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Workplace warnings

Contrary to what some employers seem to think, disciplinary procedures are supposed to help employees improve, not act as a stick to beat them with

Not surprisingly, therefore, workplace warnings can have a major impact on an employee's working life in terms of advancement, promotion or pay, and can also be a key feature in redundancy selection criteria.

Iain Birrell, a solicitor in Thompsons Newcastle office, outlines the nature and purpose of disciplinary warnings and looks at how employers should use them.

The basics

Most employers have a written disciplinary procedure setting out a tariff of penalties according to the seriousness of the offence. These range from minor capability or conduct issues through to serious offences such as theft or fighting:

- informal warnings – first offences of low level seriousness
- verbal warning – first stage of formal sanction but still at the lower end
- written warning – increasing seriousness
- final written warning – last chance

ACAS, the Government's Advisory, Conciliation and Arbitration Service, advises employers that:

- warnings should be recorded (even verbal warnings)
- they should state the nature of the problem and improvement needed from the worker
- they should state the consequences of failing to comply, such as further warnings or dismissal
- they should be disregarded for disciplinary purposes after a specified period of time.

Employers who intend imposing serious penalties for what might otherwise be considered a minor infraction must make that clear in their disciplinary procedure.

Similarly, if a practice was previously tolerated and the employer wants it to stop, then they need to make that clear to the workforce. Otherwise the warning will be unfair and may be grounds for constructive dismissal (see below). It will also be unfair if the employer did not follow a proper process.

Statutory disciplinary and dismissal procedure

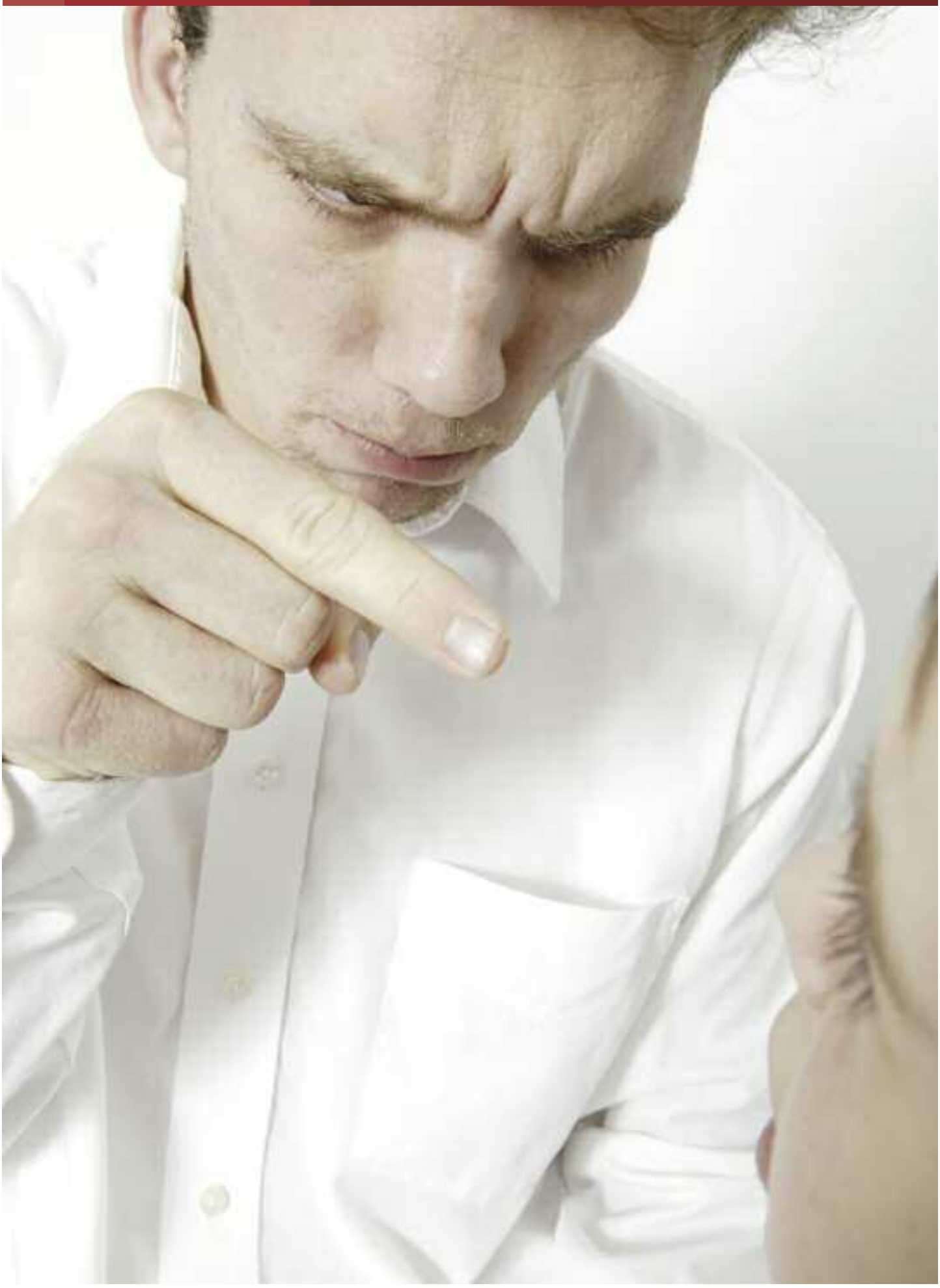
Introduced in October 2004, the statutory disciplinary and dismissal procedure (DDP) provides a mandatory mechanism for resolving disputes, but within a framework that ensures only the most basic of procedural safeguards.

