



EMPLOYMENT MEMO 2007

Newsletter Issue 1

April 2007

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Welcome to the Employment Law Memo 2007 newsletter, highlighting important recent developments and proposals. This newsletter consolidates the 93 update items for February, March and April and also focuses on the legislative changes that have come into force this April. For the online update service, please click [here](#) for a month-by-month listing of the cases, legislation and proposals covered, and for the facility to search by topic or specific paragraph. Readers can now also register to receive Memo updates by email as soon as they are published online. Further, for those that use the Employment Memo 2007 CD, these updates are now downloadable onto the CD.

We hope you find our updating service useful and informative and welcome any comments you may have as to how we can improve our service.

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Legislative changes in April 2007

As a reminder, this section highlights a number of important legislative changes which occur this month. These have all been covered in detail in Employment Memo 2007 and/or in updates. Cross-references are given so that readers can access further information as required.

Rights of parents and carers

Increases to statutory pay and allowances

On 1 April, the basic rate of statutory maternity pay, as well as the rate of maternity allowance, statutory adoption pay and statutory paternity pay, increase from £108.85 to £112.75 a week (£4402, £4480, £4500, £4554 and £4600).

Increased rights for parents

1 April also sees changes to maternity and adoption provisions under the Work and Families Act 2006. These changes apply to employees on maternity or adoption leave whose expected week of childbirth or placement for adoption falls on or after 1 April.

Such employees are entitled to longer periods of statutory maternity or adoption pay (39 rather than 26 weeks), and are entitled to do up to 10 days' work during leave without jeopardising their entitlement to statutory leave or pay.

Further, the length of service requirement for additional maternity leave no longer apply and employees who qualify for ordinary maternity leave are automatically entitled to additional maternity leave.

Finally, employees' obligations also change to and employees who wish to return before the end of their maternity leave period must give 8 instead of 4 weeks' notice (£4404).

Increased rights for carers

The statutory right to request flexible working, which was previously available only to parents with children under 6 years old (or under 18, if the children were disabled) is extended on 6 April to people who care for adults, under the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006. To qualify for the right, an employee must care for an adult who is either his or her spouse or civil partner, or a relative, or who lives at the same address as him (£4695).

Health and safety

Smoking ban in Wales

From 2 April, enclosed or substantially enclosed public spaces and workplaces in Wales are required to be smoke-free. The Health Act 2006 creates offences of smoking in a smoke-free place and failing to prevent smoking in a smoke-free place

Comment: the equivalent provisions will apply to workplaces in Northern Ireland from 30 April 2007 and to workplaces in England from 1 July 2007 (see Update 1 item 18 to £4980)).

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Directors

Provisions repealed

The following provisions are repealed on 6 April 2007 (SI 2006/3428):

- the prohibition on companies making payments to their directors under their service contracts which are tax-free or calculated by reference to income tax rates (contained in s 311 Companies Act 1985) (¶2119);
- the obligation on directors to disclose their interests in the shares in or debentures of their companies and associated companies (in s 324 Companies Act 1985) (¶2170); and
- the provisions relating to public company directors aged 70 or more (ss 293, 294 Companies Act 1985) (¶2170).

Sickness injury and absence

New rate of statutory sick pay

Statutory sick pay increases from £70.05 to £72.55 a week on 6 April (see Update 3 item 6 to ¶4165).

Information and consultation in the workplace

New duties for medium-sized businesses

The effects of the Information and Consultation of Employees Regulations 2004 are extended on 6 April to businesses with at least 100 employees (¶7658).

Disputes and grievances

Statutory dispute resolution procedures

Also from 6 April 2007, and following the introduction of the Employment Act 2002 (Amendment of Schedules 3, 4 and 5) Order 2007, new disputes heard under the European Public Limited Liability Company Regulations, the Information and Consultation of Employees Regulations and the Occupational and Personal Pension Schemes Regulations will be required to follow the statutory dispute resolution procedures (see Update 1 item 37 to ¶¶7852, 7782, 3448).

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Equality at work

Gender equality duty in public sector

From 6 April, public sector employers are bound by a duty to promote equality between men and women. The Equality Act 2006 also requires public sector employers to gather information regularly on the composition of their workforce, to set objectives to achieve gender equality, and to assess the impact of existing and new workforce proposals in light of the duty to promote equality (see Update 1 item 30 to ¶5801)

New definition of religion or belief

From 30 April, section 93 of the Equality Act 2006 takes effect. This section changes the statutory definition set out in the regulations outlawing discrimination on grounds of religion or belief. The regulations previously defined these terms as “any religion, religious belief or similar philosophical belief” (¶5383). From 30 April, the word “similar” no longer applies.

The purpose of the government in making this change is to make it absolutely clear that atheists and agnostics are protected from discrimination. The change confirms the existing practice of the tribunals, which is to protect those who do not believe in any particular religion (see Update 3 item 1 to ¶543). If the language has wider effects, then we will report these in updates as the cases come in.

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Cases

Types of employment relationship

Employee or self-employed?

Controlling shareholder

See EM: ¶43

Gladwell v Secretary of State for Trade and Industry [2006] EAT case 0337/06; new reference [2007] ICR 264, EAT

While, in general, a majority shareholder is unlikely also to be an employee, there is no rule to the effect that a shareholder can never be an employee. In deciding whether a shareholder is indeed an employee or self-employed, the tribunal must consider all the facts of the case and not fall into the trap of treating the shareholder's control of the organisation as decisive.

Whether self-employed or worker

See EM: ¶46

James v Redcats (Brands) Ltd [2007] EAT case 0475/06

Where a person can refuse work offered to them, because the person is "unwilling" to take it, that person will not normally be defined as a worker. Where however a person who is "unable" to do their work is required to find a substitute to fill their place, that person is under an obligation to an employer. That person will fall within the definition of a worker. In this case, a motorcycle courier argued that she was a worker and, as such, was entitled to the national minimum wage (¶2868). Her employment was governed by a document headed "self-employed courier". The courier argued that this document did not reflect the realities of her work. The company set deadlines for delivery and required paperwork to be done. Where the courier could not attend work, for example when she was on holiday, she would find a substitute.

The EAT was willing to treat the courier's use of a substitute while she was on holiday as an example of a substitution provided while the worker was unable to perform her duties.

Pre-employment

Recruitment and selection

Discrimination

See EM: ¶¶543, 5383

Glasgow City Council v McNab [2007] EAT case 0037/06 (Scotland)

In a recent example of a case concerning discrimination in recruitment, an atheist was successful with a discrimination claim on the ground of religion or belief where he applied for a post at a Catholic school and was not considered on the grounds that he was not a Catholic.

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Employment contract, variation and breach

Terms implied by common law

Mutual trust and confidence

See EM: ¶1245

Baldwin v Brighton and Hove Council [2007] IRLR 232, EAT

With regard to the duty of mutual trust and confidence, EAT has confirmed that the employer must refrain from conduct “calculated or likely to destroy or seriously damage the relationship of trust and confidence” (see ¶1245 especially *Woods v WM Car Services (Peterborough) Ltd*).

Comment: The EAT held that cases which had suggested that an employer was required to refrain from conduct “calculated and likely to destroy or seriously damage the relationship of trust and confidence” (i.e. cases which imply a two-stage test due to the first “and”) were incorrect.

Unenforceable terms

Unfair Contract Terms Act 1977 (UCTA)

See EM: ¶¶1340+

Commerzbank AG v Keen [2007] IRLR 132, CA

Where a person deals as a consumer or on the other party’s written standard terms of business, terms excluding or restricting liability for contractual breaches or entitling the seller to perform his contractual obligations in a substantially different way than that reasonably expected of him (or to give no contractual performance at all) are subject to the test of reasonableness (s 3 UCTA 1977). The Court of Appeal has held that UCTA does not apply to a contract term regarding an employee’s remuneration and considered that previous cases on application of UCTA to employment contracts were not entirely satisfactory and not binding. The Court firmly held that an employee does not deal as a consumer with his employer in respect of pay for work.

The Court of Appeal went on to hold that neither does the employee deal with his employer on his employer’s written standard terms of business. In this case the employer’s business was banking and employee bonus terms could not be said to be standard terms of the business of banking, they were terms of remuneration of certain employees of the bank.

Comment: Following this decision it is extremely unlikely that UCTA will apply in relation to any aspect of an employee’s contract of employment. Only if, under the contract of employment, the employer supplies services or goods to the employee for his use, then the employee to whom they are supplied for his consumption could be reasonably be regarded as a consumer of the goods or services supplied and consequently be protected by UCTA.

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Information to be provided in writing

Written statement of particulars

See EM: ¶¶1461, 1405

Scott-Davies v Redgate Medical Services [2006] EAT case 0273/06; new reference [2007] ICR 348, EAT

The employer must provide written details of the main terms and conditions of employment to all employees whose employment lasts for at least 1 month. Where the statement has not been provided, an employee may make a reference to a tribunal. The purpose of the reference is to obtain an order setting out what the terms are. Where in the course of other proceedings (typically in unfair dismissal cases), it becomes clear that the employee did not receive a written statement, there are financial remedies for the employee bringing the claim. Where however a claimant S-D who had no other successful proceedings sought to bring a reference, the EAT ruled that it should not be heard. S-D had already been dismissed, so there was no purpose in setting out his terms and conditions. S-D had been in employment for less than one year and could not bring a case for unfair dismissal. Given that there is no free-standing right to complain of a breach of the duty to provide contractual terms, the failure of S-D's unfair dismissal claim automatically also meant the failure of S-D's reference for a written statement of terms.

