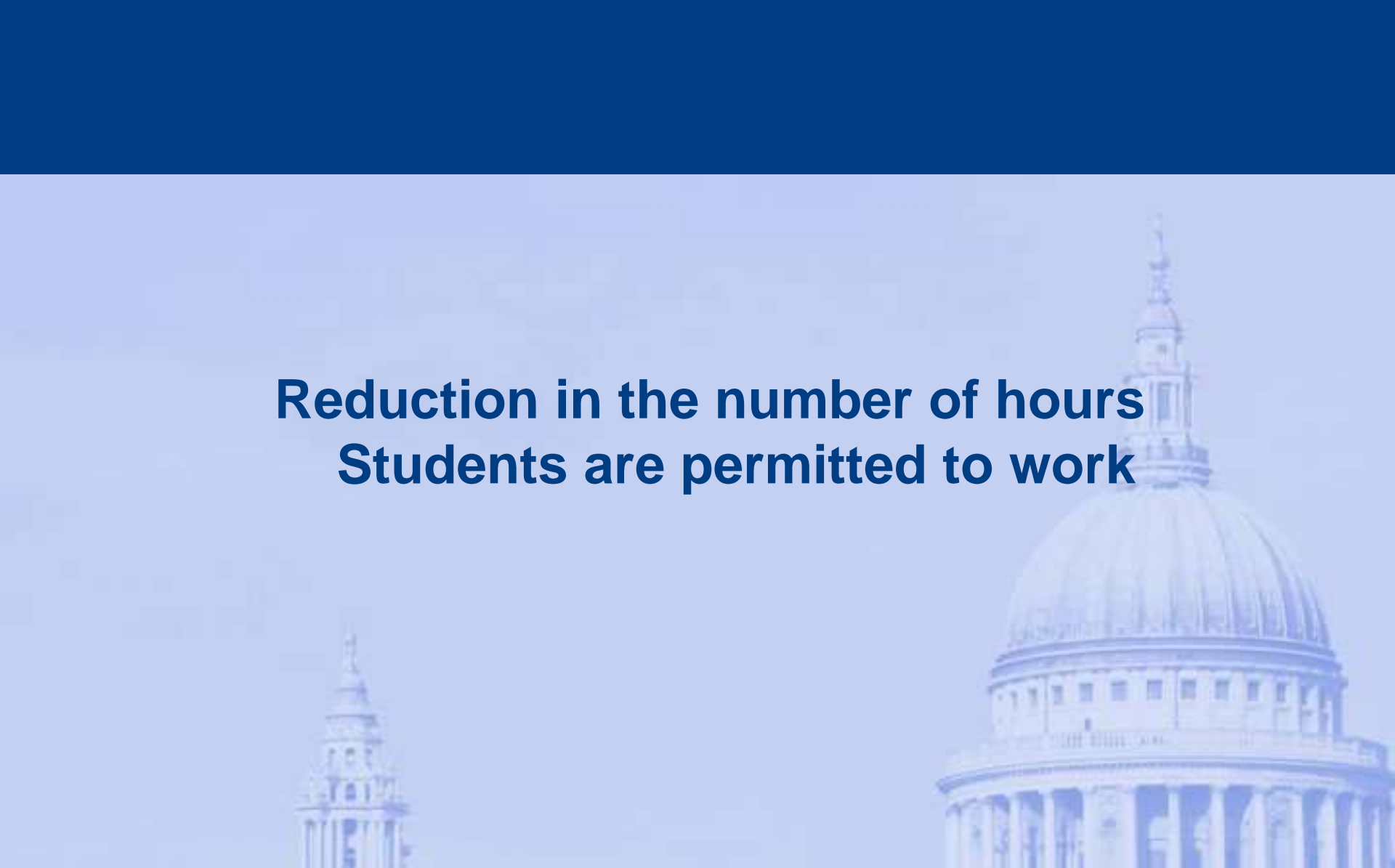
- Do not discriminate against any employees or potential employees.
- Always ask ALL candidates for the appropriate documents showing permission to work in UK.
- Don't make assumptions on the basis of someone's appearance.

# Protecting Yourself

- Build checks into recruitment procedure and implement in non-discriminatory way.
- Check documents **before** an employee starts work and make production of such docs a condition of their employment.
- Keep good records!

# Self-Employment

- Consider engaging as self-employed
- Still carry out the 3 Step Test
- Beware: some groups cannot be self-employed
  - Students



# Reduction in the number of hours Students are permitted to work

# From 4 July 2011

- Students studying at a publicly funded Higher Education institutions:
  - above degree level are permitted to work for twenty hours per week during term time and full time during vacations.
  - below degree level may only work for ten hours per week during term time and full time during vacations.
- Students studying at a publicly funded Further Education college on any course are permitted to work for ten hours per week during term time and full time during vacations.