It stands to reason that a breach of the safeguards results in a sanction, but, confusingly, not all warnings are covered. The DDP only applies if the employer is thinking about dismissing someone, or taking "Relevant Disciplinary Action" (RDA).

RDA, amazingly, excludes warnings. So if the employer makes clear at the start of the process that dismissal is unlikely and only a warning is on the cards, then the DDP does not apply and the employee has no statutory right to the minimum procedures or the associated benefits.

And they can be worth having: they give a degree of control over the timing and location of meetings; they guarantee a right of appeal; they give an automatic right to be accompanied at meetings under the statutory procedure; and they require the meetings to be conducted in a way that allows the person to defend themselves.

There is some authority suggesting that employers should warn the employee as



early as the step one letter if they are considering dismissal. For instance, in **Alexander and Hatherley -v- Brigden Enterprises Ltd (2006, IRLR 422)**, the Employment Appeal Tribunal (EAT) said that: "… at step one the employee simply needs to be told that he is at risk of dismissal and why."

If an employer does not give an early indication, then representatives should seek written confirmation about whether dismissal is a possible outcome.

Expired warnings

If an employee has a warning on their records that has not expired, they are likely to receive a more serious one in the event of a second offence. But the warning has to be live.

As the Gilbert and Sullivan song goes: "let the punishment fit the crime"

That does not mean that warnings can be open-ended and remain on someone's record indefinitely. ACAS recommends that they should be disregarded for disciplinary purposes after 12 months for a final written warning and six months for a less serious one.

And tribunals are prepared to enforce this rule. The Court of Session (the Scottish Court of Appeal) held in **Diosynth -v- Thomson** (2006, LELR 111) that expired warnings cannot be taken into account when deciding whether to dismiss an employee.

Airbus -v- Webb

The EAT agreed that this was the correct approach in **Airbus UK -v- Webb** (2007, weekly LELR 5), but left the door open for employers to undermine even this simple protection.

It said that if employers were going to be "denied the right to regard expired warnings in any circumstances then they must be allowed reasonable flexibility to formulate their rules to allow for exceptional cases which will inevitably make them more complex".

It said that employers are entitled to extend the period of time before the warning expires where it was justified by the seriousness of the misconduct or where a warning was, in fact, an act of leniency.

It also suggested that employers might be justified in extending the period for a repeat offence for which an earlier final written warning had been given. The EAT warned that any rules must always be carefully drafted and brought to the attention of the employees.

The net effect of the Airbus decision may be to prompt employers to extend the lifespan of warnings generally thereby increasing the vulnerability of employees subject to them. This is to be resisted as the decision makes clear that such adjustments should be considered on a case by case basis and generally limited to exceptional circumstances.

It is important to note that the ACAS guidance deals with the expiry of warnings for disciplinary purposes. Expired warnings may generally be taken into account for other purposes such as redundancy selection, and it is common for redundancy selection criteria to refer to someone's disciplinary history.

But employers still have to ensure that their decisions are balanced and reasonable.

Consider for instance who has the better disciplinary record: a longstanding employee with a perfect record since a final written warning 10 years ago; or one with no disciplinary history but with only five years' continuous employment.

Disproportionate sanctions

As the Gilbert and Sullivan song goes: "let the punishment fit the crime." Employers have a wide range of options available to them once they have formed a reasonable belief in the guilt or incapability of an employee. This "band of reasonable responses" allows sanctions ranging from the harsh to lenient. But whatever sanction is chosen, it must be fair.

If the employer gives a warning disproportionate to the offence, this may be a breach of the implied duty of mutual trust and confidence, leading to a potential constructive dismissal situation (see below).