Staff handbook

Example of clause conferring contractual right

See EM: ¶¶1483, 1295, 1105

Keeley v Fosroc International Ltd [2006] IRLR 961, CA

The Court of Appeal has considered a clause regarding contractual redundancy pay, which was set out in a staff handbook. The term in the handbook read: "Those employees with 2 or more years continuous service are entitled to receive an enhanced redundancy payment from the Company, which is paid tax free to a limit of £30,000." In speaking clearly of an entitlement, it was held, the term should properly be regarded as conferring a right. The court therefore concluded that the term had contractual effect.

Flexible working

Fixed-term employees

Dismissal before end of fixed-term contract

See EM: ¶¶1992, 1027

Prakash v Wolverhampton City Council [2006] EAT case 0140/06

The EAT has considered the case of a worker employed on a fixed-term contract who was dismissed from his post with several months of the contract remaining and subsequently reinstated following appeal. There was a lengthy, 16-month delay before the appeal was heard, and by the time the worker was reinstated, his initial contract had already come to an end. The worker suggested that he should be entitled to a period of work equivalent to the period lost while his appeal was being heard. The employer held that the contract was complete. There was no ongoing duty to provide the employee with further work. In such circumstances, the EAT held, the appeal did no more than reinstate the original contract. The employer's liability was for the period ending with the date at which the contract was originally intended to end.

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Agency workers

1. Whether can be employed by agency and end-user?

See EM: ¶¶2040, 2046

Cairns v Visteon UK Ltd [2006] EAT case 0494/06; new reference [2007] IRLR 175, EAT

Where a tribunal is asked to consider whether an agency worker works on a contract for services as a worker (with the agency) or on a contract of service as an employee (with the end-user), the EAT has held, it will not be possible for the agency worker to be employed on both forms of contract at once. A worker cannot be employed by two employers at the same time and for the same purpose. In this case, an administrative assistant, C, worked in V's offices for three years as an employee, after which she was employed for a further four years on a contract for services by an agency but still at V, and for the same manager. C was accused of falsifying timesheets, and although a V investigation found that the accusation was false, the company refused to take her back. She was dismissed. Before the EAT, C accepted that she had been employed on a contract of service with the agency, but went on to argue that in reality she had been employed by both the agency and by V. The EAT described this argument as "new legal territory".

In a previous Court of Appeal case (*Dacas v Brooks Street Bureau (UK) Ltd* [2004] IRLR 358, CA), the court had considered, and not ruled out the possibility, that an employee might indeed be simultaneously employed on both an agency contract and a contract of employment. In this case, however, the EAT came down against that possibility and held that for policy reasons, there could not be simultaneous contracts for services and of employment. If there were two employers, then a worker could not know which employer had the power to dismiss, nor to which employer he should bring any grievance. A contract for service is incompatible, the EAT held, with a contract of service. In the same employment, a worker cannot be employed on both. In this case, the EAT held that C in fact was employed by the agency under a contract for services.

2. Contractual relationship with end user

See EM: ¶¶2040+, 2049, 2051

James v London Borough of Greenwich [2006] EAT case 0006/06; new reference [2007] IRLR 168, EAT

The EAT has addressed the situation of agency workers who seek to show that they are in a contractual relationship with an end user. Only rarely, the EAT has ruled, should a tribunal find that there was indeed a contract between these two parties. In most situations, the end user is not paying wages, indeed the end user cannot insist that the agency provides any particular worker at all, and the agency worker will not be subject to the company's disciplinary and other procedures. Typically, the express contracts between worker and agency and between agency and end-user will usually be sufficient to explain the worker's services.

Further, if a genuine agency arrangement exists at the start of the employment, then there must be some words or conduct, subsequent to the relationship commencing, to enable the tribunal to conclude that the reality of the relationship is only consistent with a deemed employment contract between the worker and the end user. Such an employment contract is most likely to be found in situations where a worker is taken on by way of a conventional contract, and only subsequently has an agency arrangement imposed on them. In such circumstances, the tribunal is not implying a contract as such, but arguing that the original employment contract never came to an end. The EAT also disagreed with comments made by Sedley LJ in *Dacas v Brooks Street Bureau (UK) Ltd* [2004] IRLR 358, CA to the effect that a lengthy period of employment may serve to convert an agency contract into a contract between the worker and the end user. In the words of the EAT, "the mere passage of time does not justify any such implication".

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3. End-user/agency relationship

See EM: ¶2051

Craigie v London Borough of Haringey [2007] EAT case 0556/06

Agency workers will usually have a relationship with their agency on a contract for services. Only rarely will they be found to have an employment relationship with the end-user. In this case, the EAT considered whether the guidance as to “triangular” situations previously provided by the Court of Appeal in the case of *Dacas (Brook Street Bureau (UK) Ltd v Dacas* [2004] IRLR 358, CA) should be treated as binding authority. An employee, C, argued that the facts of their situation were identical to those of D in *Dacas*. Accordingly, it followed that they should be treated as an employee. Citing the alternative authority of *Muscat (Cable & Wireless v Muscat* [2006] ICR 975, CA), the EAT held that the rules set out in *Dacas* should be treated as guiding rather than binding. They were general rules of construction. Even had the facts been identical, which they were not, the tribunal would have been right to find that C was not an employee.

Directors

Duties and statutory obligations

Fiduciary duties

See EM: ¶2139

Foster Bryant Surveying Ltd v (1) Bryant and (2) Savernake Property Consultants Ltd [2007], EWCA Civ 200

A former director may not take for himself a business opportunity pursued by his former company, where part of his motivation in resigning was to take advantage of that opportunity, or where it only arose as a result of his position as director. The Court of Appeal has recently held that this fiduciary duty may not apply where the former director does not initiate the business opportunity. In this case, a director B was compelled to resign from a company FBS. B having resigned, SPC (the main client of FBS) sought him out and invited him to work for them as a consultant, which reduced the business opportunities open to FBS. Given that the initiative had come from the client SPC, and not from the former director B, there was no breach of B's fiduciary duties.

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Company information

Confidential information and confidentiality

Freedom of expression

See EM: ¶2410

HRH Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776

The Court of Appeal has held that there is an important public interest in observing duties of confidence. Employers (and anyone else who enters into other arrangements that carry a duty of confidence) ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. However, since the Human Rights Act 1998 the test must be one of proportionality and when considering whether it is necessary to restrict freedom of expression in order to prevent public disclosure of information received in confidence the issue is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider if, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public. A duty of confidentiality that has been expressly assumed under contract will carry more weight, when balanced against the right of freedom of expression, than a duty of confidence that is not buttressed by express agreement. However, the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case.

In this case, the Prince of Wales successfully sued Associated Newspapers for breach of confidence and infringement of copyright in relation to handwritten journals kept by Prince Charles which were provided to the newspaper by an employee of the Prince in breach of her contract of employment.

Restraints and restrictive covenants

1. Example of intention to compete

See EM: ¶2512

Shepherds Investments Ltd and anor v Walters and ors [2007] IRLR 110, HC

An employee must not breach his duty to serve his employer with fidelity. Where an employee sets up a business in direct competition with his employer, that will normally constitute a breach unless any preparations towards competition were no more than preliminary. Here, employees drafted business plans, prepared financial predictions and cash flow summaries, contacted off-shore attorneys and recruited customers who were clients of their existing employers. Their behaviour was held to be more than a preliminary action and consequently did amount to a breach of their duties to serve their employer loyally and in good faith.

Comment: Note that an employer can place further contractual requirements on an employee, to prohibit them from competing or taking steps to compete with the employer (see ¶¶2520+).

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2. Example of no intention to compete

See EM: ¶¶2512, 2520

Helmet Integrated Systems Ltd v Tunnard and ors [2007] IRLR 126, CA

An employee must not breach his duty to serve his employer with fidelity. In deciding whether there has been a breach, the court will look to the employee's job description, to see if their work was work during which an employee would be expect to be bound. In this case the defendant did not breach any fiduciary obligation because his own preparatory activity in designing a competitive helmet could not be described as "competitor activity" in the context of his employment as a salesman. Further, there was no express term of his contract to forbid such activity, nor was it obvious, given his employment as a salesman rather than as a designer, that any other, imprecise terms should be read as creating such a duty.

3. Restrictive covenant protecting confidential information

See EM: ¶2573

Thomas v Farr Plc and anor [2007] EWCA Civ 118

Where the employer relies on a restrictive covenant to protect confidential information, the employer will be required to show that it is not possible to protect the information in any other way, and that the information would cause damage in the hands of a competitor.

In this case, the managing director of a firm of insurance brokers left to join a competitor. His previous employers sought to prevent this employment, relying on clauses of his contract which prevented the director from working for a competitor during a period of 12 months. In his previous employment the director had no access to client details. He argued that any information he did have was in the public domain. The Court of Appeal found, however, that he did have access to information regarding growing a business and acquisition strategy, the running of a company, its turnover and its strategies to maximise profitability. Post employment this knowledge could not be protected except by a restrictive covenant and would be of real assistance to a competitor. Attempts to limit the use of this information were reasonable.

