



EMPLOYMENT MEMO 2007

Newsletter Issue 2

July 2007

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Welcome to the Employment Law Memo 2007 newsletter, highlighting important recent developments and proposals. This newsletter consolidates the update items for May, June and July and also focuses on the affect of the non-smoking ban. 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. These updates are also downloadable onto your Employment Memo 2007 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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Smoking ban

Since 1 July 2007, it is illegal to smoke in England in a place which is required to be smoke-free and importantly it will also be illegal for employers to fail to prevent smoking in smoke-free places (s 7 Health Act 2006; Smoke-free (Premises and Enforcement Regulations) SI 2006/3368). Smoking has been unlawful in such places in Scotland (since March 2006), Wales (since 2 April 2007, Smoke-free Premises etc. (Wales) Regulations SI 2007/287) and Northern Ireland (since 30 April).

All **enclosed or substantially enclosed places** which are open to the public or are a workplace for more than one person must be smoke-free. An enclosed space is defined as one which has a ceiling or roof, and which (except for doors, windows and passageways) is wholly enclosed (either permanently or temporarily). Workplace toilets fit within this definition. A substantially enclosed place includes premises with a ceiling or roof where there is an opening in the walls, or an aggregate area of openings in the walls which is less than half their area. This definition is wide enough to include tents, marquees and smoking shelters on the outside of buildings that are not compliant.

Work vehicles and vehicles used by members of the public will also be required to be smoke-free (s 5 Health Act 2006). A vehicle is affected by this rule if it is used by members of the public or if it is used as a work vehicle by more than one person, even if those persons use the vehicle at different times or only intermittently (reg 11 Smoke-free (Exemptions and Vehicles) Regulations SI 2007/765). A van driver, who is the only person to use his van, will not be committing any offence if he smokes, but where the driver works with a companion, he will be committing an offence.

It is likely that **certain spaces will be exempt** from the ban. Prisons will be exempt, rooms in care homes and mental hospitals, private homes and common spaces in social housing when used as workplaces by people who do not live in them, for personal care, domestic work, work to maintain the structure of fabric of the dwelling, or work to install, maintain or service the dwelling (Smoke-free (Exemptions and Vehicles) Regulations SI 2007/765). Accommodation for guests and club members in hotels, guest houses, inns, hostels and members' clubs will also be exempt, as will be bedrooms in residential accommodation, the shops of specialist tobacconists and designated rooms in offshore installations. In addition, venues will be exempt where an artistic performance requires a person to smoke (Smoke-free (Exemptions and Vehicles) Regulations SI 2007/765). In other words, if the BBC films a historical drama, the actor playing Winston Churchill will be free to smoke a cigar. There will also be exemptions for private vehicles when they are not being used for work purposes (Smoke-free (Exemptions and Vehicles) Regulations SI 2007/765).

Employer liability

It will be the duty of an employer to **stop a person smoking in smoke-free premises** (s 8 Health Act 2006). Three defences are open to the employer:

- that he took reasonable steps to cause the person to stop smoking;
- that he did not know, or could not reasonably be expected to know, that a person was smoking; or
- that on other grounds it was reasonable not to comply with the duty.

The Health Act also requires employers to erect **no-smoking signs** in smoke-free places. At each entrance to such premises, a sign of at least A5 size must be displayed showing the no-smoking symbol, and carrying the words, "No smoking. It is against the law to smoke in these premises" (Smoke-free (Signs) Regulations SI 2007/923). The rules regarding no smoking signs will apply to vehicles. People with responsibilities for vehicles will be required to ensure that each compartment of a vehicle displays a sign. The term "compartment" is designed to cover, for example, in a taxi, both the driver's area and the passenger area as separate compartments. A no-smoking sign will be required in each (slightly different rules concerning no-smoking signs apply in Wales, see the Smoke-free Premises etc. (Wales) Regulations SI 2007/287).

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Unitary, district and borough councils will have the responsibility for enforcing these rules. A system of **fixed penalties and enforcement rules** will be put in place. Where a person smokes in a smoke-free place, they will be subject to a fine, up to a maximum of £200 (the Smoke-free (Vehicle Operators and Penalty Notices) Regulations SI 2007/760). Where an employer fails to prevent a person from smoking in a smoke-free place, they will be subject to a fine, up to a likely maximum of £2500 (Smoke-free (Penalties and Discounted Amounts) Regulations SI 2007/764). Where an employer fails to display a required no smoking sign, they will be subject to a fine, up to a maximum of £1,000 (Smoke-free (Vehicle Operators and Penalty Notices) Regulations SI 2007/760).

It should also be noted that where an employer fails to prevent a person from smoking, in addition to the criminal penalties listed above, they may potentially make themselves **vulnerable to civil action**: if, for example, a non-smoker acquired lung cancer having worked for an employer who had unlawfully failed to prevent his other workers from smoking. Further, an employer has **common law health and safety obligations**. As part of these duties, he must provide and maintain a working environment that is safe and suitable, so far as is reasonably practicable, for the employee to do his work. Allowing smoking at work, such that employees must work in a smoke-filled environment, has been found to breach this term.

Introducing the ban

Roughly one in four adults in the UK currently smokes. This suggests a smoking population of several million workers. For their part, many employers will be unwilling to risk litigation, and are likely to err on the side of compliance with the law. In surveys, a number of employers have indicated an intention to introduce total bans on smoking on their premises.

The smoking ban will have considerable effects in those workplaces where smoking has been tolerated, and may prove controversial. Where workers wish to continue to smoke within the workplace, it will be unlawful for employers to respond by maintaining smoking rooms within the work area, as these are likely to come within the definition of an enclosed or substantially enclosed space in which one or more person works. The same principles apply if a worker has previously been allowed to smoke in his own room. If the employer continues to allow him to do so, the employer is likely to be committing a criminal offence.

While the law will prohibit employers from tolerating workers who continue to smoke within the workplace, some employers will undoubtedly allow a certain lassitude to those who continue to smoke during breaks in unenclosed spaces outside the workplace. Further, while there is no actual obligation on the employer to provide a smoking area, he may choose to install a compliant structure for such purposes (for example, a sufficiently open structure providing protection against the elements outside the office building with appropriate signage and sentinel bins).

What will happen if employers refuse to allow breaks and smokers seek to enforce them? Before a court, workers could insist on a contractual right to take such breaks, where the employer has always accepted that practice in the past. Some voices have already attempted to counter that argument by pointing out that when smoking was legal, employers allowed smokers to take work in return for the smokers not smoking or at their desks. If this was the implied agreement, it could not be expected to continue once smoking at work had become a criminal activity. Further, if the acceptance of smoking is considered to be a works rule rather than a term of the contract there will be no contractual right in any event. As mentioned, although it is unlikely that workers would be able to enforce their right to take breaks in face of a total smoking ban at work, some employers may still feel it appropriate to allow smoking breaks outside the workplace building in an unenclosed area or in a specified compliant structure which has been constructed for that purpose.

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Smoking ban policy and sanctions

It is advisable that employers should introduce a workplace smoking policy (if they have not already done so) which sets out the smoking ban, whether smoking and taking smoking breaks is possible and allowed in unenclosed areas or compliant structures, and the sanctions employees will face if they breach the ban. Employers should set out clearly in their smoking ban policy that smoking in prohibited areas could lead to disciplinary action. Care must be taken in the appropriate sanctions for breaches of a smoking ban. While repetitive breaches may lead to a reasonable sanction of dismissal for gross misconduct, it is unlikely to be reasonable for one instance of illegal smoking. The appropriate response will depend on all the circumstances.

Supporting employees to stop smoking

Finally, as a matter of best practice, employer have much to gain from encouraging smokers to break their addiction, for example by agreeing to subsidise nicotine patches or fund activities designed to help smokers to quit. A report in April 2007 from the National Institute of Clinical Excellence has estimated that a business with 20 workers, of whom typically 5 would smoke, could spend £66 helping staff to quit, and still make an overall saving of £350 from increased productivity (the text of their report, with handy cost calculators for businesses of different sizes is available here: <http://www.nice.org.uk/page.aspx?o=424885>).

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Types of employment relationship

Employee or self-employed?

1. Casual worker on a series of short term contracts

¶37 When a casual worker has a series of specific contracts of employment, he is continuously employed for the duration of each contract and will be able to rely on the main statutory rights once the necessary qualifying periods of employment have been achieved. Unless it can be found that there is an umbrella or global contract, the worker will be forced to rely on the statutory rules concerning continuity of employment. Where the worker does rely on these rules, periods of non-employment will usually break his continuity of employment (¶1010+).