This can arise if one employee gets a harsher penalty than another for the same offence. This inconsistency links in to issues of proportionality and is a way in which an employee can seek redress.

However, it is important not to get too carried away with this potential line of defence. The two cases have to be very similar for the argument to succeed. Even simple differences such as one employee admitting guilt and the other denying it, will usually be enough to justify a disparity in treatment.

In **Airbus UK -v- Webb**, the EAT said that it was more important to consider the individual circumstances of the dismissal than to adopt a "tariff" approach of seeing whether the claimant had been treated differently from someone else.

Challenging warnings

If an employee feels that a warning is disproportionate or unfair, they should appeal in the first instance. If their appeal fails, however, there is little more they can do, except bring a claim of constructive dismissal on the basis that the implied duty of mutual trust and confidence has been breached.

This though is inevitably something of a gamble as it requires the employee to give up their job.

End of term

Contract staff used to be at a serious disadvantage compared to permanent staff. **Victoria Phillips**, head of Thompsons' Employments Rights Unit, explains how the latest legislation has improved matters

Until 2002, there was nothing to stop employers from treating fixed-term staff differently to permanent employees. The result was that they could (and often did) keep them dangling on an endless succession of fixed-term contracts, at the end of which they could fire them.

That all changed with the introduction of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. These gave fixed-term employees a number of rights, most notably the right to become permanent after four years of successive fixed-term contracts.

Who is a fixed-term employee?

A fixed-term employee is someone with a contract of employment that is due to end when a specified date is reached, a specified event does (or does not happen) or a specified task has been completed.

Less favourable treatment is when a fixed-term employee does not get a benefit that a comparable permanent employee gets – like a bonus

The Department of Trade and Industry (DTI) suggests in its guidance that this could include employees doing seasonal or casual work; employees covering maternity, parental or paternity leave or sick leave; employees hired to cover for peaks in demand; and employees whose contracts expire when a specific task is completed.

The regulations cover all employees, except members of the armed forces, agency workers and apprentices.

What is the "equal treatment" principle?

This states that a fixed-term employee cannot be treated "less favourably" than a comparable permanent employee just because they are on a fixed-term contract, unless the employer can objectively justify the difference.

Who can they compare themselves with?

Fixed-term employees have to compare their treatment with a "comparable permanent" employee who works for the same employer in the same "establishment", doing the same or broadly similar work.

If there is no one who fits that bill where they actually work, then they can compare themselves with someone in another of their employer's "establishments", if there is more than one.

They cannot, however, compare themselves with someone who works for an associated employer. It has to be the same one. Nor can they compare themselves with a permanent employee who has left. The comparator has to be an actual named person, not a hypothetical comparator (unlike the sex and race discrimination legislation).

What is less favourable treatment?

Less favourable treatment is when a fixed-term employee does not get a benefit that a comparable permanent employee gets – for instance a bonus, training or promotion opportunities. The employer can, however, objectively justify their treatment of the employee.

In **Coutts & Co plc and Royal Bank of Scotland -v- Cure and Fraser (2004)**, the Employment Appeal Tribunal (EAT) said that the bank had breached the regulations when it excluded fixed-term employees from the right to a bonus.

It was irrelevant that it had also excluded other non-permanent groups of workers.

What is objective justification?

The DTI says that employers can justify the different treatment if they can show that it:

- is to achieve a legitimate objective, for example a genuine business objective
- is necessary to achieve that objective
- is an appropriate way to achieve that objective.