Whistleblowing

1. Qualifying disclosures

See EM: ¶¶2711+

Babula v Waltham Forest College [2007] EWCA Civ 174

To qualify for protection, a disclosure must, in the reasonable belief of the worker making the disclosure, show that some criminal offence, failure to comply with a legal obligation, miscarriage of justice, or danger to health and safety of any individual or to the environment, or the deliberate concealment thereto, has happened or is likely to happen. Further to this, the EAT has held that if a worker mistakenly believed that a legal obligation existed, when in fact it did not, he would not be protected by claiming that he reasonably believed that a legal obligation existed (*Kraus v Penna plc and anor* [2004] IRLR 260, EAT and see ¶2711). However, the Court of Appeal has overturned this principle and held that *Kraus* was an incorrect statement of the law. A belief may be reasonably held and yet be wrong. What matters is that the worker did believe that misconduct took place (i.e. belief that the information in his possession tended to show that a criminal offence had been committed or at the very least that it tended to show that misconduct was likely), and that it was reasonable for the worker to believe so. It is not necessarily fatal to the worker's status as a whistleblower if his belief was factually wrong, nor if the facts which the worker believed to be true did not amount to a legal wrong.

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2. Burden of proof

See EM: ¶¶2761+

Kuzel v Roche Products Limited [2007] EAT case 0516/06

Where an employee claims that he has been dismissed for whistleblowing, and the employer states that he has been dismissed for some other reason, the EAT has rejected suggestions that the shifting burden of proof approach, as required in discrimination cases (see ¶5731), should be used. The following questions should instead be asked:

- has the claimant shown that there is a real issue as to whether the reason put forward by the employer was not the true reason? Has he raised some doubt as to that reason by advancing a whistleblowing reason (i.e. that he was dismissed or suffered a detriment because he made a protected disclosure)?
- if so, has the employer proved his reason for dismissal?
- if not, has the employer disproved the whistleblowing reason advanced by the claimant?

if not, the dismissal or detriment suffered is for a whistleblowing reason.

3. Conduct related to protected disclosure

See EM: ¶2765

Bolton School v Evans [2007] IRLR 140, CA

A worker has the right not to be subject to any detriment on the ground that he made a protected disclosure. The Court of Appeal has confirmed the EAT's decision (see ¶2765) that where conduct is connected in some way to a claimed disclosure, but the conduct is irresponsible and sufficient to justify disciplinary action, the misconduct will not be protected. The court must consider the employer's motive in disciplining the employee. If the employee was disciplined for making a disclosure, then the employee will be protected. If he was disciplined for the associated irresponsible conduct, however, he will not be protected.

4. Time limit

See EM: ¶2766

Arthur v London Eastern Railway Ltd t/a One Stansted Express [2007] IRLR 58, CA; new reference [2007] ICR 193, CA

Where a worker has suffered a detriment for having made a protected disclosure, he can bring a claim to the employment tribunal. One difficulty occurs where the worker claims to have suffered a series of detriments over a lengthy period: section 48(3) of the ERA 1996 states that a worker has 3 months to claim where the last act was "part of a series of similar acts or failures". If the last act is within the time limit, then that part of the case can be heard. But if the previous acts or failures are older, then the court must decide whether the acts were in fact similar. In this case, the Court of Appeal held that whether acts were actually similar will usually depend on who caused the detriments and what their intent was in doing it, whether the acts were concerted or organised, and other factual questions of this type. Evidence as to all the nature of the acts and their similarity will usually be required.

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Remuneration

Bonuses

1. Whether implied term of co-operation

See EM: ¶2829

It has been reported that *Takacs v Barclays Services Jersey Ltd* (see memo point 1 to ¶2829) has settled out of court. In this case, the High Court had allowed a claim to go to trial on the basis that there was a real prospect of success that there was an implied term in the claimant's contract of employment to the effect that the employer would co-operate in, and not prevent, the employee achieving his bonuses. A court decision will now have to wait for another time.

2. Discretionary

See EM: ¶2833

Commerzbank AG v Keen [2007] IRLR 132, CA

The exercise of any discretionary bonus is not absolute and the employer must not exercise it irrationally or perversely, but must do so rationally and in good faith. However, the Court of Appeal has recently highlighted that it would take an overwhelming case to persuade a court to find that the level of a discretionary bonus payment was in fact irrational or perverse where the employer had a very wide contractual discretion and where the area in which the employer operated in was subject to fluctuating market and labour conditions (in this case a bank). Independent evidence would be needed in such circumstances to support the employee's claim of irrationality with regard to the size of his bonus. The Court emphasised that the only function of a court is to decide on the legal limits to with regard to any contractual discretion and whether the employer in question had acted within or without these limits. Apart from this, it remains with the employer, not the court, to judge what he should pay his employees. In this case, the employee, a trading manager for a bank, failed in his attempt to obtain damages for breach of contract in respect of alleged under-payments of his discretion bonus.

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Time on

Working time

1. Remedies

See EM: ¶¶3769

Sayers v Cambridgeshire County Council [2007] IRLR 29, HC

Where an employer breaches a part of the Working Time Regulations, and this breach concerns daily and weekly rest periods, in-work breaks, compensatory rest or annual leave, a worker can bring a complaint to an employment tribunal. Where, however, a worker is required to work in excess of 48 hours per week, this breach does not enable the worker to bring a claim.

In this case, which concerned a senior manager who regularly worked 50-60 hours a week, the High Court reaffirmed the above rules. The Court further considered submissions that a breach of the maximum working week gave rise to some other private legal right of action: such as an action for breach of statutory duty, or a claim by way of the direct effect of the European Working Time Directive, or a claim by reference to other health and safety legislation. The Court rejected these arguments. In its view, Parliament had not intended to create such rights. Accordingly, the claim for damages failed.

Comment: Note that although there is no statutory entitlement to bring a claim, *Barber v RJB Mining UK (Limited)* (see ¶3760) held that the regulations impose an implied contractual obligation on employers not to require workers to work in excess of 48 hours per week. The High Court in *Sayers* held that for S to succeed in a claim for damages for breach of a contractual claim, S was required to establish that her damages were foreseeable. In this case as she could not show that her damages were foreseeable (see Update 3 item 9 to ¶4957), her claim could not succeed.

2. Right not to be unfairly dismissed

See EM: ¶¶3769, 3680

McLean v Rainbow Homeloans Ltd [2007] IRLR 14, EAT

Under the Working Time Regulations, unless he has opted out (¶3688) or has unmeasured working time (¶3625), a worker may not be required to work more than 48 hours per week. Where an individual is dismissed for reason of asserting this right, the dismissal is automatically unfair. A worker who is already working more than 48 hours per week without complaint may reasonably refuse to have his hours increased. There is no requirement for the employee to positively assert his rights, as, for example, by mentioning the Working Time Regulations by name when refusing to work outside them. All that is required is that the employer must have required the worker to work outside the Regulations, and the worker in turn must have refused to accede to that requirement.

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Time off

Annual leave

Payment in respect of leave: effect of performance bonuses on calculating a week's pay

See EM: ¶¶4013, 2937, 2935

May Gurney Ltd v Adshead and others [2006] EAT case 0150/06

With regard to statutory annual leave, a worker must be paid, in respect of any period of annual leave to which he is entitled, at a rate of 1 week's pay for each week's leave. Regular contractual bonuses or allowances, such as a fixed attendance bonus, should be included as part of a worker's remuneration for the purposes of the calculation of a week's pay. With regard to performance and productivity bonuses, the EAT has held that these must be included in the calculation of a week's pay for these purposes using the special rules that apply to workers who have normal working hours but whose pay varies (see ¶2937).

Health and safety

Scope of protection

1. Statutory duties: Attorney General's Opinion on "so far as is reasonably practicable"

See EM: ¶¶4800, 4860

Commission of the European Communities v United Kingdom, Case C-127/05

Under the Health and Safety at Work Act 1974, employers have a statutory duty to ensure the health and safety of their workers whilst at work "so far as is reasonably practicable" (s 2 HSWA 1974). This particular clause has been criticised, with the European Commission arguing that the European General Health and Safety Directive (EC Directive 1989/39) requires all members to introduce legislation under which the employer is objectively liable for the health of his workers. It follows from this analysis that the Health and Safety at Work Act, with its emphasis on the balancing of interests, is incompatible with European law. In an important test of these arguments, the Attorney General of the ECJ has delivered an Opinion that European law does not in fact impose strict liability on the employer. The Attorney General therefore concluded that UK health and safety law is compatible with European law. The case will now be heard by the ECJ. The final result of the case will be reported in further updates.

2. Tortious duty

See EM: ¶4819

Robb v Salamis (M & I) Ltd [2006] UKHL 56; new reference [2007] ICR 175, HL(Sc)

If a hazard is not reasonably foreseeable, the employer will not be liable for it. In this case, an oil platform was being fitted at sea. Within the platform, a worker was sleeping on a top bunk. He woke, and attempted to descend using a movable ladder which had not properly been attached. He fell and was hurt. The House of Lords directed that the important question was not whether that particular ladder had caused a similar accident previously. What mattered was that to place a movable ladder next to a bunk bed was to create a risk which, in the ordinary course of human affairs, a reasonable employer might have anticipated.

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3. Health and safety: Extent of employer's duty

See EM: ¶¶4800, 4860

PRP Architects v Reid [2007] ICR 78, CA

An employer has a duty to ensure the safety of his employees while his employees are at work. In this case, an employee injured her hand while leaving her employer's office following the end of her day's work, by means of a lift which was within the same building as her office but was not owned or controlled by her employer. The Court of Appeal directed that while the employee was in the lift she was still at work. The employer was liable for the employee's injury.

Vicarious liability

Third Party

See EM: ¶4850

Yorke and Yorke v Moonlight [2007] EAT case 0025/06

An employer may be vicariously liable for the acts of his employees, or for the acts of his contractor's employees, or for a breach of a statutory duty imposed on its employees. A more difficult situation emerges when an employee claims that the employer should be held vicariously liable for the acts of a third party, such as (for example) a regular customer of the business. In this case, Y, the father of the employer, and the former owner of the business, verbally abused an employee PM, who resigned. The EAT held that she had no cause of action against the employer, since the employer had not encouraged Y in any way.