# From 4 July 2011

- Students who are applying to come to the United Kingdom or to extend their existing permission to study in the United Kingdom and not sponsored by a publicly funded Higher Education institution or Further Education college will not be able to work at any time during their studies.
- Some of your employees may lose their permission to work when they apply to extend their permission to stay in the United Kingdom.

**Questions?**

# Employment Status

# Introduction

- Different rights
- No clear set of defining criteria

# Definition and Distinctions

- Employee:  
“a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing”
- Worker:  
“an individual who has entered into or works under:  
a) a contract of employment; or  
b) any other contract...whereby the individual undertakes to do or perform personally any work or services for another... whose status is not...that of client or customer of any profession or business undertaking carried out by the individual”

# Test to identify a worker

- Personal service
- Business undertaking
  - wide meaning not intended
  - intention = create intermediate class
  - protection needed because...
  - Worker in a subordinate and dependent position
- Test: degree of control; exclusivity; duration; method of payment; who supplied equipment; risk undertaken by worker
- Mutuality of obligation

# Clarkson v Pensher Security Doors Ltd 2009

- Not a worker
- Why?
  - not integrated into the business
  - nothing to indicate he played any part in company
  - came and went how he chose
  - determined how and when he worked
  - not involved in company procedures
  - not work not paid
  - specialist skills which gave him stronger bargaining position



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# Employment for discrimination purposes

- In “employment”
- Applying for “employment”
- “Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work”
- No exclusion for client/customer

# Significance of distinction

- Employers and Employees have obligations implied
- Core legal protections
  - Unfair dismissal
  - Redundancy payment
- ACAS Code: Employers only
- Tax

# Same status for all purposes?

- HMRC and ET may disagree
- Vicarious liability

# Sham

- ET to determine
- Contract not deformative
- What happens in practice?

# How to ID a Contract of Service

- Personal service
- Mutuality
- Control
- Other factors

# Personal Service

- Substitution clause
- Core legal protections
  - *Express + Echo Publications Ltd v Tanton*, 1999
  - *MacFarlanes v Glasgow CC*, 2001
  - *Staffordshire Sentinel Newspapers Ltd v Potter*, 2004
  - *Real Time Civil Engineering v Callaghan*
- Duties capable of delegation – dominant?

# Mutuality of Obligation

- Must have it
- Carmichael v National Power, 2000
- ABC News International v Gizbert, 2006

# Control

- “The power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done”
- Consider all factors
- Employee
  - Told place of work and hours
  - Subject to day-to-day direction and rules
- Self-employed
  - More independent
  - Determine their hours

# Other factors

- Who provides equipment
- Hires help
- Financial risk
- Degree of investment in and management of business
- Opportunity to profit
- Fixed wage or salary
- Holiday and sick pay
- Integration into business
- Other activities
- Description applied by parties
- Nature and length of engagement
- Benefits and insurance



# Approach to take

- Look outside contract, to “overall factual matrix”
- Only if a sham?
- Did parties intend documents to be exclusive record of terms?
  - *If yes, consider that only*
  - *If no, look at other factors and material*

# Conclusions

- Absence of personal service is fatal
- What about right to substitute
  - Nature of duties which can be delegated
  - Whenever they choose or only if unable?
  - Who organises and pays substitute?
  - Limitations on right
  - Can individual profit?

# Unfair Dismissal

# Typically includes

- Conduct
- Capability
  - Poor performance
  - Health

# Your internal disciplinary procedure: Set the standard

- Purpose and scope:
  - “Corrective rather than punitive”
  - “To set standards of conduct and performance”
- Managers responsible for communicating and monitoring expected standard of conduct and performance”
- Be consistent

# Benchmarks of a good disciplinary procedure

- Principles:
  - “No action ... until ... investigated”
  - “Advised of nature of complaint”
  - “Views to be fully and fairly considered”
  - “Right to be accompanied”
  - “Right of appeal”
  - Ability to jump a stage in procedure

# Triggers (non-exhaustive examples)

- Breach of equal opportunities
- Harassment
- Victimisation
- Unauthorised absence
- Time keeping
- Abuse of email and internet policies
- General misconduct
- Poor performance

# Deal with problems early

- Nip problems in the bud
- Do not let matters fester
- Informal discussions
- Less than one year's service – generally no right to claim unfair dismissal unless automatically unfair reason
- Probationary period - take advantage of it