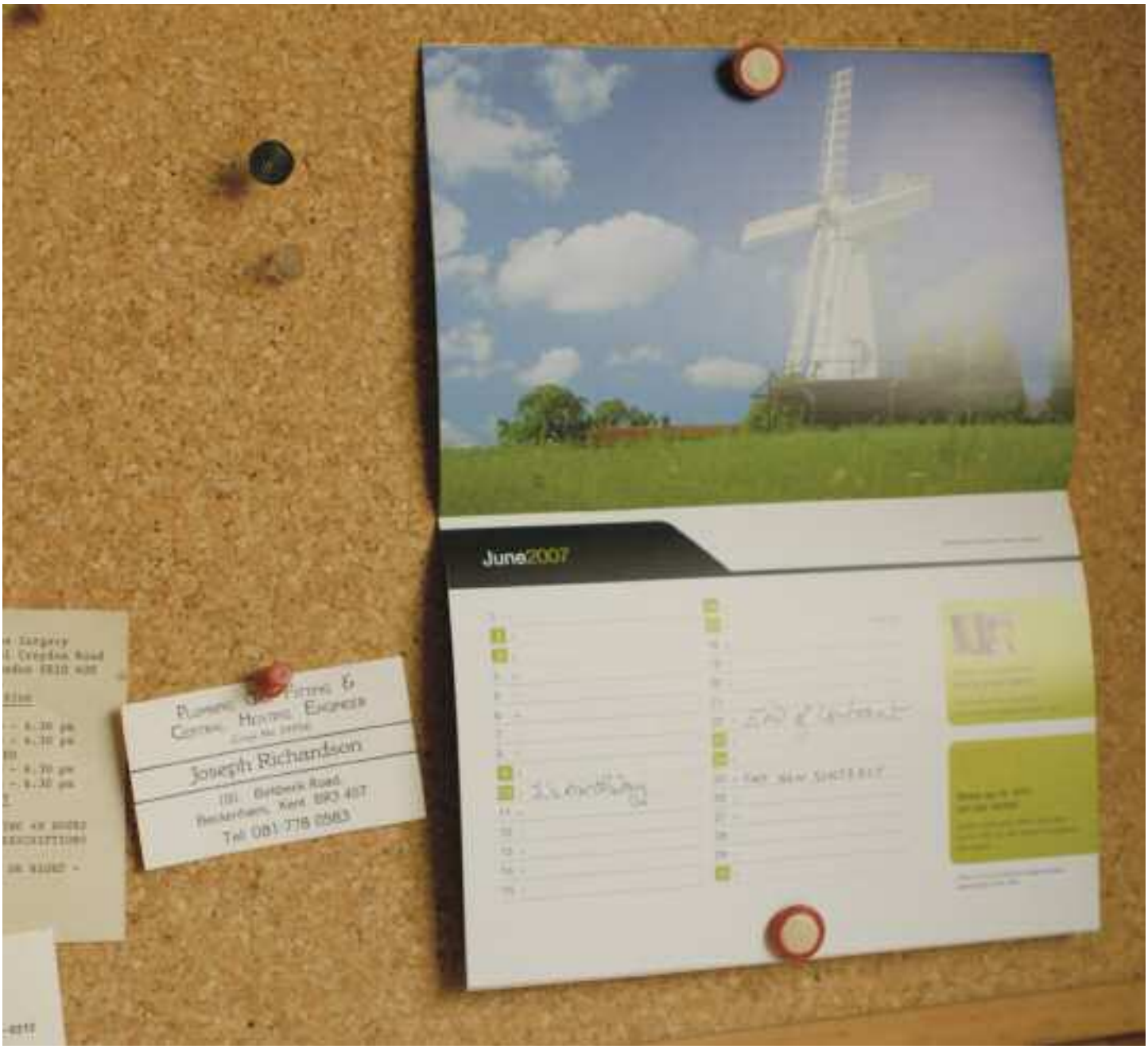
For instance, an employer may decide not to offer a fixed-term employee a company car, although a permanent employee doing a similar job has one.

The employer may be able to justify this on the basis that the cost would be disproportionate to the benefit offered, particularly if they can show that there was another way for the fixed-term employee to get about and that they would reimburse expenses.

What is the pro rata principle?

There are some benefits that employers offer on an annual basis or over a specified period of time, such as season tickets, season ticket loans, health insurance or staff discount cards. If the fixed-term contract is for less than the period for which a benefit is offered, employers should offer to pay it in proportion to the duration of the contract.

However, if this is not possible, employers may objectively justify not giving it to fixed-term employees if the cost of doing so would be disproportionate to the benefit the employee received.



How is different treatment compared?

There are two main ways – going through the terms of the contract one by one, or by looking at the overall package.

The first involves looking at each individual term of a fixed-term employee's employment package to ensure they are the same as the equivalent term of the comparable permanent employee.

The second involves looking at the overall package of terms and conditions offered to the fixed-term employee to ensure it is no less favourable than the comparable permanent employee's overall package. This allows employers to balance a less favourable condition against a more favourable one.

The DTI says the value of benefits should be assessed on the basis of their objective monetary worth, and gives the example of a fixed-term employee who is paid the same as a comparable permanent employee, but gets three days' fewer paid holiday per year. To ensure that the overall employment package is no less favourable, the fixed-term employee's annual salary is increased to reflect the value of three days' holiday.

Employers can still objectively justify not giving a particular benefit if they choose to use a package approach. And the regulations do not necessarily require them to provide compensatory benefits where they can objectively justify excluding the fixed-term employee.

What is the limit on the use of successive fixed-term contracts?

The regulations state that, once an employee has been employed on two or more successive fixed-term contracts for four years (from July 2002), their employment becomes permanent (LELR

105). Employers can, however, objectively justify continuing with a fixed-term contract beyond the four-year period.