Stress

1. Confidential advice service

See EM: ¶4954

Intel Corporation (UK) Ltd v Daw [2007] EWCA Civ 70

The Court of Appeal has confirmed the decision of the High Court (see ¶4954) and has held that while an employer who offers a confidential advice service is unlikely to be found in breach of its duty of care, the existing of such a service does not provide a panacea by which employers can discharge their duty of care in all cases.

2. Not reasonably foreseeable

See EM: ¶4957

Sayers v Cambridgeshire County Council [2007] IRLR 29, HC

In a recent example of a case concerning liability for psychiatric injury, the High Court considered the case of S, a senior operations manager, who had a heavy workload and was working 50 to 60 hours per week. In recorded incidents, S had been tearful and upset at work, though these episodes could be seen as the natural reaction of a dedicated employee to confrontation, criticisms or a failure to achieve. S had absences from work, but these were limited and S avoided any reference to her illnesses being caused by depression or symptoms of psychiatric illness. In the period leading up to S's illness, three other employees working in similar posts had suffered psychiatric illness though there was no discernible pattern to these incidents linking them to S's illness. On these facts, the High Court held that S's psychiatric injury was not reasonably foreseeable.

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Equality at work

Sex discrimination

1. Less favourable treatment

See EM: ¶5276

Kettle Produce Ltd v Ward [2006] EAT (Scotland) Case 0016/06

An employer may act unreasonably, but provided he does not treat members of one sex less favourably, he will not have discriminated. This principle was applied by the EAT to the case of a male manager who believed that a woman employee was taking an unauthorised break and chose to enter the company's female toilets to shout at her. A female manager, the EAT held, with the same robust style, would have shown the same insensitivity towards a male cleaner in the male toilets. There was therefore no discrimination.

2. During pregnancy/maternity leave: discretionary bonuses and other specified issues

See EM: ¶5320

R (on the application of Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] EWHC 483 (Admin)

Since the Employment Equality (Sex Discrimination) Regulations 2005 came into effect, on 1 October 2005, there has been statutory provision that less favourable treatment on the grounds of pregnancy or maternity leave will amount to direct sex discrimination. These Regulations were designed to incorporate European Directive 2002/73 into UK law. The protection set out in the Regulations however does not apply to discretionary bonuses and a small number of other specified issues. At a recent judicial review, the High Court held that this section should be recast as it does not comply with the European Directive. As new Regulations are made, they will be reported in subsequent updates.

3. During pregnancy/maternity leave: comparator

See EM: ¶5322

R (on the application of Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] EWHC 483 (Admin)

The SDA 1975 was amended by the Employment Equality (Sex Discrimination) Regulations 2005, which came into effect on 1 October 2005. The purpose of these Regulations was to implement EC Directive 2002/73.

Section 3A of the SDA, as amended, requires a claimant alleging discrimination on grounds of pregnancy or maternity leave to have a non-pregnant woman or a non-mother as a comparator. It is however established case law in the UK that where discrimination is on grounds of pregnancy or on maternity-related grounds, no comparator is required (see ¶5322, in particular *Fletcher and ors v Blackpool Fylde and Wyre Hospitals*). It is also a principle of European law that when a Directive is introduced there shall be no regression. The Directive may not lead to a loss of rights on the part of a protected group. At a recent judicial review of the Regulations, the High Court accordingly held that this section of the Regulations and the Act should be recast to remove the requirement for a comparator. As new Regulations are made, they will be reported in subsequent updates.

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4. Harassment

See EM: ¶5360

R (on the application of Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] EWHC 483 (Admin)

Prior to 1 October 2005, sexual harassment was not explicitly defined in UK legislation (see memo point 1 to ¶5360). A definition was introduced into the SDA 1975 by the Employment Equality (Sex Discrimination) Regulations 2005. The purpose of these Regulations was to implement EC Directive 2002/73.

Section 4A(i)(a) of the SDA, as amended, requires a claimant bringing a claim of harassment to show that the harassment was “on the ground of” her sex. At a recent judicial review of the Regulations, it was argued that this concept introduced an idea of causation and was narrower than the Directive, the purpose of which was rather to outlaw harassment related to sex. Situations were put to the Court in which the narrow definition would create an injustice: as when a male manager barged into a women’s toilet to harass an employee. If harassment is required to be on the ground of the gender of the claimant, and the manager could show that they behaved in the same fashion towards male employees, then a claim of harassment against the manager would fail. If harassment is required only to be related to gender, then a claim of harassment against that particular manager would be more likely to succeed.

The Court held that this section of the act should be recast to eliminate the issue of causation. As new Regulations are made, they will be reported in subsequent updates.

Religion or belief discrimination

Justification

See EM: ¶5419

Azmi v Kirklees Metropolitan Council [2007] EAT case 0009/07

In respect of race, ethnic or national origin, colour or nationality and religion or belief, an employer may be able to justify an indirectly discriminatory provision, criterion, practice, condition or requirement, if it is a proportionate means of achieving a legitimate aim.

As an example of this principle, the EAT has confirmed the ET decision in *Azmi v Kirklees Metropolitan Council* (see the example to ¶5419) that it was justifiable to require a Muslim teaching assistant not to wear her full veil (niqab) to teach, as the veil had an adverse effect on children’s ability to learn from her.

Disability discrimination

1. Carer for disabled person

See EM: ¶5451

Attridge Law and anor v Coleman [2007] IRLR 88, EAT

The DDA protects only disabled people. It does not protect a person who cares for a disabled person, or any person who claims to have experienced discrimination on the grounds of their association with someone else’s disability. As such it is narrower than the European Equal Treatment Framework Directive, which prohibits discrimination on grounds of disability. The EAT has confirmed that a tribunal may refer the preliminary questions of whether the Directive covers carers, and, if so, whether the DDA should be read in light of the Directive, to the ECJ.

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2. Less favourable treatment on the ground of a person's disability

See EM: ¶¶5503, 5510

High Quality Lifestyles v Watts [2006] IRLR 850, EAT

Where direct discrimination is alleged, it is essentially to look behind the reason provided for the less favourable treatment. Where, however, there is a dispute as to the facts, an employee's claim that there was direct discrimination will not be preferred to a legitimate explanation. In this case, the employer, HQL, dismissed W, an HIV-positive employee, on the grounds that W worked with people with learning difficulties, who were prone to acts that included biting. A person who has been diagnosed with HIV is deemed to be disabled (¶5476). Accordingly, W claimed that HQL had directly discriminated against him on grounds of disability. The EAT found that there had been no direct discrimination as the dismissal had been on the grounds of the real, if modest, risk of HIV transmission. The EAT did however find that HQL's dismissal had not been objectively justified. It therefore constituted disability-related discrimination.

3. Partial implementation of European directives

See EM: ¶¶5639, 1983, 5454

Cameron v Navy, Army and Air Force Institutes (NAAFI) [2006] EAT case 0124/06

In a disability discrimination case, the EAT has been required to confront complex questions concerning the relationship between British and European law. A manager employed at a British military base in Germany brought a claim in 2003. The EAT heard that the claimant's impairment was covered by the DDA, in the current form of the legislation, but had not been covered prior to 1 October 2004, when amendments were made to bring the DDA in line with the Equal Treatment Framework Directive. The claimant argued, following the ECJ case of *Mangold v Helm*, C-144/04 [2006] IRLR 143, ECJ, that where a Directive has not fully been implemented into national law, national courts are required to provide the legal protection which individuals derive from Community law and to set aside any provision of national law which may conflict with those rules. The EAT however distinguished the situation in *Mangold* from the situation facing this particular claimant. In particular, the EAT argued that the rule in *Mangold* applied where there was some national legislation which sought ostensibly to disapply a European directive, and where the offending government had used all the period allowed for transposition without properly implementing the Directive. It did not apply where the Government had gone on to fully implement the Directive within the time allowed to do so. As authority for this position, the EAT cited the more recent ECJ case of *Adeneler and ors v Ellinikos Organismos Galaktos*, C-212/04 [2006] IRLR 716, ECJ.

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4. Effect of coping strategies

See EM: ¶15471

Virdi v Commissioner of the Police of the Metropolis of London and anor [2007] IRLR 24, EAT

For an employee to be disabled for the purpose of the DDA, he must have a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities. Where a person develops strategies to manage the effects of an impairment, this coping strategy may have the effect that the impairment no longer substantially impairs the person's ability to carry out such day-to-day activities. Guidance Notes published by the Secretary of State indicate that a tribunal may have to consider both the possibility that a claimant's coping strategies may mean that he is no longer disabled for the purposes of the DDA, and also the likelihood that the coping strategy will break down with the result that the effects recur. In this case, the EAT considered the situation of a claimant who responded to a chronic visual impairment by turning his head, breaking off from work on computers after a certain time, and closing one eye while doing close work. The tribunal had failed to address the consequences of these coping strategies and in particular the question of whether the claimant was still covered by the DDA. The EAT ruled that coping strategies, where relevant, must be taken into account when deciding whether a claimant does actually remain disabled.

5. Justification

See EM: ¶15521

Heathrow Express Operating Company Ltd v Jenkins [2007] EAT case 0497/06

Where a worker has been treated less favourably for a disability-related reason, the employer will nevertheless not be liable if he can prove justification. In deciding whether an employer's response to the situation of a disabled employee was justified, a difficulty arises where the employer receives contradictory medical advice. In this case, the employer received one report stating that an employee would not be able to return to work and another stating that the employee would be able to resume almost all their previous duties. In such circumstances, the EAT has held, the tribunal should not make its own independent assessment of the medical evidence, and in particular it should not choose one report over another. Rather it should review the decision of the employer, and if the employer's decision was neither irrational nor improper, then it should be treated as justified.