In this case, an employee V was employed on a series of casual contracts. It was held that there was no umbrella or global contract because in the periods when V was not at work there were no mutual obligations which could keep the contract alive (¶38). Consequently V had to rely on the continuity of employment rules to obtain the necessary qualifying periods to bring his various claims, principally one for unfair dismissal. This he was able to do as he had worked for his employer for at least one day every week from the start of his employment in February 2003 to the end of his employment in June 2006. As such, he came within the rules regarding continuity of employment (gaps between contracts of less than one week will not break continuity of employment (¶1014)). The tricky issue was that he had taken a two week holiday in 2005. Under the continuity of employment rules in such circumstances the gap would break continuity unless V could be said to have been absent in circumstances where, by arrangement, his employment was regarded as continuing. This was held to be the case. V's employer accepted that V was entitled to statutory annual leave and had provided for holiday pay by rolling it up in V's ordinary pay. Consequently, continuity had been preserved as V must be deemed to be 'on the books' for that period even though there was no contract of employment in existence.

Comment Note that "rolled up" annual leave is now unlawful (¶4014). This was not an issue in this case so the illegality of the arrangements were not discussed.

Vernon v Event Management Catering Ltd [2007] EAT case 0161/07

2. Whether controlling shareholder employee

¶43 When deciding whether a controlling shareholder is an employee of a company the tribunal will consider:

- whether there was a genuine contract of employment;
- the degree of control that was exercisable over the shareholder as an employee; and
- the actual conduct of the parties.

In this case, a shareholder held 50.1 percent of the shares in a company. He set his own salary and determined the day-to-day running of the company. Although ostensibly the shareholder took advice from other directors, in practice, he was not subject to any disciplinary procedures. The EAT found that he was not an employee.

Morrison v ODS Business Services Ltd and anor [2007] EAT case 0618/06

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Pre-employment

Recruitment and selection

Spent convictions

¶613 If questions about past convictions are raised in an application form or at a job interview, applicants are not generally obliged to reveal spent convictions. Where an applicant answers such a question dishonestly, however (for example by failing to reveal when asked that he has been convicted of an offence and the offence is unspent), he may be committing a criminal deception.

In this case, an applicant P applied for a civilian job with the police, stating “no” on her application form in answer to the question “have you ever been convicted of an offence?” Nine years previously, following a court hearing, she had been made subject to an order for a conditional discharge. Following her job application, which was treated by the police as a false representation, P was charged with the criminal offence of obtaining a pecuniary advantage by deception. The Court of Appeal held that, as a matter of definition, an order for a conditional discharge was not a conviction. P had never been convicted of an offence. Accordingly, she had not made a false representation and the case against her was dismissed.

R v Patel [2007] ICR 571, CA

Comment: The Court went on to say that those specified employers, such as the police, who are exempt from the Rehabilitation of Offenders Act 1974, should be able to ask a broadly-phrased question, such as “Have you ever been found guilty of a criminal offence?”

Continuity of employment

General rules

Casual employment and holiday leave

¶1019 In this case, an employee V was employed on a series of casual contracts. It was held that there was no umbrella or global contract because in the periods when V was not at work there were no mutual obligations which could keep the contract alive (¶38). Consequently V had to rely on the continuity of employment rules to obtain the necessary qualifying periods to bring his various claims, principally one for unfair dismissal. This he did as he had worked for his employer for at least one day every week from the start of his employment in February 2003 to the end of his employment in June 2006. As such, he came within the rules regarding continuity of employment (gaps between contracts of less than one week will not break continuity of employment (¶1014)). The tricky issue was that he had taken a two week holiday in 2005. Under the continuity of employment rules in such circumstances the gap would not break continuity if V could be said to have been absent in circumstances where by arrangement his employment was regarded as continuing. V’s employer accepted that V was entitled to statutory annual leave and had provided for holiday pay by rolling it up in V’s ordinary pay. Consequently, continuity had been preserved as V must be deemed to be ‘on the books’ for that period even though there was no contract of employment in existence.

Vernon v Event Management Catering Ltd [2007] EAT case 0161/07

Comment Note that “rolled up” annual leave is now unlawful (¶4014). This was not an issue in this case so the illegality of the arrangements were not discussed.

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Contract, variation and breach

Terms implied by the courts

Temporary work at a different location

¶1174 The EAT has recently held that in an exceptional case the tribunal was entitled to hold that it was justifiable for the employer to require the employee to work temporarily at a different location notwithstanding that the employee's express contractual terms only provided for her working at her workplace.

In this case, L, a teacher, was on sick leave after claiming she had been bullied and harassed by her head teacher. An independent investigator hired by her employer to investigate her 33 complaints dismissed all but one of them. L did not accept the report's conclusions, but accepted the report's proposed plan of the use of a mediator to assist her return. Her employer however considered that this plan would not work until L had accepted the report's conclusions and as a result deferred her return until the matter had been resolved and requested that in the interim she should do a similar job at a different location. The EAT held that the tribunal was entitled to find that despite the fact there was no express term to support this temporary change in location, a term requiring this could be implied given that the requirement to work was justified and the temporary alternative location was suitable and the employee would suffer no detriment with regard to her benefits or status in doing so.

Luke v Stoke on Trent City Council [2007] IRLR 305, EAT

Incorporated collective agreement terms

Variation

¶1282 The Court of Appeal has considered a national agreement which set out car use allowances for authorised employees in local government. The employer, a city council implemented the scheme and then subsequently varied the agreement unilaterally. The Court held that on a true analysis of the contractual position, the Council was entitled to decide unilaterally to change the existing practice in the operation of the car use allowance scheme. However the Court held that this power to vary unilaterally the terms of the employment contracts as to car user allowance was subject to an implied term that reasonable notice of the variation be given or proper transitional arrangements be made. The council was therefore not entitled to give effect to that decision by implementing the change without transitional provisions which would protect the rights of those employees who were affected by the changes in the scheme.

Wetherill and ors v Birmingham City Council [2007] EWCA Civ 599

Constructive dismissal

1. Breach of implied term of trust and confidence

¶1716, ¶¶1245+, ¶6730 An employer will breach his implied duty of trust and confidence if he, without reasonable and proper cause, conducts himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence which should exist between him and the employee (see ¶1245).

The EAT has recently given guidance on the questions that need to be addressed when determining constructive dismissal cases where the employee has resigned due to an alleged breach of trust and confidence. These questions are as follows:

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1. what was the conduct of the employer that is complained of?
2. did the employer have reasonable and proper cause for that conduct? If so, then there is no breach of the implied duty of trust and confidence and the employee cannot claim that he has been constructively dismissed. If not, then;
3. was the conduct complained of calculated to destroy or seriously damage the employer/employee relationship of trust and confidence?

The EAT emphasised that employers have a measure of discretion in their conduct of their relationship with employees, which in particular applies to deciding how to conduct disciplinary and grievance procedures. Consequently, in the case of a constructive dismissal due to the operation of a grievance procedure, an employer will only breach his implied duty of trust and confidence if his conduct of the grievance procedure as a whole was outside the range of reasonable responses to the grievance presented by the employee.

Abbey National plc v Fairbrother [2007] IRLR 320, EAT

Comment This case has been criticised for importing the “range of reasonable responses” test required in unfair dismissal cases (see ¶¶8435, 8505, 6588) to employers’ handling of grievances.

2. Last straw

¶1716, ¶1245 An employer will breach his duty of trust and confidence if, without reasonable and proper cause, he conducts himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence which should exist between him and the employee (see ¶1245).

In this case, an employee T suffered for three years from an excessive workload, and was bullied by her supervisor. She was signed off from work, suffering from anxiety and depression. Her employer refused to take any measures to remove her from control by the supervisor. Ultimately, she resigned, claiming unfair dismissal, and arguing that the employer’s refusal had been the “last straw”. The EAT held that the employer’s failure to carry out an adequate and proper investigation into T’s grievances added materially to the distress already suffered by T, so as to amount to a breach of the implied term of trust and confidence. Accordingly, it accepted the employee’s analysis that this was a last straw case. The employer argued that his conduct should be judged in light of the recent EAT case of *Abbey National plc v Fairbrother* (see update above to ¶1245), which held that employers have a measure of discretion in their conduct of their relationship with employees, and that where an employee claims a breach of the duty of trust and confidence by an employer, the employer’s conduct should be judged on whether it was within a range of reasonable responses. The EAT took a different approach, holding that *Fairbrother* was relevant to cases where an employee resigned in protest at the operation of a grievance procedure, but it was not relevant to last straw cases, such as this one.