Can they ask for evidence?

After the four-year period, fixed-term employees have the right to ask their employer in writing for a written statement confirming that they now have permanent status. They can also ask for a written statement if they think they have been treated less favourably than a permanent employee.

When a fixed-term contract comes to an end, that termination is classified in law as a dismissal. This means employees have the right, after a year, not to be unfairly dismissed

The employer must produce the statement within 21 days of the request and if they maintain that the employee is still fixed-term, they must provide reasons. The employee may use the statement at an employment tribunal hearing if they decide to bring a complaint.

How can the four-year limit be changed?

The regulations allow employers and union representatives to vary the limit on the duration of successive contracts upwards or downwards, or to limit their use by applying one or more of the following:

- a limit on the total duration of successive fixed-term contracts
- a limit on the number of successive fixed-term contracts
- a list of permissible objective reasons justifying renewals of fixed-term contracts.

Objective reasons for renewing fixed-term contracts may include the specific needs of particular professions, for example professional sport and the theatre.

Does expiry of a fixed-term contract constitute less favourable treatment?

No. In a case taken by Thompsons (see LELR 97), the Court of Appeal ruled in **Webley -v- the Department for Work & Pensions (2005)** that a failure to renew a fixed-term contract did not constitute less favourable treatment, saying that "it is of the essence of a fixed-term contract that it comes to an end at the expiry of the fixed-term."

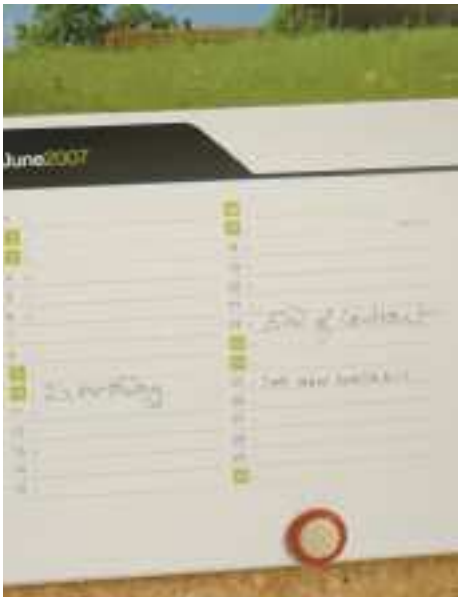
Does expiry of a fixed-term contract constitute dismissal?

Yes. When a fixed-term contract comes to an end automatically, say when the task for which they were engaged has been completed, that termination is classified in law as a dismissal.

This means employees on such "task contracts" have the right, after a year, not to be unfairly dismissed; the right to a written statement of reasons for dismissal; and the right (after two years) to statutory redundancy payments.

Is the reason for dismissal not always fair?

Just because the reason for dismissal is likely to be fair by reason of redundancy does not mean that the dismissal is



necessarily fair. Employers still have to show that they acted fairly and that they complied with the statutory dismissal procedure, in particular they should state the reasons for termination and allow an appeal against dismissal.

However, if they are making 20 or more employees redundant in a 20-day period, then employers have to comply with the obligations to inform and consult unions under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