6. Substantial disadvantage

See EM: ¶¶15530, 5549

NTL v Difolco [2006] EWCA Civ 1508

Where a provision, criterion or practice applied by or on behalf of an employer, or any physical features of premises occupied by the employer, places a disabled person at a substantial disadvantage compared with a non-disabled person, the employer has a duty to make a reasonable adjustment. Redundancy will only be a substantial disadvantage, the Court of Appeal has ruled, when it is on grounds of disability. In this case, a manager D suffered an accident at work and became disabled. While off sick, a replacement L was promoted to her post. D subsequently returned to work, on a part-time basis. In a subsequent exercise, both D and L were threatened with redundancy. D was made redundant and L was kept in post. The employer subsequently offered D a full-time position, which she declined. D claimed that her employer should have made a reasonable adjustment, such as offering her an alternative, part-time post. The Court of Appeal held that D had not been made redundant for reason of disability, but because L scored more highly in a selection test. As D had suffered no discrimination, there was no substantial disadvantage. The duty to make reasonable adjustments never arose.

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7. When duty to make reasonable adjustment arises

See EM: ¶¶5530, 5553

NCH Scotland v McHugh [2006] EAT case 0010/06

Whether an adjustment is reasonable will be determined objectively, on the basis of whether it should reasonably have been made. An adjustment involving no benefit to the disabled person will not be required. In this case, an employee was absent from work for more than three years through overwork and depression. The employee indicated no likely date of return, indeed she repeatedly stated that she was incapable of returning to work. Ultimately, the employee resigned, claiming unfair constructive dismissal and disability discrimination. The alleged discrimination was a failure on the part of the employer to offer such reasonable adjustments as a reduction in the employee's hours, or an increase in support, or a reduction in her duties. The EAT held that a key question to consider was when the reasonable adjustment should have been made. In practice, it would not have been possible for an employer to provide supervision or changes in duties without knowing when the employee intended to return to work.

As the employee never indicated a preferred return date, there was no realistic possibility of organising these adjustments. Given that there was no point at time when any feasible adjustment could have limited the disadvantage at which the employee was placed by her depression, there was no duty to make an adjustment.

Discrimination remedies

1. Burden of proof: shifting burden

See EM: ¶5731

Madarassy v Nomura International [2007] IRLR 246, CA

Where, at a hearing, the claimant (i.e. the employee) proves on the balance of probabilities facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent (i.e. the employer) has committed an unlawful act of discrimination, the burden of proof shifts from the claimant to the respondent. In effect, discrimination cases should be assessed in two stages: first the tribunal will decide whether the claimant has a case, then, where the claimant does have a case, the respondent will be required to disprove it. This principle has resulted in complex litigation. The Court of Appeal has recently developed the guidance on its operation (the Barton guidelines as previously revised by the Court in *Igen Ltd* (formerly *Leeds Careers Guidance*) and *ors v Wong* (see ¶5731 for details)).

In the first of three joined cases, the Court held that when deciding whether a claimant had done enough for the burden of proof to shift, the claimant must do more than show difference of status (e.g. race or sex) and treatment (e.g. pay). "Sufficient material" must be provided. Evidence from the respondent "would" be considered at this point. The Court went on to justify this approach by arguing that although the shifting burden involves a two-stage analysis, "the tribunal does not in practice hear the evidence and the argument in two stages."

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2. Burden of proof: example of where burden of proof did not shift

See EM: ¶5731

Appiah and anor v Governing Body of Bishop Douglass Roman Catholic High School [2007] IRLR 264, CA

In the second of three joined cases concerning the burden of proof, the Court of Appeal considered the effect of the decision in *Madarassy v Nomura International* [2007] IRLR 246, CA (see Update 3 item 14 to ¶5731). In this case, two black pupils were excluded from a school following a fight with two white pupils. The white pupils were not sanctioned. The excluded pupils brought a discrimination claim, which was unsuccessful at the High Court. On appeal, the pupils argued that, between the differential treatment of the people involved in the fighting, shortcomings in the school's internal disciplinary hearing and other signs of institutional discrimination, there was enough evidence so that the burden of proof should shift, and the school should be required to justify the exclusions. Applying *Madarassy*, the Court of Appeal rejected this approach. On the basis of the evidence, including the respondent's submissions, the pupils had failed to establish enough facts in the first stage to indicate discrimination on racial grounds. Accordingly, there was no need for the burden of proof to shift.

3. Burden of proof: whether necessary to apply both stages of test

See EM: ¶5731

Brown v (1) London Borough of Croydon and (2) Johnston [2007] IRLR 259, CA

In the third of three joined case concerning the burden of proof, the Court of Appeal considered the effect of the decision in *Madarassy v Nomura International* [2007] IRLR 246, CA (see Update 3 item 14 to ¶5731). In this case, a white manager confronted a black employee with complaints about his working manner. The employee brought a claim of discrimination to the tribunal. On appeal, the employee complained that the tribunal and the EAT had failed to apply the two-stage approach. Rather, the tribunal had simply considered whether the claim succeeded or failed on a simple balance of probabilities approach. Applying *Madarassy*, the Court of Appeal held that while in general applying the two-stage test might be "good practice", there were cases when a claimant would not be prejudiced if a tribunal disregarded the first stage entirely and moved "straight to the second stage of the test".

Equal pay

1. Statistical evidence

See EM: ¶5682

Blackburn and anor v Chief Constable of West Midlands Police, ET case 1305651/2003

A woman may not be paid less than a man for work which is like work to, or work rated as equivalent to, or work of equal value to that done by a man. A man may not, in the same circumstances, be paid less than a woman. An employer has a defence to an equal pay claim where the difference in pay or benefits is genuinely due to a material factor other than sex. Any such material factor must be objectively justified where there is evidence of discrimination. In this case, a police force offered a bonus scheme to reward employees who volunteered for night-time working. The employee B claimed that the scheme tended to discriminate against women, who for childcare reasons were less likely than men to be able to do night-time work. An employment tribunal held that the scheme did in fact reward men more favourably than women. The tribunal also held that it would be possible to reward officers for night-time working without discriminating against those with childcare responsibilities, for example, by scoring different factors towards achieving this bonus, and allowing those with childcare responsibilities to apply. Accordingly, the employer's material factor defence failed.

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2. Defences: Example of no justification

See EM: ¶5672

Tyne and Wear Passenger Transport Executive (trading as Nexus) v Best and ors [2006] EAT case 0627/05; new reference [2007] ICR 523, EAT

In an equal pay case, one fundamental question facing the tribunal will be whether there is a causative link between the claimant's sex and the fact that he or she is paid less than a comparator. It follows that different methods can be used to establish that link.

An employee may allege unequal pay solely on the basis of statistical evidence. Where, however, an employee does so, without identifying any specific provision, criterion, or practice which indirectly discriminated against the employee, a tribunal should take care not to be unduly swayed by statistics generated from a relatively small pool of employees.

This case concerned two groups of employees, one made up of people who drove underground trains, and the other made up of employees who worked both as drivers and fare collectors. The first group was better paid than the second group. But in each group, men were the large majority. They composed 92 percent of the first group, and 85 percent of the second.

The EAT held that such statistical evidence would inevitably be less persuasive than evidence where there was a majority of women in the disadvantaged group. It could not be enough to demonstrate unequal pay.

3. Defences: Example of justification in some instances

See EM: ¶5682

Redcar and Cleveland Borough Council v Bainbridge and ors [2007] IRLR 91, EAT

Where men and women are paid differently but the difference in pay or benefits is genuinely due to a material factor other than sex, the employer will have a defence. In a complex case concerning a group of female caterers, caretakers, youth workers, road-crossing officers and teaching assistants employed by a council, who compared themselves to groups of street sweepers, gardeners and refuse collectors, arguing that the latter (overwhelmingly male) groups were better paid as a result of various bonuses, the EAT found that some material factors claimed by the employer were allowed to stand as defences, while others were not.

The claimants' situation was compared to that of refuse workers who received bonuses for performance, attendance and work during wet weather. The EAT held that the performance bonuses had been introduced several decades previously because of a productivity arrangement and had been intended to result in savings and greater efficiency. They were genuinely due to a material factor other than sex.

On the other hand, the claimants were allowed to compare themselves with street sweepers who had been rated lower in job evaluation schemes, but whose pay (as a result of access to various bonuses) was greater. No genuine material factor other than sex applied.

In addition, following a more recent pay review, the council had decided to phase out the bonuses, introducing new protected payments which would guarantee the salary of the groups of male workers for a limited period of time. The bonuses were no longer attached to any particular duties and had no other purpose other than to ease the transition between a historic and discriminatory pay structure and a new system. These new bonuses were not attached to any duties intrinsic to the job, indeed had no purpose other than to continue discrimination. They could not be justified.

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4. Time limit

See EM: ¶¶5722, 5530, 9460

Humphries v Chevler Packaging [2006] EAT case 0224/06

The time limit for the presentation of discrimination complaints is 3 months from the time that the act or omission complained of was done. To be an “omission” for these purposes, it must be deliberate. Where an employer failed to make a reasonable adjustment proposed by the employee and this omission was said to constitute an act continuing for the remaining duration of the claimant’s employment, the EAT held that the time limit had begun to run from the date on which the employer declined to make an adjustment.