GAB Robins (UK) Limited v Triggs [2007] EAT case 0111/07

Interim injunctions

Suspension of employee with pay

¶¶1732+, 6595 In an extension to the situations in which an injunction is traditionally granted, the High Court has issued an interim injunction to restrain an employer from suspending an employee with pay pending the outcome of internal disciplinary proceedings. In refusing the employer’s leave to appeal this decision, the Court of Appeal supported the use of the interim injunction in such circumstances and emphasised that suspension changed the status quo from work to no work and, as it inevitably casts a shadow over the employee’s competence, there was no reason of principle why a court could not restrain an employer from suspending an employee in the same way that it may stay a dismissal.

Mezey v South West London and St George’s Mental Health NHS Trust [2007] IRLR 237, HC ([2007] IRLR 244, CA)

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Flexible working

Part-time workers

Bank holidays

¶1899 The Court of Session has affirmed the EAT's decision in *McMenemy v Capita Business Services Ltd*. The case concerned a part-time employee who worked on days other than Mondays, and had no days off in lieu of bank holidays. The Court of Session found that had the company employed full-time employees who also did not work on Mondays (i.e. because they worked Tuesday to Saturday) they too would have had no days off in lieu of bank holidays. Accordingly, the part-time worker's claim failed.

McMenemy v Capita Business Services Ltd [2007] CSIH 25, CS

Comment This decision was based on relatively unusual facts (the existence in the company of working arrangements so that full-time workers might not work on Mondays). Where a company's full-time workers do all work from Monday to Friday, it remains good practice for employers to offer part-time workers who do not work Mondays a pro rata entitlement of days off in lieu.

Agency workers

1. Where end-user declined to offer permanent contract

¶¶2040+ There is usually no employer-employee relationship between an agency worker and an end-user. Where an agency worker seeks to show that he is an employee of an end-user, he will be required to show that it is necessary for a contract of employment to be implied between them. In this case, an agency worker applied for a permanent post at a hospital but was unsuccessful. In the meantime, he continued to work at the hospital as an agency worker. In the light of his unsuccessful application for a permanent post, the EAT held that a contract of employment could not be implied between him and the end-user.

Heatherwood and Wexham Park Hospitals NHS Trust v Kulubowila and ors [2007] EAT case 0633/06

2. Whether agency contract can be set aside

¶¶2040+ In another case concerning an agency worker seeking to show that he was in a contractual relationship with an end user, the EAT considered its previous ruling in the case of *Cairns v Visteon*, that where an agency worker has an explicit contract of employment with an agency, a contract of employment cannot be implied between the agency worker and the end-user (see update in first newsletter to ¶2040).

Here, an agency worker A sought to evade the above rules by arguing that the contract of employment with the agency was fictitious. He claimed that it was a standard terms contract, that from the first day of his employment he had been controlled and managed by the end-user, and that no mutuality of obligation had ever been intended between him and the agency. In the absence of a meaningful contract of employment, A argued, it was open to a tribunal to find an implied contract between him and the end-user. The EAT rejected A's arguments, on the basis that since a contract of employment will only be implied where this is necessary, and since this will only occur in exceptional cases, the search for an implied contract of employment will be defeated whenever there is an ostensible contract of employment between the agency worker and the agency.

Astbury v Bentley Motors [2007] EAT case 1844/06

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3. Contractual relationship with end-user

¶¶2050, 2710 Although there is usually no employer-employee relationship between an end-user and an agency worker, there may be a sufficient legal relationship to protect the agency worker in particular situations. If, for example, an agency worker is injured at work, the end-user may be liable for the accident (¶¶2050). Here, an engineering consultant sought protection under the whistleblowing legislation, which specifically lists agency workers as a protected category (¶¶2710). The consultant was employed by a limited company, which provided services to an agency, which in turn was engaged by an end-user. The EAT held that although the consultant was not an employee of the end-user there was a sufficiently close relationship between the consultant and the end-user for the consultant to be qualified for protection.

Croke v Hydro Aluminium Worcester Ltd [2007] EAT case 0238/05

Directors

Personal liability

Gross negligence manslaughter

¶¶2161 A company can be prosecuted for gross negligence manslaughter, where there is sufficient evidence to show that there has been gross negligence on its part. The company's directors can only be personally liable where they are individually guilty. This was such a case. Here, the defendant was the managing director of a stone cutting factory and closely supervised activities on the shop floor. A cutting machine was installed in the factory, but its safety features were disabled and an employee was fatally injured. The defendant pleaded guilty at the Crown Court, but was not given a custodial sentence, on the grounds that if he were to be imprisoned the company would fail and its employees would lose their jobs. The Attorney General appealed the sentence, and the Court of Appeal ruled that the question of whether or not the company would have been forced to close without its managing director was an inappropriate consideration and was not relevant to sentencing. Were considerations of this sort to be allowed, there would be no incentive for small employers to comply with health and safety legislation. A sentence of 15 months was imposed.

Attorney General's Reference (No 86 of 2006) [2007] ICR 1047, CA

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Company information

Restraints and restrictive covenants

1. Interest to protect

¶2572 In a case concerning the interpretation of restrictive covenants, two financial consultants were bound to their employer by contracts which included a term that on leaving employment the consultants should not compete for the business of any client of their employer.

At the High Court, it was observed that the consultants provided their services through subsidiary companies within a corporate group of which their employer was the holding company. Since their employer did not in fact provide advice about anything to anybody, the restriction was held to be of no practical utility. Accordingly, the covenants were unenforceable. The Court of Appeal subsequently held that the key question was whether the employer had a legitimate business interest to protect. Given that it did, it was reasonable to interpret the clause as prohibiting the provision of advice to a client of any subsidiary of the employer. Interpreted in this fashion, the covenants were properly enforceable.

Beckett Investment Management Group Ltd and ors v Glyn Hall and ors [2007] EWCA Civ 613

2. Non-dealing covenants

¶2595 In a case concerning the reasonableness of various restrictive covenants, the Court of Appeal has held that an important consideration is the nature of the market in which the employee is engaged. The more specialist the market, the more likely it is that a non-dealing covenant will be upheld.

Beckett Investment Management Group Ltd and ors v Glyn Hall and ors [2007] EWCA Civ 613

3. Severing

¶2633 In a case before the Court of Appeal, two financial consultants were bound to their employer by contracts which included restrictive covenants. One term held that on leaving employment the consultants should not compete for the business of any client of their employer, nor for the private business of any individual who was an officer, employee or representative of a client.

The Court of Appeal held that a restriction which prevented the consultants from canvassing work from individuals who had not been, in their personal dealings, clients of the employer was so wide as to be unreasonable. Applying the "blue pencil" test (¶2633), the Court held that it was possible to sever the offending clause, leaving only the reasonable restriction against competing for the business of actual clients.

Beckett Investment Management Group Ltd and ors v Glyn Hall and ors [2007] EWCA Civ 613

Whistleblowing

Detriment caused by fellow worker

¶2761 Workers who reveal serious employer misconduct are protected from detriment. A worker may not be dismissed by his employer, nor may they be victimised by his employer or by a fellow employee for making a disclosure.

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In this case, a support worker in a residential home, C-M, made protected disclosures about a fellow worker, H. When the employer made known the source of the complaints, H subjected C-M to various acts, including calling her a liar, shouting at her and (C-M alleged) physically assaulting her. The employer investigated the incidents in an inadequate fashion. At the EAT, the employer accepted liability for the acts of anyone in authority over the victim, but argued that acts by anyone who did not have that authority were not acts of the employer. The employer had not encouraged H to victimise C-M. The EAT held however that the acts of H were sufficiently closely connected to the employer, and that the employer was liable for them.

Cumbria County Council v Carlisle-Morgan [2007] IRLR 314, EAT

Remuneration

Bonuses

Whether unlawful deduction of wages claim

¶2832 Court of Appeal has held that where an employer was under an obligation to put in place a bonus scheme which, properly and fairly operated, was capable of replicating the benefits of the original scheme, the claim for any unquantifiable loss suffered should be brought as a breach of contract claim and not a quantifiable claim for unlawful deduction of wages.

Coors Brewers Ltd v Adcock and ors [2007] EWCA Civ 19 now reported at [2007] ICR 983, CA

Comment Contrast this with the situation where a discretionary bonus has been declared on certain terms. In such circumstances, this creates an obligation to pay the bonus on these terms and withholding some or all of the bonus will be an unlawful deduction of wages (see ¶2832).

Right to minimum wage

Low wage was discrimination

¶2865 A worker was successful with a race discrimination case, when he was paid less than the national minimum wage, and the EAT accepted that a British or British-based comparator would not have been so underpaid. The employer's pressure on the worker to not apply for a NI number was also held to be discriminatory.