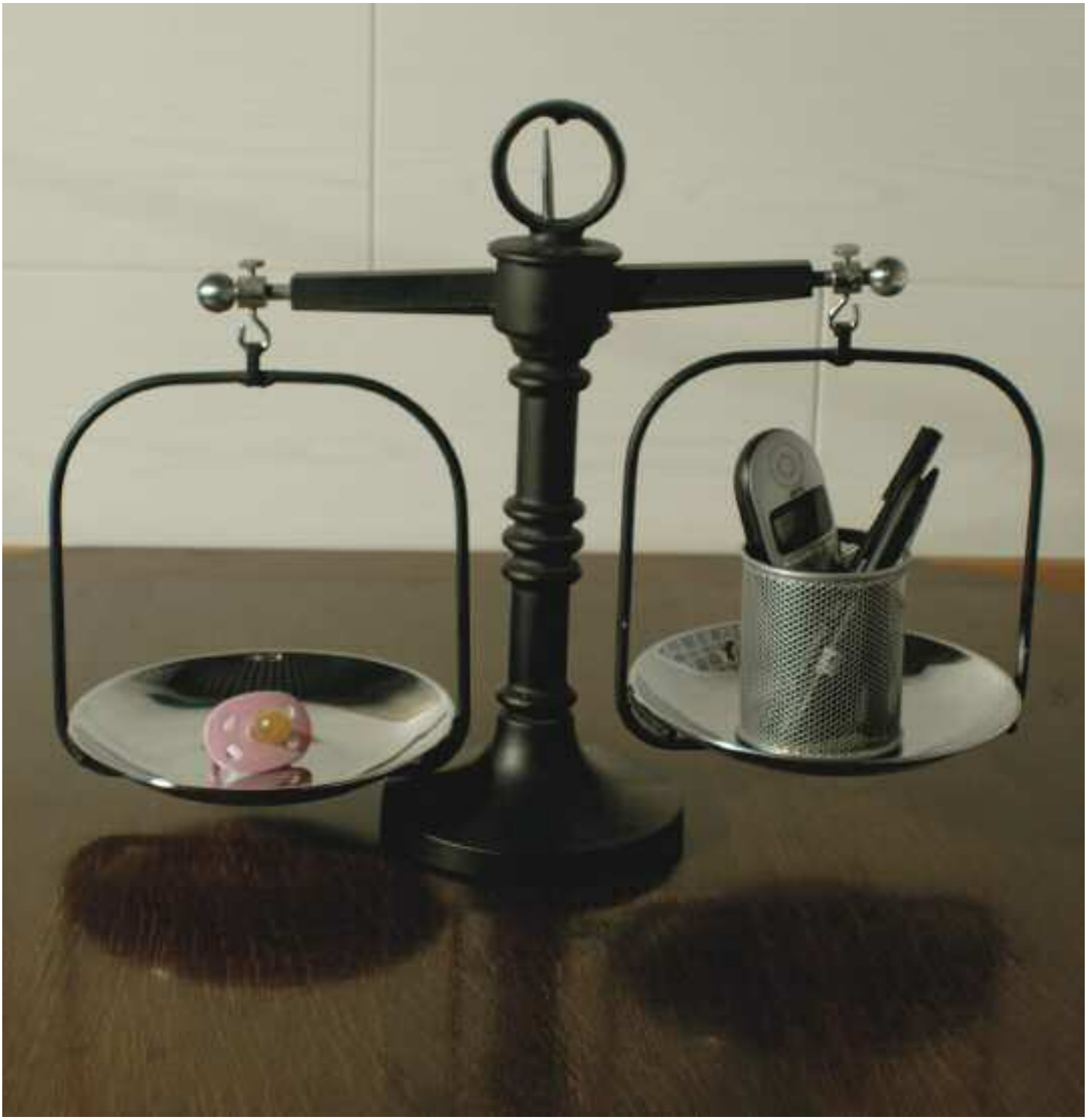
Even if section 188 does not apply, employers must still observe the "equal treatment" principle so that fixed-term employees are not necessarily first "for the chop". This is a significant change as in the past many employers used to agree to let fixed term workers go before making any redundancies in the permanent workforce. This would now amount to less favourable treatment.

Can employers give notice to end the contract?

The EAT in **Allen -v- National Australia Group Europe Ltd (2004)** certainly thought so. It said that just because the employer and/or the employee can give notice to bring the contract to an end at any earlier date does not alter its status as a fixed-term contract.

A balancing act

An overview of the Work and Families Act 2006



The Work and Families Act 2006 introduced a number of changes to maternity, adoption and paternity rights. Although these came into force on 1 October 2006, they only took effect in relation to employees whose baby was due or whose child was expected to be placed for adoption, on or after 1 April 2007.

Jo Seery, a solicitor in Thompsons' Manchester office, provides an overview of the main provisions of the new Act.

Main changes

The main changes introduced are:

- an entitlement to 52 weeks maternity leave
- an increase in statutory maternity pay to 39 weeks
- the introduction of "keeping in touch" days, which allow an employee on statutory maternity or adoption leave to work for up to 10 days during their leave without any loss of pay
- removal of the small employers exemption so that all employees have a right to return from additional maternity or adoption leave to the same or similar job
- the right to request flexible working for employees with caring responsibilities for adults
- additional paternity leave for employed fathers or partners of the mother and/or an adopter up to a maximum of 26 weeks following the birth or adoption of the child.

The Act introduces "keeping in touch" days, which allow employees to work for up to ten days for their employer during their leave period without losing pay for that week

Maternity and adoption leave

One of the biggest – and most welcome – changes is that all pregnant women whose baby is due on or after 1 April 2007 are now entitled to 52 weeks maternity leave regardless of their length of service.

However, their rights are not the same throughout their leave. For the first 26 weeks, they are entitled to all their contractual benefits (except for pay), but for the second 26 weeks they are only entitled to "residual" contractual rights. These include entitlements to notice pay, redundancy pay and the statutory dismissal and disciplinary and grievance procedures.