Data protection and privacy

Right to privacy

Freedom of expression

See EM: ¶6285

HRH Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776

In deciding a case on breach of confidence, the Court of Appeal agreed its earlier decision in *McKennitt and others v Ash and anor* (see memo point 2 to ¶6285) and held that it was necessary to look in the jurisprudence of Articles 8 and 10 of the European Convention on Human Rights when applying the rules relating to breach of confidence. The test is one of proportionality and when considering whether it is necessary to restrict freedom of expression in order to prevent public disclosure of information received in confidence the issue is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider if, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public. A duty of confidentiality that has been expressly assumed under contract will carry more weight, when balanced against the right of freedom of expression, than a duty of confidence that is not buttressed by express agreement. However, the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case.

In this case, the Prince of Wales successfully sued Associated Newspapers for breach of confidence and infringement of copyright in relation to handwritten journals kept by Prince Charles which were provided to the newspaper by an employee of the Prince in breach of her contract of employment.

Comment: The Court of Appeal once again held that a claim for breach of privacy that involved an extension of the old law of breach of confidence was not necessary (see memo point 1 to ¶6285).

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Discipline and grievance

Statutory dispute resolution procedures

1. Qualifying service

See EM: ¶¶6515, 8411

Scott-Davies v Redgate Medical Services [2006] EAT case 0273/06; new reference [2007] ICR 348, EAT

If an employer dismisses an employee without completing an applicable statutory dismissal and disciplinary procedure, and the failure is attributable to him, the dismissal will be unfair. The employee must however have one year's continuous employment to be able to bring an unfair dismissal case. In this case, an employee had been in post for just six months, before being dismissed. The employee argued that the employer's failure to follow the statutory procedures had made the dismissal unfair. The employee did not argue for a compensation payment, but for an order requiring the proper procedures to be followed. The EAT refused to grant the order. Without a substantive right (here, the right to claim unfair dismissal), the EAT held, an employee has no right to require that the statutory procedures should be followed

2. Compliance

See EM: ¶¶6560, 6605, 6610, 6628

YMCA Training v Stewart [2007] IRLR 185, EAT

The EAT has recently emphasised that where an employer has his own internal disciplinary procedure, the tribunal must look beneath the parties' own labels and focus on whether the substantive requirements of the statute, which are in simple and non-technical terms, were or were not met. It is crucial that tribunals must not be distracted by the fact that the internal procedure may have more elaborate requirements and different terminology from those required by statute. In this case, the employee was sent a letter asking her to attend an investigatory meeting and a witness statement was attached detailing the alleged misconduct. The EAT held that this letter was sufficient to comply with the Step 1 requirement as it contained the necessary statement of the alleged misconduct and there was an invitation to a meeting to discuss the matter. The statutory procedure permits the employer to present his case in two stages – stating the grounds first (Step 1) and supplying the basis for them later (though in good time before the meeting) (Step 2) - there is nothing to prevent the employer from providing both at the same time as was the case here.

With regard to the decision of the disciplinary meeting, although the statutory disciplinary rules states that the employer must inform the employee of his decision after the meeting, this must not be interpreted narrowly. "After" should be used in the sense of "at the end of". Consequently in this case, the fact the employer announced his decision at some later stage during the meeting itself, rather than concluding the meeting and waiting a day or an hour before doing so, did not mean that he had failed to comply with the statutory requirement.

Comment: The statutory disciplinary procedure lay down statutory minimum requirements which must be followed (though it should be noted as detailed in ¶6501 that it remains essential for employers to also ensure that they are aware of, and implement, best practice principles to ensure that they dismiss employees fairly). Consequently, it is advisable for employers to have their own internal procedures which satisfy both the basic building blocks of the statutory minimum requirements and best practice.

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3. Employer's procedures must comply

See EM: ¶¶6560, 6680

Masterfoods (a division of Mars UK Ltd) v Wilson [2006] EAT case 0202/06; new reference [2007] ICR 370, EAT

The statutory dismissal and disciplinary procedures lay down statutory minimum requirements which must be followed to ensure that a dismissal is not automatically unfair (see ¶6515) and employers must be careful that their own internal procedures satisfy these basic building blocks and do not impose more onerous requirements. For example, with regard to the right to appeal, what is clear is that there is no prescription about the form in which the wish to appeal should be registered. No writing is required, nor are grounds; all that is required is that information be passed to the employer. In this case, W was dismissed following a disciplinary hearing after having been caught for a second time fraudulently claiming sick pay and being dishonest as to why he was on sick leave. Further to his employer's disciplinary procedure, W was notified that he had the right to appeal against this decision if he gave written grounds for his appeal within five working days. Although W informed his employer that he wished to appeal, he did not give written grounds within the required time limit, and consequently his employer refused to hear his appeal. The EAT held that W's dismissal was automatically unfair (under section 98A of the ERA) as Step 3 of the statutory procedure simply states that if the employee wishes to appeal the decision and informs the employer of his wish to appeal, the employer must invite him to attend a further meeting. The employer therefore did not comply with the statutory minimum requirements when he refused to hear the appeal on the grounds that his own disciplinary procedures required the employee to give written grounds within a set time limit.

Comment: The statutory disciplinary procedure lay down statutory minimum requirements which must be followed (though it should be noted as detailed in ¶6501 that it remains essential for employers to also ensure that they are aware of, and implement, best practice principles to ensure that they dismiss employees fairly). Consequently, it is advisable for employers to have their own internal procedures which satisfy both the basic building blocks of the statutory minimum requirements and best practice.

4. Suspension without pay

See EM: ¶6595

Masterfoods (a division of Mars UK Ltd) v Wilson [2006] EAT case 0202/06; new reference [2007] ICR 370, EAT

The EAT has recently confirmed that suspension without pay does, in itself, amount to a disciplinary penalty and when applying this sanction the statutory dismissal and disciplinary procedures must be followed.

Disciplinary procedures: investigation

See EM: ¶¶6618, 5262

Lewis v HSBC Bank [2007] EAT case 0364/06

The purpose of a disciplinary hearing is to investigate a disciplinary matter. As best practice, the person conducting the hearing should review the evidence, give any witnesses an opportunity to comment and ensure that the employee is told very clearly of the allegations and evidence raised, and given an opportunity to see any witness statements. In this case, a colleague accused another employee L of performing a lewd act in the work gym. The investigation of the allegation was discriminatory. However, the subsequent disciplinary hearing involved a thorough reappraisal of the case. In these circumstances, the fairness of the disciplinary hearing was found to outweigh the unfairness of the initial investigation and L was unsuccessful in his claim of less favourable treatment with regard to his dismissal. This decision was reaffirmed on appeal.

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Statutory grievance procedures

Raising a grievance under modified procedure

See EM: ¶¶6765, 6745

City of Bradford Metropolitan District Council v Pratt [2007] IRLR 192, EAT

Where an employee raises a grievance under the standard statutory grievance procedure (at Step 1 of 3), he is required to set out in writing the grievance and send the statement (or a copy of it) to his employer. Where, however, a former employee raises a grievance under the modified statutory grievance procedure (at Step 1 of 2, see ¶¶6745), he is required to send a written statement setting out both the grievance and the basis for it. These are separate requirements and both must be met individually.

In this case, the EAT considered a former employee seeking to bring an equal pay claim who in her letter of grievance to her employer had identified her grievance (equal pay) but not its basis (her comparator). The EAT ruled that the requirements of the modified grievance procedure had not been met..

Trade unions and industrial action

Trade unions: obligation to members

1. Example of where workers were not unjustifiably disciplined

See EM: ¶7146

Beaumont v Amicus [2006] EAT case 0219/06; new reference [2007] ICR 341, EAT

Members of trade unions are protected against unjustifiable disciplinary action by unions. Relevant disciplinary action includes expulsion, fines, refusal to accept contributions, suspension and depriving members of benefits. It does not include a letter that merely threatens action. In this case, an application was unsuccessful with a claim where the disciplinary action was a letter before action, and where there was no immediate demand nor power behind the request.

2. Level of compensation for right not be unjustifiably disciplined

See EM: ¶¶7147, 5751

Massey v Amicus [2006] EAT case 0223/04

Where a union member M had been unjustifiably disciplined by a union, she successfully sought damages. M was barred from holding union office, and suffered a series of injuries as a result, including a stroke. The EAT held that in deciding which damages could be claimed, and how compensation should be calculated, the correct model to follow was victimisation in compensation in sex or race discrimination cases. M was able to for claim injury to feelings, personal injury and aggravated damages. Her total compensation was set at £17,000.

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3. Duty not to unlawfully exclude or expel a member

See EM: ¶7148

Associated Society of Locomotive Engineers & Firemen v United Kingdom, ECHR case 11002/05

A trade union may not lawfully expel a member on the grounds of their membership of a political party. The union may however lawfully expel a member on the grounds of their political activities (s 174 TULRCA 1992). These statutory provisions were introduced in December 2004 following the success of the claimant, L, in an earlier case of *Lee v Aslef* (EAT case 0625/03). The union, A, which was unsuccessful in *Lee v Aslef*, more recently brought a case to the European Court of Human Rights, arguing that the pre-2004 statutory provisions contradicted the union's right of association (Art 11 European Convention of Human Rights). The ECHR has ruled that Aslef's rights had indeed been restricted. Just as a worker is free to join a union of their choice, so a union is free to choose who it will allow into membership. It is now to be seen whether the relevant legislation will be amended further.