Mehmet t/a Rose Hotel Group v Aduma [2007] EAT case 0573/06

Sickness, injury and absence

Occupational sick pay

Contractual sick pay and disability discrimination

¶¶4173, 5526 The Court of Appeal has upheld the EAT's decision in *O'Hanlon v HM Commissioners for Revenue and Customs* that an employer is not obliged to maintain a disabled employee indefinitely on long-term sickness absence at full pay.

O'Hanlon v HM Commissioners for Revenue and Customs [2007] Times, 20 April (CA) now reported at [2007] IRLR 404, CA

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Parents' and carers' rights

Maternity rights

Type of job on return from maternity leave

¶4450, ¶4474 An employee on OML is entitled to return to the same job in which she was employed before her absence. An employee on AML is entitled to return to the same job except where it is not reasonably practicable, in which circumstances she must be given another suitable and appropriate job. In the first appellate case on the meaning of "the same job", the EAT held that where the employee is entitled to come back to the same job there should be as little change as possible in her working life, so as to avoid adding to the burdens which will inevitably exist simply because she has a young infant making new demands upon her. Where, conversely, the employee's right is to return to another suitable and appropriate job, the appropriateness of the new job should be considered in the light of the nature of her old job, and the content of her old job should be construed narrowly. The employer already has a protection in terms of his right to place the employee in a different but suitable job.

In this case, a primary school teacher was employed before maternity leave teaching a reception class (pupils aged 4-5). On her return, she was asked to teach a year two class (pupils aged 6-7). Her employer justified this request by saying that it was a settled principle of job allocation in her school that teachers ordinarily changed classes every two years. On the facts, the EAT agreed that the teacher was employed to teach more widely than merely to a reception class, and in consequence her employer had indeed allowed her to return to the same job.

Blundell v Governing Body of St Andrew's Catholic Primary School and anor [2007] EAT case 0329/06

Comment There was one limited ground, however, in regard to which the employee's appeal was granted. When the decision was taken as to which class the employee would teach, no effort had been made to consult with her as to which class she would prefer to teach. In losing the chance to state her preference, the EAT held, the teacher had lost something that she might reasonably think it of value to have been afforded.

Remedies

Discrimination against adopter

¶4771 Where an employer dismisses an employee for a reason relating to adoption leave (¶4767) the dismissal will be automatically unfair. In this case, a tribunal considered an employee C who had been intending to take adoption leave, when she was dismissed, ostensibly for dishonesty. On a scrutiny of the facts, the tribunal concluded that the charges against her had been fabricated. The initiative for the dismissal had come from a senior manager, H. The tribunal found that H had orchestrated the employee's dismissal with the intention of preventing her from taking adoption leave. Her dismissal was unfair.

Coulombeau v Enterprise Rent-A-Car (UK) Ltd [2007] ET Case 2600296/06

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Health and safety

Scope of protection

1. ECJ decision

¶4800 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 clause has been criticised, with the European Commission arguing that the European General Health and Safety Directive (EC Directive 1989/39) introduces a system of “no fault” liability, which is to say that it requires all member states to introduce legislation under which the employer is objectively liable for the health of his workers, so that even in situations where an accident was not the fault of the employer, the employer will still be liable under the law.

Following an Opinion of the Attorney General (see update to ¶4860), which found against the Commission, the European Court of Justice has agreed with the Attorney General’s Opinion and has held that the Health and Safety at Work Act, with its emphasis on the balancing of interests, is compatible with European law. In particular, the ECJ found that the Health and Safety Directive does not introduce no fault liability. Accordingly, there shall be no need to amend the UK legislation.

Commission of the European Communities v United Kingdom [2007] ECJ Case C-127/05

2. Status of Codes of Practice

¶4800 Employers are required to comply with certain statutory obligations, as set out in the Health and Safety at Work etc Act 1974, various Regulations and Codes of Practice. In a case concerning the practice of the courts in implementing the Codes of Practice, the Court of Appeal considered an employee injured in a fall at work. Her employer was a care home. The workplace had slippery vinyl floors and several of the residents were prone to incontinence. The relevant legislative protection placed an absolute duty on employers to ensure that the floors of workplaces are properly constructed. Different, lesser, duties exist to remove from a floor a temporary hazard.

Before the High Court, the employee attempted to bring the evidence of Codes of Practice published by the Health and Safety Commission, which, she argued, clarified the extent of the duty. The Court refused. The Court of Appeal held that the High Court had been wrong to refuse this evidence. A Code of Practice which was designed to give practical guidance to employers as to how to comply with their duties under statutory regulations could be taken as providing some assistance as to interpretation. Such guidance always had to be treated with caution. It might be wrong. It did not carry the authority of a judicial decision. But if relevant, as it was here, it should be considered.

Ellis v Bristol City Council [2007] EWCA Civ 685

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Enforcement and remedies

Gross negligence manslaughter

¶5072 A company or an employer may be prosecuted for gross negligence manslaughter, where there is sufficient evidence to show that there has been gross negligence on its part. Here, the defendant was the managing director of a stone cutting factory and closely supervised activities on the shop floor. A cutting machine was installed in the factory, but its safety features were disabled and an employee was fatally injured. The defendant pleaded guilty at the Crown Court, but was not given a custodial sentence, on the grounds that if he were to be imprisoned the company would fail and its employees would lose their jobs.

The Attorney General appealed the sentence, and the Court of Appeal ruled that the question of whether or not the company would have been forced to close without its managing director, was an inappropriate consideration, and was not relevant to sentencing. Were considerations of this sort to be allowed, there would be no incentive for small employers to comply with health and safety legislation. A sentence of 15 months was imposed.

Attorney General's Reference (No 86 of 2006) [2007] ICR 1047, CA

Equality at work

Discrimination – Key concepts

1. Territorial scope

¶¶5215, 2280 Generally, workers are excluded from anti-discrimination legislation if they work wholly outside GB. Workers are still covered however even if they work wholly outside GB, where:

- the employer has a place of business at an establishment in GB;
- the work is for the purposes of business carried on at that establishment; and
- the worker is ordinarily resident in GB at the time he applies for, or is offered the employment, or at any time during the course of the employment.

In a case concerning a British lecturer who worked for a Malaysian registered company which operated as a franchise of a British university, the EAT held that the above statutory rules on jurisdiction should be interpreted in line with the common law rules which apply when assessing whether work is for the purposes of a business carried on in Great Britain. The same principles apply as are set out in the House of Lords' decision in *Lawson v Serco Ltd* (¶2280).

Williams v University of Nottingham [2007] EAT case 0124/07

2. Acts of third parties

¶¶5231, 5435 In discrimination and harassment cases, an employer may be liable for the acts of third parties. This principle has previously been limited by the House of Lords (*Pearce v The Governing Body of Mayfield School*, ¶5231) to situations where the detrimental act was caused or permitted in circumstances in which the employer had sufficient control over whether or not the act would happen and where the employer's failure to take reasonable steps to protect his employees from the discriminatory act was itself for a reason connected to the worker's sex race or disability.

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That is in order for an employer to be liable for the direct discrimination claimed, there has to be a failure of the employer which must itself be an act of discrimination. That case preceded, however, the coming into effect of the Equal Treatment Amendment Directive, which introduced new, expansive definitions of harassment on the grounds of age, disability, sex, sexual orientation, race and religion. The new definition of harassment on grounds of race is found in s 3A RRA (¶5435).

In this case, a white British employee complained of having suffered racist comments and racist text jokes addressed to her by customers, and of being instructed by her employer to ignore them. A tribunal chairman struck out her claims, holding that as a matter of law it was highly unlikely that a claimant could bring a claim against an employer in respect of comments made by third parties. The EAT restored the claim, holding that there was no reason why the restrictions set out in *Pearce v The Governing Body of Mayfield School* should continue to apply. There was no reason to assume that the employer could not be directly liable for third party acts if the detrimental act was caused or permitted in circumstances in which the employer had sufficient control over whether or not the act would happen. This case will now go to a full hearing for the case to be decided.

Gravell v London Borough of Bexley [2007] EAT case 0587/06

3. Claim against individual worker

¶¶5233, 5722 Where an employee brings a discrimination claim against an employer, the employee must raise a grievance (¶¶6500, 6773) in writing with his employer before his claim will be accepted. Where however an employee brings a discrimination claim against a fellow worker, the EAT has ruled, there is no requirement for the statutory dispute resolution to be followed and as a consequence it is not necessary for the employee to raise a grievance.

Odoemelam v the Whittington Hospital NHS Trust [2007] EAT case 0016/06

Sex and sex orientation discrimination

Victimisation in the course of an equal pay claim

¶5353 When bringing an equal pay claim, an employee is protected under the Sex Discrimination Act from subsequent victimisation (¶5350). To succeed with the claim, the employee must show that he/she has been less favourably treated by reason of having brought, or given evidence in connection with, or taken other action in reference to, proceedings, or made an allegation against his/her employer or another worker.