# If still problems with conduct ...

- Employee can have no complaint
- Procedure is key
- HR
- Range of reasonable responses (to include summary dismissal)

# If still problems with capability ...

- Tribunals accept “enough is enough”
- Dismissing for poor performance can be fair reason
- Procedure is key
- Multiple steps ... so start it early
- HR
- Range of reasonable responses (rare to include summary dismissal)

# Formal steps: a summary ...

- Fair review of problems and reasons
- Opportunity to make representations
- Appropriate warnings and opportunity to improve

# General principles

- No unreasonable delay
- Timing and location reasonable
- Both parties able to explain case
- Appeals: more senior manager if possible

# Gather information/investigate - Keep Notes

In determining fairness, must:

- Genuinely believe employee guilty
- Reasonable grounds to sustain that belief
- As much investigation as reasonable in the circumstances

Flawed investigations = unfair dismissal

If you are being investigated what would you want to

see done?

# Investigation

- Investigate before making any decisions
- In conduct cases, investigator should not conduct any subsequent disciplinary or appeal meeting
- Only put employee on paid suspension as a last resort (e.g. pending investigation into serious allegations of gross misconduct)

# Role of investigator (misconduct)

- To look into facts and gather evidence
- Keep notes and obtain written statements
- To be objective and open-minded
- NOT the decision-maker or HR advisor
- Be clear of your remit (not to recommend any sanctions)

# Investigation process

1. Consider witnesses and order
2. Speak to relevant witnesses and take notes; confirm accuracy of notes
3. Obtain any other evidence
4. Speak to witnesses again if necessary
5. Explore new lines of evidence

# What should be in an investigation report?

- Summary of actions taken
- Details of evidence collated (attaching relevant documents/statements)
- Findings of fact, where appropriate
- Recommendations about whether to proceed to next step in procedure but not conclusions re misconduct or sanctions

# Investigator's future role

- Pass report and findings to another manager to conduct disciplinary meeting
- No further involvement or may be required to attend disciplinary meeting and possibly appeal meeting

# Misconduct – issues to consider

- What happened?
- Particularise allegations
- Witnesses?
- Third party complaint?
- Conflicting accounts?
- One-off happened before?
- Pattern?
- Seniority
- Seriousness



# Dealing with misconduct

- Investigate any allegations of misconduct
- Follow the 3 step disciplinary procedure
- Give employee opportunity to respond to allegations and consider relevant evidence before reaching any decisions
- In letter of outcome, warn employee of potential consequences of further misconduct (e.g. next level of warning)

# Conduct cases – special issues

- Mitigation
- Seniority/position of responsibility?
- Trust
- Seriousness of allegation
- Any unexpired warnings?
- Attitude to process
- Apology?

# Determining fairness of dismissal

- Tribunal will consider if:
  - Genuine belief in employee's guilt
  - Reasonable grounds to sustain that belief
  - Employer carried out as much investigation as reasonable in the circumstances (NB. flawed procedure, e.g. inadequate investigation – unfair dismissal)

# Performance – issues to consider

- “Investigation”
- Informal discussions? Employee made aware and given opportunity to improve?
- Examples of failings
- Technical or attitude?
- Training?
- Out of character?
- External factors
- DDA (reasonable adjustments)



# Dealing with performance

- Invite employee to formal meeting, set out concerns, refer to any previous discussions and warn of potential outcome
- At formal meeting, discuss each area of concern, set clear objectives, agree realistic timescale for improvement and set a review date
- Confirm outcome in writing – issue a warning if appropriate – with right of appeal

# Performance cases – special issues

- Training?
- Supervision/appraisals
- Over promotion?
- Negligence/lack of ability
- Gross incompetence
- DA (e.g. dyslexia)
- Alternative work
- Effect on others



# Summary of disciplinary procedure

- Investigate
- Letter to employee
  - Set out in writing circumstances leading you to contemplate taking disciplinary action (i.e. allegations of misconduct or concerns of poor performance)
  - Invite to formal disciplinary meeting with right to be accompanied
  - Warn of potential outcome

# Before meeting

- In advance of meeting:
  - Make sure employee is aware of basis for disciplinary meeting (i.e. why you want to hold such a meeting and provide evidence)
  - Crucial to investigate/gather information beforehand

# At meeting

- Companion?
- Do they understand “basis”?
- Put forward allegations/concerns
- Give employee opportunity to respond
- Discuss reasons/mitigation
- Witnesses
- In performance cases, discuss targets and timescales