Statutory recognition application

Admissibility

See EM: ¶7249

BECTU and Royal Shakespeare Company [2006] TUR1/540

For an application for statutory recognition to be admissible, the Central Arbitration Committee must find that the union passes two tests. First, at least 10% of the workers constituting the proposed bargaining unit must be members of the union. Second, there must be evidence that a majority of the workers constituting the relevant bargaining unit would be likely to support recognition. As an illustration of the rules in deciding whether an application for statutory recognition was admissible, the CAC looked to the evidence of support for recognition within the workplace. At the time of the application, 21% of the staff employed in the bargaining unit were members of the union plus a further 26% had signed petitions supporting recognition. The fact that petitions calling for union recognition had been circulated and signed over a relatively lengthy (12 month) period did not invalidate the union's claims that majority support was likely.

Transfer of the business

Types of transaction

1. Economic identity (stability)

See EM: ¶7932

Balfour Beatty Power Networks Ltd and anor v Wilcox and ors [2007] IRLR 63, CA

TUPE now contains an express definition of an economic entity based on the principles drawn from case law decided before the new TUPE regulations came into force. Consequently, this case decided under the old TUPE rules still provides guidance. In this case, the Court of Appeal noted that an entity may be stable as a matter of practical and industrial reality, even though its long-term future is not assured. In other words, what is important is whether the entity can be said to be stable at the time of transfer and it is irrelevant as to whether the business can succeed long term.

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2. Economic identity (labour-saving operations)

See EM: ¶7941

Balfour Beatty Power Networks Ltd and anor v Wilcox and ors [2007] IRLR 63, CA

TUPE now contains an express definition of an economic entity based on the principles drawn from case law decided before the new TUPE regulations came into force. Consequently, this case decided under the old TUPE rules still provides guidance. In this case, the Court of Appeal addressed the issue of labour-intensive operations and confirmed the EAT's decision that even where the transferor chooses to lease equipment rather than own it, as a matter of commercial prudence, it is not a matter of critical importance that neither the equipment nor those leases are transferred to the would-be transferee, if that transferee also leases identical equipment (¶7941).

The Court of Appeal highlighted that the range of intermediate possibilities between asset-reliant and labour-intensive operations were unlimited and that in such circumstances it must always be an issue of whether on all the relevant facts and circumstances, the undertaking in question could be said to have transferred.

Varying terms and conditions

1. Changes to the workforce

See EM: ¶8015

London Metropolitan University v Sackur and others [2006] EAT case 0286/06

The EAT has confirmed that entailing changes in the workplace means that the structure of the workforce must be changed, by either a reduction in the number of employees, or a change in job functions (see note 1 to the table at ¶8015).

Comment: This case was decided on the old TUPE rules, but the principles remain relevant to the new TUPE rules.

2. ETO reason: Dismissal by transferor

See EM: ¶¶8041+

Hynd v (1) Armstrong and others, (2) Bishops Solicitors and others [2007] CSH 16

The Court of Session has held that a transferor employer cannot rely on the transferee's ETO reason to justify the redundancy of an employee prior to the transfer of the business. The right of a transferee to dismiss for an ETO reason relates only to a reason of its own, relating to its own future conduct of the business which entails a change in its own workforce. This is so even if the employee could have been fairly dismissed after the transfer, on grounds of redundancy. In this case, the employee was held to be automatically unfairly dismissed because the transferee had used the transferor's ETO reason (i.e. that the new firm was not going to practice in the area of the employee's expertise) in making the employee redundant before the transfer.

Comment: This case was decided on the old TUPE rules, but the principles remain relevant to the new TUPE rules. This decision is a further illustration of the potential risk in transferees dismissing employees prior to the transfer and transferees should be reluctant to implement dismissals at the transferee's request without obtaining appropriate indemnities (see ¶8046).

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Ending employment

Retirement

Whether compulsory retirement constitutes age discrimination

See EM: ¶¶8201, 5639

Palacios de la Villa v Cortefiel Servicios SA, Case C-411/05, ECJ

Non-discrimination on grounds of age is a general principle of European Community law. It does not follow, however, that compulsory retirement ages are in fact contrary to European law.

In a case concerning a collective agreement which regulates the Spanish textile trade, the Advocate General of the ECJ has delivered an opinion that compulsory retirement ages are not contrary to European anti-discrimination law. The case will now be heard by the ECJ.

Depending on the ECJ's judgment, the outcome may have implications for the statutory default retirement provisions. The final result of the case will be reported in further updates.

Unfair dismissal

1. Ostensible and real reason for dismissal

See EM: ¶¶8423, 7590, 8630

Afzal v Europackaging [2006] EAT case 0411/06

When looking at the reason given for dismissal, the tribunal may substitute the correct reason for the ostensible reason given by the employer, provided the facts have been established. In this case, a tribunal had ruled that the reason for an employee's dismissal had been misconduct, but that because the employee was an active trade unionist and father of the union chapel, the employer had failed to give him a fair hearing under the statutory dismissal procedure. Being procedurally unfair, the dismissal was automatically unfair. The employee appealed against this finding, and the appeal was upheld. The EAT found, as a matter of logic, that when trade union activities are the reason or a principal reason for dismissal, it is correct to regard the dismissal as being for trade union activities. The tribunal would have been within its powers to substitute this as the correct reason for the dismissal and should have done so.

Comment: The utility of the appeal was in the more generous compensation regime applicable to a dismissal found unfair because of union activities.

2. Polkey-reversal provision

See EM: ¶8436

YMCA Training v Stewart [2007] IRLR 185, EAT

A recent decision of the EAT has stated that it is now established that "failure to follow a procedure" must not be interpreted narrowly and that it embraces any step which the employer ought to have taken before deciding to dismiss the employee (confirming *Alexander and anor v Bridgen Enterprises Ltd* [2006] ICR 1277, EAT, followed in *Kelly-Madden v Manor Surgery*, EAT case 0105/06 (see memo point to ¶8436 for these cases)).

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3. Dismissal on grounds of incapacity

See EM: ¶¶8459, 4245

Royal Bank of Scotland v McAdie [2006] EAT case 0268/06

Dismissal on the grounds of incapacity is a fair reason for dismissal. Where the employer has responsibility for a worker's sickness or injury, it would be natural, the EAT has held, for the employer to put up with longer sickness absence than would be normally be required, or to find alternative employment for the employee. There is no rule, however, that where an employer is responsible for the sickness or injury, any subsequent dismissal will automatically be unfair. In this case, an employee developed a stress-related illness, which was attributable to her treatment at the hands of one of her managers. She was not fit to work and had no prospect of recovery. Because there was no prospect of the employee returning to work, the EAT held, her subsequent dismissal for incapacity was fair. The EAT approved the decision of a previous EAT (*London Fire and Civil Defence Authority v Betty* [1994] IRLR 384, EAT) that while the tribunal can take the fact the employer caused the illness into consideration, this will not always make a dismissal unfair. The real question is whether the dismissal is fair. As a matter of policy, the EAT continued, even an employer who has caused an incapacity cannot be barred from fairly dismissing an employee. If there was a contrary rule, requiring the employer to retain the worker in employment, then employers would be obliged to retain on their books indefinitely employees who were incapable of work.

4. Misconduct

See EM: ¶¶8501+

Masterfoods (a division of Mars UK Ltd) v Wilson [2006] EAT case 0202/06; new reference [2007] ICR 370, EAT

While this may not be possible in small organisations, the EAT has held that where a large organisation has very large substantial human resources and management personnel available, it is not appropriate for one manager to be involved at every stage of an employer's dismissal and disciplinary process. Such over-involvement in the process will render any dismissal procedurally unfair.

Further, where a manager has a closed mind to the outcome of an employee's disciplinary proceedings he should not be involved and such involvement will again render any dismissal procedurally unfair.

In this case, a manager attended a medical review of an employee on sick leave turning that review into an investigation. The manager informed the employee of alleged incidents which lead to a suspicion that the employee was fraudulently claiming sick pay and that he was dishonest as to his reasons for his absence. The manager then suspended the employee and recommended to the employer's disciplinary panel that the employee be dismissed.

At the disciplinary meeting concerning these allegations, the manager sat on the disciplinary panel which subsequently dismissed the employee. The EAT held that given that the employer was a large organisation, the manager should not have continued his involvement to the disciplinary proceedings and the EAT further questioned whether it had been appropriate for the manager to have attended the medical review. The manager also demonstrated that he had a closed mind as to the outcome when, before the disciplinary meeting, he said to the employee, "The game is up".

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5. Compensation (future loss)

See EM: ¶¶8598, 8628

Thornett v Scope [2007] ICR 236, CA

If the employee is still suffering a loss at the date of the hearing, either because he remains out of work or has only been able to obtain work at a lower rate of pay, the tribunal will consider how long such loss might be expected to continue, which naturally requires a degree of speculation. The tribunal may also take into account the fact that the old employment would have ended fairly at some point in the future in any case (see ¶8628), or that the employer had a good reason for dismissal but failed to follow a fair procedure (see ¶8630). The Court of Appeal has recently confirmed this approach and has emphasised that deciding what compensation for future loss is just and equitable “will almost inevitably involve a consideration of uncertainties”. The Court of Appeal pointed out that with regard to whether the old employment would have ended at some point in the future in any event, there may be cases where there is no evidence that the employment would not have continued definitely but, where there is evidence that it may not have been so, that evidence must be taken into account. Just because this may involve making predictions which may be difficult to do does not mean that a tribunal can opt out of their duty to make an assessment on the evidence in front of them.

In this case, the Court of Appeal remitted the case back to the tribunal for it to decide on the evidence whether, even if the claimant had not been unfairly dismissed, the old employment would have only lasted another 6 months in any case.