Since the case of *Chief Constable of West Yorkshire Police v Khan*, the courts have subjected victimisation claims to the test that any detriment must have occurred "by reason" of protected conduct. Sometimes, this test has been phrased as a defence: that an employer has not victimised an employee where he was "acting honestly and reasonably" to some other end.

In a recent case, the House of Lords has suggested that this is an inappropriate test. Rather than asking whether a detriment was by reason of victimisation, it will normally be a more useful test to ask whether there was a detriment at all. An approach that focuses on the motivation of the employer is unhelpful, as it is for the employee to say whether he/she believes that he/she has been victimised, and for the court to determine whether his/her perception of victimisation is reasonable. In the words of Lord Neuberger, "one must view the issue from the point of view of the alleged victim".

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Here, a council had responded to a group of female catering staff bringing an equal pay claim by writing a threatening letter to the employees concerned, encouraging them to withdraw their claim, and threatening them and the schoolchildren for whom they cooked with particular consequences if the caterers did not settle. The House of Lords found that there had indeed been a detriment: the caterers had suffered mental distress.

The Lords went on to say that nothing should prevent an employer from sending a letter with a view to pointing out the possible consequences of a claim. Such conduct would become victimisation only where an employee could show that he/she had suffered a detriment by receiving the letter, and it was reasonable for the employee to believe that he/she had in fact been victimised.

St Helens Borough Council v Derbyshire and ors [2007] UKHL 16 now reported at [2007] IRLR 540, HL

Alcohol and harassment

¶5360 As an example of the rules concerning harassment on grounds of sex, an employee was dismissed for sexually assaulting a colleague by grabbing and holding her breasts in the course of an after-work function. The employee claimed that he had been unfairly dismissed, as his employer when investigating the allegation had failed to consider that this was a drink-fuelled occasion, where there had been much light-hearted banter, some of a sexual nature. Context, he suggested, was everything.

The EAT disagreed. If the employee had indeed sexually assaulted his colleague, then no amount of banter, lewd comments by others present or the amount of alcohol consumed during the evening would alter that simple fact.

Honda Motor Europe v McMillan [2007] EAT case 0471/06

Racial and religion or belief discrimination

1. When claims of both religious and racial discrimination

¶5383 It is common for employees bringing claims of religious discrimination to claim racial discrimination in the alternative. It is also common for employees to bring claims in other combinations (such as when alleging both sex and racial discrimination). An EAT has ruled that where tribunals consider such applications they should take care to distinguish between the two claims. It is inappropriate for a tribunal to assume that because one form of discrimination is proved, the other also automatically is.

In this case a black Muslim postal worker, J, brought claims of both racial and religious discrimination against his employer and cited appropriate comparators (including white, Sikh and Hindu workers). In evaluating his claim, the tribunal found that J had suffered racial discrimination. The tribunal then went on to treat the claim of religious discrimination as a subsidiary matter, inferring that such discrimination had taken place, but without considering any contrary evidence. The EAT held that the real evidence of religious discrimination had been "virtually non-existent", and in that context it was inappropriate for the tribunal to read off one type of discrimination from evidence of another.

Royal Mail Group PLC v Jan [2007] EAT case 0101/07

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2. When rival claims of religious and sexual orientation discrimination

¶¶5383, 5271 When discrimination on grounds of religion or belief was first prohibited in 2003, some concerns were expressed that this protection might be used by individuals as a shield behind which to protect conduct which in reality discriminated against other employees, for example on grounds of sex or sexual orientation. This potential contradiction between the discrimination strands has rarely, however, been the subject of litigation.

In this tribunal case, an employee A-G was a member of a Christian prayer group, and circulated at work homophobic literature containing passages from the Bible with A-G's analyses of them. A-G was dismissed by his employer, and brought a claim to a tribunal of religious discrimination. On a scrutiny of the whole facts of the case, the tribunal held that A-G had not been treated less favourably on the grounds of his religion or belief.

Apeologun-Gabriels v London Borough of Lambeth [2006] ET case 2301976/05

3. No strike out

¶5384 The EAT has declined to strike out a claim of racial discrimination brought by a member of the British National Party, P, who was denied employment by the prison service under the terms of a policy by which the service refused employment to members of racist organisations. On a proper construction, the EAT held, P's case was that the service's policy only applied to members of white racist organisations and not to members of black racist organisations.

While the argument appeared "thin", the EAT held, the case raised an issue of direct discrimination, and only in the most exceptional cases should any discrimination claim be struck out (¶9573).

HM Prison Service v Potter [2006] EAT case 0457/06

Disability discrimination

1. Conditions with unclear cause

¶5460 In a disability discrimination case, it is not always necessary to establish how an impairment is caused. On the other hand, where there is an issue as to the existence of an impairment, it is open to a respondent to seek to disprove the existence of the impairment, including by seeking to prove the claimed impairment is not genuine.

In a case concerning an employee suffering from an undiagnosed back condition, both parties agreed to instruct a joint expert witness. The expert gave written evidence that the employee suffered from various pains. The witness also found, however, that the employee's condition was such that it would be impossible to know the source of her disability. The respondent then sought to instruct a second expert. The EAT held that the tribunal should permit the respondent to do so.

The Hospice of St Mary of Furness v Howard [2007] EAT case 0646/06

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2. Causation

¶5502 Less favourable treatment on the ground of a person's disability occurs where an employer, on the ground of the disabled person's disability, treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person. One issue is whether a disabled person would have received the less favourable treatment from his employer "but for" his disability.

In this case, a post was advertised an emergency ambulance worker. The applicant C was found to be suffering from psoriasis, a skin condition, to such an extent that he could not be exposed to latex medical equipment, and there would be a cross-infection hazard for patients. Psoriasis is also a disfiguring condition (¶5479) and C argued that he had experienced discrimination on account of his disfigurement. The Northern Ireland Court of Appeal held that this had not been the reason for the differential treatment: it was the risk to patients, rather than his disability, which had caused the applicant to be unsuccessful.

Cosgrove v Northern Ireland Ambulance Service [2007] IRLR 397, NICA

3. When duty to consult with disabled person

¶5534 Where any provision, criterion or practice applied by or on behalf of an employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage compared with non-disabled people, the employer will be under a duty to make reasonable adjustments to the provision, criterion, practice or feature, in order to remove the disadvantage (¶5530). Where a disabled employee asks an employer to make reasonable adjustments to his working conditions, the employer may be under a duty to consult with the employee. The duty will apply for example where the failure to consult prevents the employer from making adjustments that could reasonably have been made (see ¶5534).

In this EAT case, a qualifications body failed to provide reading software for a disabled person with a visual impairment. An employment tribunal found that this failure was unreasonable and was the consequence of the qualification body's failure to focus on the individual needs of the disabled person. Consultation should have taken place. The EAT endorsed the tribunal's reasoning.

Project Management Institute v Latif [2007] EAT case 0028/07 now reported at [2007] IRLR 579, EAT

4. No duty to consult with disabled person

¶5534 An employer has a duty to make reasonable adjustments to any provision, criterion, practice or feature of the workplace, which places a disabled person at a substantial disadvantage compared to a non-disabled person. In previous cases, the question has arisen as to whether an employer has further, implied duties, either to obtain information or to consult with the employee, and in either case to establish whether an adjustment is required. Here, an IT manager suffered an attack, which left him two collapsed lungs. His employer offered various routes to enable the employee to return to work, but no adjustments could be agreed. Ultimately, the employee was dismissed. Before the EAT, the employee argued that the employer should have obtained a medical report, so as to be in a position to properly evaluate whether, or how he could return. The EAT, however, rejected this argument, approving the approach taken in *Tarback v Sainsbury's Supermarkets* (see ¶5534). What matters, the EAT held, is simply whether a reasonable adjustment is carried out. Whether that is done by luck or judgment is immaterial.

Spence v Intype Libra [2007] EAT case 0617/06

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5. Practicability of reasonable adjustment

¶5553 Where any provision, criterion or practice applied by or on behalf of an employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage compared with non-disabled people, the employer will be under a duty to make reasonable adjustments to the provision, criterion, practice or feature, in order to remove the disadvantage (¶5530). Whether a suggested adjustment is reasonable will be determined objectively, taking into account factors such as the effectiveness of the proposed adjustment, its practicability and the resources of the employer. Where the proposed adjustment would do nothing to enable the employee to remain in post, there is no duty.