# After meeting

- Following formal meeting:
  - Adjourn to consider evidence or carry out further investigations if necessary
  - Make findings of fact based on evidence
  - Consider all relevant factors before determining appropriate sanction, if any

# Outcome

- Confirm outcome in writing
  - In conduct cases, set out findings with reasons and state if considered to be misconduct or gross misconduct
  - In performance cases, if employee failed to meet required level of performance, set out targets, timescale, monitoring
  - Any disciplinary sanction (e.g. warning), right of appeal and potential next steps

# Appeal

- Obtain employee's grounds for appeal
- Pass to more senior manager
- Carry out further investigation if necessary
- Hold appeal meeting and consider each ground for appeal in turn
- Re-hear?
- Set out decision in writing

# Repeated misconduct/failure to meet required standard of performance

- Issue warning:
  - Verbal
  - First written
  - Final written
  - Dismissal
- When considering reasonableness of sanction, Tribunal will consider size and administrative resources of employer

# Conclusion

- Safest approach:
  - Be clear about your role and procedure that needs to be followed
  - Carry out thorough investigation as swiftly as possible
  - Keep employee informed
  - Follow internal procedures thereby complying with statutory minimum requirements

# Abolishment of Retirement Age

# Retirement

- 6 April
- To have a retirement date at all?
- If so, what?

# Forced retirement

- Two part defence
  - retirement achieves a legitimate aim and
  - age relied on is a proportionate means of achieving that aim

# Getting it wrong

- No cap
- Lifetime loss

# Why have an age at all?

- Employers can chose
- Some employers have abolished
- BUT
- Alternative =
  - performance manage:
    - health
    - doing job
  - will manager's manage?
  - dignity in retirement?



# Legitimate aims

- Not easy
- Assertions not enough
- Need evidence
- ACAS Guidance
  - workforce planning
  - health and safety
- Avoid job blocking
- Leave with honour



# If have an age, what should it be?

- 65 not justified, otherwise why remove?
- 68?
- 70?
- Before deciding:
  - Research
  - Consider performance
  - Consider health and safety
  - Do legitimate aims apply?



# Unanswered questions

- How will ET assess legitimate aims?
- Business by business or wider?
- If set age, will you ever be allowed to waive it?
- Should you take into account individual circumstances?
  - yes
  - no
- Can same employer have different ages?

# What to do?

- Announce retirement ages being reviewed
- Grant extensions to those over 65
- Carry out review and go from there

# The Equality Act 2010

# Objectives

- Two principal aims
  - streamline all the different strands of discrimination law into one Act
  - strengthen and extend the law to support progress on equality

# Part 2 of the Act: Key Concepts

- Establishes key concepts on which the Act is based
  - each “protective characteristic” is identified and explained
  - discrimination is defined
- These key concepts are applied in subsequent Parts of the Act

# Protected Characteristics

- Age
- Disability: list of capacities removed
- Gender reassignment
- Marriage and civil partnership
- Maternity and Paternity
- Race – note power to include “caste”
- Religion or belief
- Sex
- Sexual orientation
- All largely reflect existing definitions



# Types of Discrimination ...

- Direct discrimination
  - “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
  - allows claims based on associative discrimination and perception

# ... Types of Discrimination ...

- Indirect discrimination
  - applies to all protective characteristics, except pregnancy/maternity
  - extended scope – e.g. deterred from applying
  - disability

# ... Types of Discrimination

- Harassment
  - extends to cover harassment based on
    - ◆ perception
    - ◆ association
    - ◆ by third parties
  - pregnancy/maternity leave and marriage/civil partnership excluded
- Victimisation

# Association and Perception ...

- Direct discrimination
  - “because of a protected characteristic”
  - explanatory notes – broad enough to cover less favourable treatment because of the victim’s association with someone who has that characteristic or because the victim is wrongly thought to have it

# ... Association and Perception ...

- Extended to all protected characteristics, except marriage and civil partnership
- Exception for provision of childcare benefits

# ... Association and Perception ...

- Harassment

“unwanted conduct *related to* a protected characteristic which has the purpose or effect of violating (B)’s dignity or creating an intimidating hostile, degrading, humiliating or offensive environment for (B)”

# ... Association and Perception

- *Coleman v Attridge Law*
  - no duty to make adjustments for carers
- *Labelling*
  - intended to cover a case in which someone is treated as if they had a protected characteristic that they neither have, nor are perceived to have at the time
  - *English v Thomas Sanderson Limited*

# By third parties

- Employer – employee (worker) relationship
- Harassment has occurred on at least two previous occasions
- The employer is aware that it has taken place
- The employer failed to take such steps as would have been reasonably practicable to prevent the third party from harassing the employee