Redundancy

Collective consultation (failure to comply/infringement of rights)

See EM: ¶8951

Transport & General Workers' Union v Brauer Coley Ltd (in administration) [2007] IRLR 207, EAT; new reference [2007] ICR 226, EAT

If a tribunal upholds a complaint that an employer failed to collectively consult or comply with the related election requirements, it may make a protective award, which the employer will be obliged to pay. This EAT decision concerns the issue of who should bring such a claim. Where the complaint has been brought by a recognised trade union (for example for failure to consult with appropriate representatives) on behalf of its members that have been affected the award can only be made in relation to those it represents. Any employees who are not members and have been affected by a non-union breach (for example, due to a failure to consult) must bring their own claims. Practically speaking, such claims can be brought simultaneously.

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Employment claims

Tribunal claims

1. Time limits

See EM: ¶¶9460, 5722

Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548

The time limit for presentation of discrimination and harassment complaints is 3 months from the time that the act or omission complained of was done. One difficulty occurs where an employee claims to have suffered a series of detriments over a lengthy period. In such circumstances, it is likely that at least some of the detriments claimed will be out of time. In order to be able to complain of events prior to the three month limit, the employee will have to show that the detriment constituted one ongoing act. The Court of Appeal has ruled that where such a claim is made, the tribunal should look at the substance of the complaint in order to decide whether the acts were in fact continuous. In this case, an employee L was accused of bullying, but following an investigation by her employer, all charges against her were dismissed. L subsequently brought a grievance regarding the handling of the investigation, and later still, also brought a tribunal claim. On the facts of the case, the Court held that the dismissal of the charges against L, following the conclusion of the employer's investigation, represented a break. From this point onwards, L had suffered no ongoing detriment.

2. Time limits (completion of statutory dispute resolution procedures)

See EM: ¶¶9482

H M Prison Service v Barua [2007] IRLR 4, EAT

Under the automatic extension to the normal time limits for bringing tribunal claims to enable parties to complete statutory dispute resolution procedures, the normal time limit will be extended by 3 months where an employee presents a tribunal claim out of time (i.e. outside the normal time limit) if, within this time limit, the employee has sent a Step 1 letter to his employer to start the statutory grievance procedure. The EAT has held that "within" in this context simply means that the grievance must be lodged before the normal time limit ends. Consequently, the grievance can be lodged before the normal time limit begins to run. In this case, B had brought a claim for unfair constructive dismissal, breach of contract and unlawful deduction of wages just short of six months from the date of his constructive dismissal, which was the date the normal time limit had begun to run. The EAT held that B was in time with his claim as the normal 3-month limit was automatically extended by a further 3 months as he had raised a formal grievance of the fundamental breach. It did not matter that the normal time limit period had not begun to run at the time the grievance was raised (B raised his grievance during his notice period), in fact the EAT pointed out that this order of events is likely to be common in constructive dismissal claims.

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3. Commencement of a claim

See EM: ¶¶9511, 9513

Hamling v Coxlease School Ltd [2007] IRLR 8, EAT; new reference [2007] ICR 108, EAT

The revised standard form (form ET1), which has been mandatory since October 2005, requires certain information to be provided for the claim form to be valid. In another case on the admissibility of claim forms (see ¶9511 for examples of other cases), the EAT has again emphasised that these requirements must not be interpreted so as to deny a claimant access to the tribunal system: “the rules are simply a procedural vehicle to enable important statutory claims to be advanced before the tribunal service.” Whether any omission is relevant and, if so, whether it is also material has to be answered in the affirmative before a claim form can be rejected for being incomplete. In this case, the fact that the claimant’s solicitors’ address was given instead of her own was not relevant or material as the form had been submitted and signed by the solicitors on the claimant’s behalf, full particulars for the representatives had been given and the form indicated that if representative details were given all further communication would be with the representative.

4. Striking out: high threshold

See EM: ¶9573

Ezias v North Glamorgan National Health Trust, The Times, 19 March 2007

At the pre-hearing review, the tribunal can strike out or amend all or part of any claim or response on the grounds that it is scandalous, vexatious, or has no reasonable prospect of success or if the claimant or respondent (or their representatives) has conducted the proceedings in a scandalous, unreasonable or vexatious manner.

The Court of Appeal has recently held that only in exceptional cases should a strike-out application be granted where the main facts of the case are in dispute.

Further, in discrimination cases, there is a higher threshold and therefore only in the most exceptional cases should a claimant’s claim be struck out (see ¶9573). The Court of Appeal has held that as whistleblowing cases concern similar issues, this higher threshold should also apply to whistleblowing cases as well.

5. Apparent bias

See EM: ¶¶9614+

Ansar v Lloyds TSB Bank plc and ors [2007] IRLR 211, CA; new reference [2007] ICR 1565, EAT

The test to determine whether there has been apparent bias is whether a fair-minded and informed observer would conclude that there was a real possibility or danger that the tribunal was biased. The Court of Appeal has once again confirmed this test while also emphasising that the mere fact that a complaint is made does not mean that the chairman or member should automatically decide to withdraw. Parties cannot generally assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. As in *Lodwick v London Borough of Southwark* “something more” is required.

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6. Referral to the ECJ

See EM: ¶9841

Attridge Law and anor v Coleman [2007] IRLR 88, EAT

The EAT has allowed a tribunal to refer the questions of whether the European Equal Treatment Framework Directive covers carers, and whether the DDA should be read in light of the Directive, to the ECJ. In this case, the referral was made by a tribunal Chairman following a pre-hearing review. It is very unusual for cases to be referred directly to the ECJ by an employment tribunal. Normally a higher court makes the referral. A tribunal does also, however, have the power to do so. An appeal against the referral was unsuccessful.

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Proposals

Corporate Manslaughter and Corporate Homicide Bill

See EM: ¶¶5073, 2161

The Corporate Manslaughter and Corporate Homicide Bill has received its third reading in the House of Commons and is now progressing through the House of Lords. If enacted, the Bill would create a new offence of corporate manslaughter (in England and Wales, corporate homicide in Scotland), which would occur when an organisation committed a gross breach of a relevant duty of care owed by the organisation to the deceased.

An organisation would be guilty of an offence if the way in which its activities were managed or organised by its senior management was a substantial element in the breach. Courts would have powers to order remedial and publicity orders and fine offending organisations.

The legislation remains before Parliament. If passed, its final form will be reported in subsequent updates.

Comment: The organisations covered by the Bill include corporations but not unincorporated bodies or public bodies acting under a statutory provision. A gross breach would be action that falls far below what can be reasonably be expected of the organisation in the circumstances. In deciding whether the breach was gross, a jury would be required to consider the extent to which the failure was a breach of health and safety legislation, and how much of a risk of death it posed.

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EC and Government Consultations

Flexible working

See ¶¶1810, 1870, 1950, 2040, 30

The European Commission has been consulting on whether changes to European law are needed in order to protect employees' rights in a context of greater flexible working. Proposals include common European definitions of employment and self-employment, as well as the suggestion of a "floor of rights", which would apply to everyone in employment, including the self-employed. The Commission also asks if new rules are needed in such areas as agency working and working time. The text of the consultation is available at <http://ec.europa.eu/>. The consultation closed on 31 March 2007.

Agency workers

See ¶2040

The Government is consulting on draft Regulations to provide protection to three particular groups of agency workers. Regulations will be made to protect, first, agency workers who have been required to take out loans before travelling to work in Britain, second, people employed as HGV drivers and being required to work more than 48 hours a week, and third, entertainers and models who are charged fees at supposed "casting sessions". The text of the consultation is available at <http://www.dti.gov.uk/consultations/>. The consultation closes on 31 May 2007.

Extending annual leave

See ¶¶4005, 4018

The Government is consulting on draft Regulations to extend statutory annual leave from 20 days to 24 days from 1 October 2007 and to 28 days from 1 October 2008. The Regulations would also enable workers to carry forward 4 days (from 1 October 2007) and subsequently 8 days (from 1 October 2008) of their untaken statutory entitlement from one year to the next. The consultation is online at <http://www.dti.gov.uk/consultations/>. The consultation ends on 13 April 2007.

Future of HSC and HSE

See ¶5050

The Government is consulting on proposals to merge the Health and Safety Commission and the Health and Safety Executive. Details of the proposals are available at <http://www.hse.gov.uk/consult/>. The consultation closes on 5 March 2007.

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Statutory dispute resolution procedures

See ¶¶6501+, 9200+, ¶¶9500+

Following an independent review of employment dispute resolution procedures, which calls for a radical overhaul of the current dispute resolution procedures, the Government is consulting on what changes are necessary to: support employers and employees to resolve more disputes in the workplace; actively assist employers and employees to resolve disputes that have not been resolved in the workplace; and how to make the employment tribunal system simpler and cheaper for users and government. The specific measures being consulted on include repealing the current statutory dispute resolution procedures; providing better help and guidance to resolve disputes at an earlier stage; and improving how employment tribunals work. The text of the consultation is available at <http://www.dti.gov.uk/consultations/page38508.html>. The consultation closes on 20 June 2007.

Trade union and other representative rights

See ¶¶7600, 7603

The Government is consulting on the rights of trade union and other workplace representatives. Proposals include changes to the rules which currently require paid time off for trade union representatives to be for the purposes of training or collective bargaining. The Government is also considering introducing a minimum membership requirement before trade union officials would become entitled to paid time off, as well as a clarification of the amount of time a union official is entitled to take each week. Other proposals include extending statutory rights to union equality and environment representatives. The consultation is available at <http://www.dti.gov.uk/>. The consultation ends on 29 March 2007.

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