In this case, a mobile librarian H requested that a risk assessment be carried out of her working arrangements. The employer (a county council) had however received a number of medical opinions, from which the council had concluded that H was incapable of remaining in her post without exacerbating her condition. The Court of Appeal held that since H was incapable of remaining in post, no obligation to make a risk assessment arose.

Hay v Surrey County Council [2007] EWCA Civ 93

Age discrimination

Compatibility with European directives

¶¶5639, 8201 Prior to the introduction in 2006 of Regulations outlawing discrimination on grounds of age, an employee aged over 65 could not claim unfair dismissal.

In a recent case concerning a cleaner who was dismissed from his post at the age of 82, the EAT was forced to consider whether the recent ECJ case of *Mangold v Helm* (see memo point to ¶5639) had the effect of making this prohibition unlawful on the grounds that the ECJ ruled in this case that a claimant acquired the legal right to bring an action under a Directive from the date of its enactment, and this right over-rode subsequent national legislation which offended against the Directive.

The EAT held that when implementing these cases a tribunal should be bound by four propositions:

- that the EC Treaty and Directives introduce a number of fundamental rights which bind a member state;
- that non-discrimination on grounds of age is one of these fundamental rights, with the result that it may be necessary to set aside any provision of national law, where it conflicts with this principle;
- that in cases since *Mangold*, the ECJ has declined to use these principles to extend community law beyond the words of the Directive, or to reduce the freedom of member states to utilise the periods granted by the Directive for lawful implementation; and
- that in *Mangold* the domestic provision (i.e. in that case German legislation) was in breach of the Directive, and it was for this reason that the ECJ concluded that it should be set aside.

The EAT held that since the UK's domestic legislation was not in breach of the UK's obligations under the Directive, it was not necessary for there to be a direct operation of the Directive and there was no need to address the question of whether the provisions against discrimination could apply earlier in time than the 2006 transposition of the Directive into UK law.

Lloyd-Briden v Worthing College [2007] EAT case 0065/07

Comment The decision in *Mangold* has been controversial, and the forthcoming ECJ decision in *Palacios de la Villa v Cortefiel Servicios SA* is likely to be significant (for the Advocate General's Opinion see the update in newsletter 1 to ¶8201).

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Remedies

1. Equal pay: new comparator allowed

¶¶5770, 9631 The principle of “res judicata” (¶9631) holds that where an issue has been decided in one court in should not be reopened in another court. This rule prevents an employee from bringing the same, or substantially the same case, to the court twice.

By a 2-1 majority, the EAT has ruled that res judicata does not prevent an employee for bringing fresh proceedings for equal pay, where the same employee has previously made a complaint against the same employer covering the same period of time, but in the new complaint the employee cites a new comparator.

Bainbridge v Redcar & Cleveland Borough Council (no. 3) [2007] EAT case 0426/06 now reported at [2007] IRLR 494, EAT

2. Equal pay: compensation in respect of arrears of pay

¶5770 Where an equal pay claim is successful, the employee may ask a tribunal for compensation in respect of arrears of pay. The normal limit to compensation is 6 years' arrears pay.

Where the action comes about because a job evaluation has rated a worker's job as equivalent to a job done by member of the opposite sex (¶5657), the appropriate compensation, the EAT has ruled, is arrears for the period since the job evaluation. This cannot be more than 6 years' arrears, and will typically be less.

Bainbridge v Redcar & Cleveland Borough Council (no. 3) [2007] EAT case 0426/06 now reported at [2007] IRLR 494, EAT

Comment This decision means that where two employees have long worked on different tasks, and have been paid differently, but then a job evaluation recognises that the tasks are of equal value, the employee who has previously been worse paid will have no action for the period up to that job evaluation in which they have experienced unequal pay. The EAT held that this approach is necessary in order to encourage employers to conduct frequent job evaluation surveys.

3. Statutory grievance procedure

¶5722 Where an employee brings a discrimination claim against an employer, the employee must usually raise a grievance (¶¶6500, 6773) in writing with his employer before his claim will be accepted. Where however an employer has dismissed an employee, the statutory grievance procedure does not apply (¶¶6581, 6760).

Accordingly, the EAT has held that where an employee brings a discrimination claim, and the substance of his complaint is that he has been dismissed for a discriminatory reason, the employee is under no obligation to pursue a grievance.

Lawrence v HM Prison Service [2007] EAT case 0630/06 now reported at [2007] IRLR 468, EAT

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Data protection and privacy

Right to privacy

1. Monitoring and surveillance

¶¶6252, 6150 Where an employer intends to monitor his workers, any monitoring should be carried out subject to a written monitoring policy, should be proportionate and needs to be justified by some benefit that it brings to the employer. Further, covert monitoring, that is monitoring about which the subject of it is unaware, is only justifiable in exceptional circumstances (see ¶6250).

In this case, a secretary C worked for a further education college. The college had no monitoring policy. For several months, the secretary was monitored by her employer when using telephone, email and internet. The ostensible purpose of monitoring was to ascertain whether the applicant was making excessive use of her employer's facilities for her own personal benefit. The European Court of Human Rights ruled that the conduct of the employer had breached C's right to privacy under Article 8 of the European Convention on Human Rights.

Copland v UK - 62617/00 [2007] ECHR 253 (3 April 2007)

2. Breach of confidence: House of Lords' decision in *Douglas v Hello! Ltd*

¶6285 In the final instalment of the *Douglas v Hello! Ltd* saga, the House of Lords by a 3-2 majority allowed the appeal by OK! on the ground of breach of confidence. The House of Lords confirmed that there was no new common law tort of invasion of privacy (see *Wainwright v Home Office* (memo point 1)). Instead, Lord Hoffman in his leading judgment emphasised that in recent years, English law has adapted the action for breach of confidence to provide a remedy for the unauthorised disclosure of personal information (see *Campbell v MGN Ltd*). This development has been mediated by the analogy of the right to privacy conferred by Article 8 of the European Convention on Human Rights and has required a balancing of that right against the right to freedom of expression conferred by Article 10 (see memo point 2). However in this case, as OK!'s claim was to protect commercially confidential information and not the protection of privacy, no consideration of Convention rights was necessary.

OBG Ltd and ors v Allan and others; Douglas and another v Hello! Ltd and others; Mainstream Properties Ltd v Young and others [2007] UKHL 21

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Training and performance

Training

Discrimination

¶6340 An employer may not discriminate on the grounds of sex, race, disability, age, sexual orientation, or religion or belief in offering employees an opportunity to undergo training. In this case, the EAT considered an applicant to the Government Legal Service (GLS)'s vacation placement scheme, a ten-day course, during which students are placed as legal trainees on work experience with the GLS. The applicant was unsuccessful with an application and brought a claim of race discrimination. The GLS argued that their scheme should not be included within the definition of training, as it did not have a syllabus and there was no direct instruction or feedback. The EAT disagreed, finding that the vacation placement scheme was training for these purposes.

Treasury Solicitor's Department v Chenge [2007] IRLR 386, EAT

Discipline and grievance

Grievance procedures

Whether complaint contained within grievance

¶6773 In respect of complaints covered by the statutory dispute resolution procedures (¶9986), an employee cannot start tribunal proceedings in respect of the subject of his grievance unless the employee has first raised a grievance in writing under Step 1 of the applicable statutory procedure. Disability discrimination cases are among the group to which the statutory dispute resolution procedures apply.

In this EAT case, a disabled employee had been absent from work on long-term sickness, and had, during the period of his employment, complained about the employer's delay in finding alternative work for him. Subsequent to the issuing of the letter of grievance, further acts and omissions had taken place. On appeal, the employer argued that the proper action would have been for the employee to issue renewed grievances subsequent to each act of which he wished to complain. Since the employee had not raised the further acts in any grievance letter, they could not be the subject of any action.

The EAT rejected the employer's argument. Where a grievance complains of an act or omission, which is in reality a continuing act or omission, and where subsequent events occur without changing the substance of what is essentially the same complaint, then even where an employee fails to submit a new grievance the employee is not barred from bringing a claim.

Smith v Network Rail Infrastructure Ltd [2007] EAT case 0047/07

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Transfer of the business

Types of transfer

1. Whether economic identity?

¶7932 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 claimants had been working on short-term contracts for a company, Wightlink (Guernsey) Limited (WGL), which supplied personnel to do a variety of jobs on different ferries. WGL decided to change its practices and to only employ permanent employees with the result that the claimants were offered the same work by another company, Guernsey Ship Management (which WGL had entered into an arrangement with) for lower pay. The claimants brought an action that this was a TUPE transfer in order to seek TUPE protection with regard to their terms, but this failed on the grounds that they did not form an economic entity. On appeal, the Court of Appeal held that although, on the one hand, the claimants could be said to belong to a group which could be identified because all members had short-term contracts and fulfilled a specific role in WGL's business, on the other hand they all did different work, on different vessels. To the Court's mind, neither factor was conclusive and the tribunal was entitled to hold that, taking both factors into account, this group was not an economic entity.