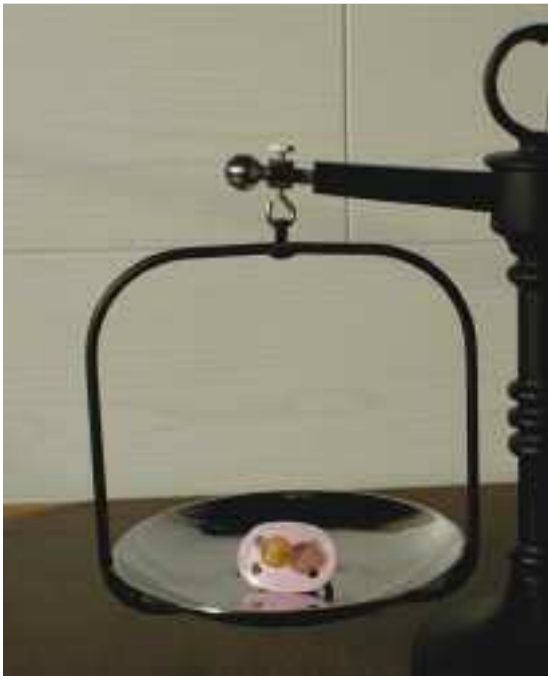
Adoptive parents must have worked for their employer for 26 weeks by the week in which they were notified that they had been matched with a child to qualify for 52 weeks adoption leave.

Extension of notice of return

If an employee wants to return to work early from maternity or adoption leave, they must now give their employer eight weeks notice before the end of their leave.

If they don't do that, their employer can postpone their return to work by eight weeks, although not if that would take them past the end of their statutory maternity or adoption leave period.

Likewise, if an employee changes their mind about the return date, and wants to come back earlier than the original date, they also have to give eight weeks notice



of the date on which they intend to return.

"Keeping in touch" days

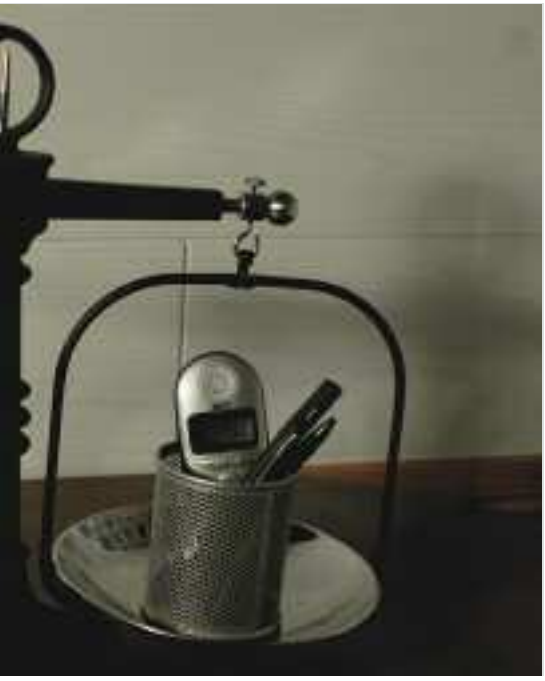
The Act also introduces "keeping in touch" days. These allow employees to work for up to ten days for their employer during their leave period without losing pay for that week and without bringing their leave to an end.

The definition of "work" includes training or any activity that allows the employee to keep in touch with her employer.

Both parties have to agree on the work to be done, and employers cannot force employees to work during the statutory maternity or adoption leave period. If someone refuses to work on "keeping in touch" days they have the right not to be subjected to a "detriment" (disadvantage) or to be dismissed for that reason.

There are no specific provisions about whether or not employees should be paid for "keeping in touch" days, but given that they are working under their normal contract, they should be paid the normal contractual rate.

Once the ten "keeping in touch days" have been used up, the employee will lose



a week's pay for any week in which they do work under the contract, even if they only work for a couple of hours or part of that week.

In addition, the changes allow either party to make reasonable contact with each other during the statutory maternity/ adoption leave period without the leave period being brought to an end.

Small employer exemption

From 1 April 2007, employers with five or fewer employees are no longer exempt from claims for unfair dismissal connected with pregnancy, childbirth, maternity leave or adoption leave if they fail to allow an employee to return to the same or similar work from additional maternity or adoption leave.

Maternity pay

From 1 April 2007, pregnant women became entitled to 39 weeks paid leave (increased from 26), and the Government has said it intends to extend this still further to 52 weeks by the end of this parliament. Statutory Maternity Pay (SMP) now consists of 90 per cent of average earnings for six weeks, with 33 weeks paid at either the standard rate of £112.75 or 90 per cent of average weekly earnings, whichever is lower.