# Disability ...

- Indirect Disability Discrimination
  - policy that is applied has a disadvantageous effect on people with a protected characteristic and puts the individual at that disadvantage
  - this disadvantage must affect those who share the individual's particular disability

# ... Disability ...

- Discrimination arising from disability
  - *Malcolm v Lewisham*
  - “(A) treats (B) unfavourably because of something arising in consequence of (B)’s disability and this cannot be objectively justified”
  - no comparator
  - defence if could not reasonably be expected to know the person was disabled

# ... Disability ...

- Reasonable Adjustments
  - provision, criterion and practice
  - physical feature
  - “but for the provision of an auxiliary aid”

# Pre-employment health questions

- Employer must not ask job applicant questions about health
  - before making an offer
  - before including applicant in a pool to be offered work

# Pre-employment health questions ...

- Exceptions
  - whether applicant can participate in interview
  - whether reasonable adjustments required for interview
  - whether applicant can carry out function intrinsic to job
  - diversity monitoring
  - positive action
  - occupational requirement

# Pre-employment health questions ...

- Enforcement – EHRC can take action to enforce breach
- Unsuccessful job applicant claiming disability discrimination – asking question reverses burden of proof

# Positive action in recruitment and promotion

- 6 April 2011
- Section 159
- Option
- “as qualified as”

# Agency Workers Regulations

# Overview

## EU Temporary Workers Directive

1 October 2010

# Scope of the Regulations

- Apply to agency workers who are assigned to do temporary work (for hirers) through temporary work agencies
  - Access to collective facilities and amenities
  - Access to information about job vacancies
  - Same “basic working conditions”
- } day 1
- } 12 weeks

# Guidance on the Regulations

- <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/a/11-905-agency-workers-regulations-guidance.pdf>
- Non-statutory

# Definitions

- Agency worker
- Problems with definition
- Temporary work agency
  - intermediary bodies
  - in-house temporary staff banks
- Hirer

# Day One Rights ...

- Access to collective facilities and amenities
- Examples:
  - canteen
  - crèche
  - transport services
  - toilet/shower facilities
  - common room
  - Waiting room
  - Mother and baby room
  - Prayer room
  - Vending machine
  - parking
- Comparators
- Justification of less favourable treatment

# ... Day One Rights ...

- Access to information about employment vacancies
- Comparators
- Advertising vacancies

# Equal Treatment Following a Qualifying Period ...

- Calculating 12 week period
  - continuity broken
  - continuity not broken, but weeks not count
- Guidance:
  - working through multiple agencies
  - working for multiple hirers

...

- When will continuity be broken?
  - new assignment with new hirer
  - new and different assignment with same hirer
  - break of at least six calendar weeks

...

- when absence will merely suspend continuity
- consecutive absences
- absences where continuity continues to accrue

# Anti-Avoidance Provisions: Structures of Assignments

- Prohibited structures
- Factors to take into account
- Example

# Equal Treatment: Basic Working and Employment Conditions ...

- Pay
- Duration of working time
- Night work
- Rest periods
- Rest breaks
- Annual leave

“Ordinarily include”

...

## ■ Pay

- included in pay
- excluded from pay
- bonuses
- performance appraisals
- working time and holiday arrangements
- payment in lieu

# What is equal treatment?

- Common sense
- Comparators
- Deemed compliance
- Examples
  - hirer has pay scales
  - hirer has no pay scales
  - no pay scales or comparable employees
  - all new recruits negotiate terms individually

# Derogations from Equal Treatment Principle

- Permanent contracts providing pay between assignments
  - anti-avoidance measures
  - minimum amount of pay
  - agreements between workers and employer representatives

# Pregnant Women and Nursing Mothers

- Protection of such agency workers
- Ante-natal appointments
- Health and safety: adjustments and alternative work

# Information and Consultation Issues

- Provision of information to workers' representatives
  - collective bargaining
  - collective redundancy
  - TUPE

# Enforcement and Remedies

- Rights
- Information
- Equal treatment
- Access to facilities and employment
- Liability for equal treatment

# Health & Safety of Lone Workers

# Duties of Employer

- No specific duties
- General duty to maintain safe working arrangements
- Risk assessment of hazards

# Duties of Lone Worker

- Take reasonable care of own health and safety
- Safeguard those affected by their work
- Co-operate with health and safety policies
- Not misuse equipment

# Reducing the Risks

- Communication
- Preventing violence
- Personal alarms
- Monitoring lone workers' health and safety
- Emergency arrangements

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