Wain & Ors v Guernsey Ship Management Ltd [2007] EWCA Civ 294

2. Evidence of business transfer following a transfer of shares

¶7932 This case concerned a transfer of the shares of a subsidiary company to its parent company. The Court of Appeal has emphasised that the mere fact of a transfer of control, i.e. ownership of the shares of the company, will not be sufficient to establish the transfer of the business from subsidiary to parent. What is needed for a TUPE transfer is for the overall arrangement to have changed so that the subsidiary's day-to-day activities can be shown to have transferred to the parent company. This is simply a question of fact and it is not necessary to "pierce the corporate veil" to ascertain whether the transaction was in fact more than a share sale. In this case, as the tribunal had found that on the facts the subsidiary's day-to-day activities had transferred to the parent company it was entitled to hold that there had been a TUPE transfer.

Millam v The Print Factory (London) 1991 Ltd [2007] EWCA Civ 322 now reported at [2007] IRLR 526, CA

Comment As can be seen, a pure transfer of shares remains outside the scope of the TUPE rules.

Varying terms and conditions

Favourable conditions agreed on transfer

¶¶8015+ The new TUPE regulations make it clear that variations due to the transfer (or connected to the transfer and not due to an ETO reason) are void (¶8015). However, the EAT has recently held that this does not prevent an employee from taking advantage of a variation which he considers more favourable.

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In this case, the employee's contractual retirement age was agreed as a result of the transfer to be 65 (the employee's contractual retirement age with the transferor had been 60). However, after the transfer the transferee notified the employee that they would be retiring him on his 60th birthday. The EAT held that the employee could rely on his contractual retirement age being 65 so that he was eligible to claim unfair dismissal.

Power v Regent Security Services Ltd [2007] IRLR 226, EAT now reported at [2007] ICR 970, EAT

Comment

1. On the other hand, the EAT opined, if the employee wants to, he can object to any variation which he considers to be to his detriment (even if the change has compensating advantages) and can treat it as void. In such situations, the EAT commented that the employee may well have to give up any related compensating benefits obtained under the varied contract as a condition of doing so. The EAT emphasised that this ability to choose which terms to rely on applies to employees only and no similar right is to be conferred on the transferee.

As a result of this case, the Department of Trade and Industry (now called the Department of Business, Enterprise and Regulatory Reform) has amended its Guide to the new TUPE Regulations to make it clear that changes to contracts agreed by the parties which are entirely positive are not prevented by the Regulations. See <http://www.berr.gov.uk/files/file20761.pdf>.

2. Note that the upper age limit of either the normal retiring age for a job or the age of 65 (if lower) for unfair dismissal claims has been removed with effect from 1 October 2006 by the Employment Equality (Age) Regulations (see ¶8412).

Information and consultation in the workplace

Domestic information and consultation

Failure to reach agreement

¶7715 Certain employers are required to inform and consult UK-based employees on an ongoing basis about potential measures which will affect their employment prospects and which are likely to lead to substantial changes in the workplace. This process is governed by the locally-negotiated information and consultation agreement. Where there is no agreement, employees may make a formal request to initiate negotiations towards reaching an agreement. Where a valid employee request has been made by more than 40% of employees, the employer is under an obligation to initiate negotiations for an agreement. Where a valid employee request has been made by between 10% and 40% of employees, the employer may ballot the workforce to establish whether there is general support for the request. The decision on whether or not to require a ballot must be taken by the employer and the employer must inform all relevant employees within 1 month of receiving the request (¶7685). Where the employer chooses not to require a ballot, the employer will be deemed to have accepted the request. The standard information and consultation provisions (¶7745) will be deemed to apply from 6 months after the employee request has been received.

In this case, an employer M received a valid request on 15 March 2006 from around 14% of its employees. M had a pre-existing agreement in place, but this only affected one of its sites. M neither negotiated with its employees, nor reached an agreement with them, nor allowed elections of information and consultation representatives to take place. The employer was asked on 15 March to hold a vote to elect information and consultation representatives but by 15 October 2006 had not done so. The CAC therefore gave an order that an election should be held.

Amicus v Macmillan Publishers Ltd [2007] IRLR 378, CAC

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Ending employment

Constructive dismissal

Last straw

¶¶8234, ¶¶6730 An employer will breach his duty of trust and confidence if, without reasonable and proper cause, he conducts himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence which should exist between him and the employee (see ¶1245).

In this case, an employee T suffered for three years from an excessive workload, and was bullied by her supervisor. She was signed off from work, suffering from anxiety and depression. Her employer refused to take any measures to remove her from control by the supervisor. Ultimately, she resigned, claiming unfair dismissal, and arguing that the employer's refusal had been the "last straw".

The EAT held that the employer's failure to carry out an adequate and proper investigation into T's grievances added materially to the distress already suffered by T, so as to amount to a breach of the implied term of trust and confidence. Accordingly, it accepted the employee's analysis that this was a last straw case.

The employer argued that his conduct should be judged in light of the recent EAT case of *Abbey National plc v Fairbrother* (see update to ¶1245), which held that employers have a measure of discretion in their conduct of their relationship with employees, and that where an employee claims a breach of the duty of trust and confidence by an employer, the employer's conduct should be judged on whether it was within a range of reasonable responses.

The EAT took a different approach, holding that *Fairbrother* was relevant to cases where an employee resigned in protest at the operation of a grievance procedure, but it was not relevant to last straw cases, such as this one.

GAB Robins (UK) Limited v Triggs [2007] EAT case 0111/07

Unfair dismissal

Relationship between Polkey-reversal provision and Polkey compensatory reduction

¶¶8436+, 8628, 8630+, 8665 A failure by the employer to follow a procedure (other than a statutory dismissal and disciplinary procedure) will not, by itself, be regarded as making the employer's action unreasonable if the employer can demonstrate that he would have decided to dismiss the employee in any event had he followed the procedure (s 98A(2) ERA 1996 and see ¶8436). This effectively reverses the common law concept formerly known as the "Polkey principle" and is called widely referred to as the "Polkey-reversal" provision or section. Where there is an unfair dismissal, with regard to calculating an unfair dismissal compensatory award, the tribunal must still take into account whether the employment may well have terminated anyway had a fair procedure been followed (see ¶8630). This is commonly known as the "Polkey reduction" and applies equally to procedurally unfair dismissals (i.e. the employee would have been dismissed in any event had a proper procedure been followed) and substantively unfair dismissals (i.e. the dismissal would have occurred in any event at a later date for a different fair reason).

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Since the introduction of the “Polkey-reversal” provision, the principle behind the Polkey reduction continues to operate in conjunction with the new statutory dismissal and disciplinary procedures, albeit with some differences (see ¶8631). Prior to the reversal provision, a Polkey reduction of up to 100% might have been made to an employee’s compensatory award. This is still the case in circumstances where an employer has failed to comply with an applicable statutory procedure: any subsequent dismissal will be automatically unfair, but the employee’s compensatory award may nevertheless be reduced by up to 100% by way of a Polkey reduction since the Polkey-reversal provision will not apply. However, if an employer has complied with an applicable statutory procedure but the dismissal is otherwise procedurally unfair in other respects, it is probable that a Polkey reduction of only up to 50% can now be made since an employer will have a “defence” to a procedurally unfair dismissal if he can demonstrate on the balance of probabilities that he would have taken the decision to dismiss the employee in any event (i.e. the Polkey-reversal provision will apply and the dismissal will not be unfair on this ground).

The EAT has recently given detailed consideration to the relationship between the “Polkey-reversal” section and the assessment of a “Polkey reduction” and has summarised the principles as follows:

1. In assessing compensation the tribunal must assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

2. Where the employer argues that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, the burden of proof is on him to adduce evidence on which he wishes to rely. Nevertheless, the tribunal must take into account all the evidence available when making that assessment, including any evidence from the employee himself (for example, he may have given evidence that he had intended to retire in the near future).

3. There will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. Whether that is the position is a matter of the tribunal’s impression and judgment after it has properly directed itself. However, the tribunal must regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

4. Although the Polkey-reversal provision and Polkey compensatory reduction exercises run in parallel and will often involve consideration of the same evidence, they must not be combined into one exercise. Consequently, even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

5. After such proper consideration of the evidence, the tribunal must decide whether: – if fair procedures had been complied with, the employer has proved that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal in such circumstances would be deemed fair by virtue of the Polkey-reversal provision. (This does not apply if the statutory dismissal and disciplinary procedure have not been complied with.):

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- there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly under the Polkey compensation rule;
- the employment would have continued but only for a limited fixed period, in which case compensation should be accordingly reduced;
- employment would have continued indefinitely (however, this conclusion should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored).