If an employer awards a pay rise between the 15th week before the baby is due and the end of maternity leave, the employer must pay the extra that is due in terms of SMP. The longer maternity leave period makes it more likely that pay increases will be awarded during it, so women need to keep an eye on any pay negotiations during their statutory maternity leave period.

As well as the amount of maternity pay payable, the way in which statutory maternity pay (SMP) is calculated has also changed. SMP for women whose baby is due on or after 1 April 2007 will start from any day of the week when notice is given to the employer, rather than the Sunday following the day she stopped work. This means that the start of the maternity pay period will now be the same as the start of maternity leave.

If an employee leaves her employment after the 11th week before her baby is due, but before the maternity pay period is due to start, her maternity pay period will start from the day after her employment ends instead of the following Sunday.

If a woman is absent from work for a pregnancy related reason in the last four weeks before the leave is due to start, then the maternity pay period will automatically be triggered.

Paternity leave

The Work and Families Act 2006 introduces a new statutory right to additional paternity leave and pay for employees during the second six months of the 12 months maternity leave period, although these have not yet been introduced.

The Government has indicated that it intends to bring in these changes by the end of this parliament, in addition to the current entitlement of two weeks statutory paternity pay.

The additional paternity leave is essentially a way to share the second period of 26 weeks leave between the mother, father or partner. A father or partner will be entitled to additional paternity pay, which is most likely to be paid at the same rate as the current statutory paternity pay (£112.75 or 90 per cent of average earnings whichever is less). However, this will only be paid if the mother or adopter has not used up all their entitlement to either SMP or statutory adoption pay when they return to work.

Flexible working

Employees with 26 weeks service now also have the right to request flexible working if they have caring responsibilities for adults. To qualify, the employee must either be, or expect to be, caring for a person aged 18 or over who:

- is married to, or is a partner or civil partner of the employee, or
- is a relative of the employee, or
- living at the same address as the employee.

The term "relative" is defined specifically and includes not just immediate family (mother, father, brother, sister) but also step relations, uncles, aunts and grandparents as well as adoptive parents.

Comment

These changes certainly simplify the provisions in relation to maternity and adoption rights, with effect from 1 April 2007, while the provisions relating to paternity and flexible working are subject to further legislation.

Good employers will, however have already started negotiating with trade unions on how to improve flexible work and leave provisions with the aim of better balancing work and family life without the spur of legislation.

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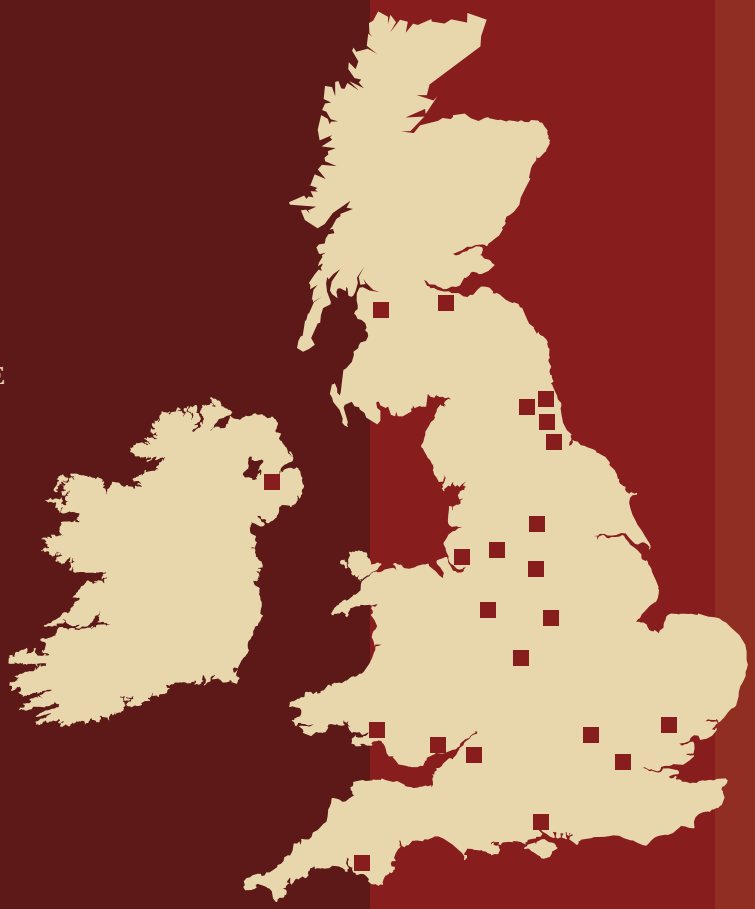

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