In this case, the EAT held that the tribunal was entitled to find that the redundancy dismissals had not been shown to be fair by virtue of the Polkey-reversal provision, but held that there was evidence which the tribunal ought to have considered in order to decide whether, and to what extent, a Polkey reduction was appropriate. The case was remitted back to the tribunal for re-assessment.

Software 2000 Ltd v Andrews and ors [2007] EAT case 0533/06 now reported at [2007] IRLR 560, EAT

Unfair dismissal

Reinstatement

¶18685 A tribunal has the power to order an employer to take an employee back into employment. When deciding whether or not to exercise the power, the tribunal will take into account the practicability of reinstatement.

Here, the EAT considered the case of a disabled radiographer, who following the diagnosis of her impairment, was allowed to continue to work in a supervisory role, but then dismissed, ostensibly on grounds of redundancy. The tribunal found that the employer had failed to make reasonable adjustments to enable the employee to continue in employment. A tribunal ordered reinstatement. When deciding whether or not make an order for reinstatement, the EAT held, the tribunal should investigate practicability as a separate factual matter, taking evidence as necessary, and providing reasons in its judgment. Where a tribunal had judged that it did not believe the evidence of a witness in matters concerning liability, the tribunal should not fall into the trap of automatically disregarding their evidence when it came to the practicability of reinstatement.

Great Ormond Street Hospital for Children NHS Trust v Patel [2007] EAT case 0085/07

Redundancy

Definition of establishment

¶18921 The ECJ has recently confirmed that its definition of establishment is very broad and has held that as long as the unit is a distinct entity with a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure to facilitate these tasks, it need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy or geographical separation from other units and facilities of the undertaking. It was in this spirit that the Court held in *Rockfon* that it was not essential for the power to effect redundancies to lie with that unit.

Athinaiki Chartopoiia AE v Panagiutidis and ors [2007] IRLR 284, ECJ

Comment Under UK domestic law, where 20 or more redundancies are proposed at one establishment the employer has a duty to consult with appropriate representatives of the employees who may be affected by the proposed dismissals or by measures taken in connection with them. There is no statutory definition of establishment and so tribunals have taken a practical approach when deciding whether to add together the number of employees to be made redundant in a business which has several sites. Taking into account the ECJ's definition of establishment, it will be a matter of judgment, depending on the circumstances of the particular case, as to whether a business operation constitutes an independent unit or merely forms part of a larger unit.

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Employee rights on insolvency

Occupational pension benefits

¶¶9056+, 3405+ The European Court of Justice has held that the UK has not correctly implemented the EC Directive on Insolvency Protection with regard to pension benefits (Art 8 EC Directive 80/97). The Court held that while there was no obligation to guarantee entitlement to benefits in full, the Directive provides employees/ex-employees with a minimum level of insolvency protection with regard to their acquired and prospective rights to benefits under an occupational pension scheme. UK domestic legislation the Court concluded did not meet this minimum standard of protection as unchallenged statements before the Court showed that two of the claimants in the main proceedings would only receive 20 and 49% respectively of the benefits to which they were entitled. The Government will need to change the current rules and further developments will be covered in future updates.

Robins and ors v Secretary of State for Work and Pensions [2007] IRLR 270, ECJ

Employment claims

Advising and handling claims

1. Time limits (extension of time limit: incorrect advice)

¶¶9470, 9474 Although the EAT has recently begun to take a less stringent view and has allowed an employee's claim to proceed even though it was out of time because she had been given incorrect advice (*Marks and Spencer plc v Williams-Ryan* and see ¶9470), this does not mean that this will automatically happen. In this case, like in *Marks and Spencer plc v Williams-Ryan*, the employee was unaware that, in order to protect his position, he needed to present his unfair dismissal complaint to the tribunal within the 3-month time limit as he had received incorrect advice from the Citizens Advice Bureau that he needed to exhaust his employer's internal dispute resolution procedures before submitting a claim. However, this case was different in that the internal dispute resolution procedure concluded before the end of the time limit (by 1-2 days) and as there were no grounds given on which to conclude that it was not reasonably practicable for the claim to be presented in the part of the three months that remained after the appeal process was completed and as no reasons were given to show that it was presented in a reasonable time after the end of the three month period, the EAT held that no extension of the time limit was justifiable and the applicant was not allowed to proceed.

Royal Bank of Scotland Plc v Theobald [2007] EAT Case 0444/06

2. Expert evidence

¶9565 Where expert evidence is required, it is a convention of the employment tribunal that normally only one expert is instructed and both sides agree to instruct the expert jointly.

In a case concerning an employee suffering from an undiagnosed back condition, the EAT held that while it was normally desirable that only one expert witness should be instructed, there are exceptions to this rule. In particular, the EAT held, it may be useful to appoint two expert witnesses in cases involving very substantial claims, and where key evidence is disputed.

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The total size of the claim was in this case £500,000. The parties originally agree to instruct a joint expert, but while the expert's evidence covered one key issue for the tribunal (the question of whether pains were caused by a particular condition or not), the employer maintained that it did not satisfactorily address another key issue in the litigation, which was whether the claimant suffered from any genuine impairment at all.

Faced with substantial claims, the EAT held, a tribunal should adopt the procedure of a civil court, which in similar circumstances would allow each party to ask questions of the expert witness, and if questions did not resolve a matter at dispute, would allow a second expert to be called.

The Hospice of St Mary of Furness v Howard [2007] EAT case 0646/06

3. Bias: Judge's interest in outcome

¶9614 The right to a fair trial by an impartial tribunal is a basic principle of natural justice. The principle is so important that the appearance of bias ("apparent bias") is equally unacceptable as actual bias. 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.

In this case, a judge applied for a post with a firm of solicitors. When his application was unsuccessful, he described the firm as "insulting" and "condescending". Shortly afterwards, a case came before the same judge in which one of the parties was a partner of the same firm. Counsel for the applicants invited the judge to stand down. Rather than doing so, he ordered a preliminary hearing. At that hearing, he interviewed a witness vigorously, as if cross-examining him. He threatened counsel with "professional consequences", and acted throughout in an undignified and intemperate fashion. An appeal against the judge's decision not to stand down was allowed.

Howell and ors v Millais and ors [2007] EWCA Civ 720

4. Bias: member of tribunal panel

¶9615 The right to a fair trial by an independent and impartial tribunal is a statutory right and a basic principle of natural justice. The principle is so important that the appearance of bias ("apparent bias") is as unacceptable as "actual bias".

In this case, an individual H brought a claim to the employment tribunal alleging that he had been victimised by a union, the GMB. One of the three members of the tribunal panel D was a full-time official of another union, UNISON. H alleged bias.

On appeal, the EAT held that the test of apparent bias was met: the complainant had been disciplined for flouting a policy which was shared by both UNISON and GMB. D had been a senior official of UNISON, who could be expected to support her own union's policy. She was closely connected with individuals who were involved in the case, and one of the issues which had come up before the tribunal was whether the policy of UNISON and GMB was itself reasonable or lawful. Accordingly a reasonable person would take the view that there was a real possibility of bias. The case was remitted to another tribunal for a fresh hearing.

Hamilton v GMB (Northern Region) [2007] IRLR 391, EAT

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Legislative and other changes

Racial and religion or belief discrimination: Extension of definition

¶5383 From 30 April, section 77(1) of the Equality Act 2006 takes effect. The definition of religion or belief is extended to cover “any religion” and “any religious or philosophical belief” including “a lack of religion” and “a lack of belief”. The purpose of this change is to make it 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 in newsletter 1 to ¶543). It is possible, however, that the amended definition will be interpreted more broadly to cover, for example, political beliefs. If the language does have wider effects, then these consequences will be reported in future updates.

Equality Act 2006 (Commencement No. 2) Order 2007 SI 2007/1092

Age discrimination: clarifications

¶¶5600, 8221, 9200, 9223 New statutory regulations clarify the rules regarding age discrimination claims. The most notable changes are:

- amendments to section 105 of the Employment Rights Act 1996 to confirm that a dismissal will be unfair if the reason for dismissal is the employee exercising, or seeking to exercise, his or her right to be accompanied, or to accompany another, at a meeting to request working beyond an intended date retirement (¶8221);
- amendments to the Employment Act 2002 (Dispute Resolution) Regulations 2004 SI 2004/752, so that complaints of age discrimination are covered by the statutory dispute resolution procedures (¶9200) in the same way as complaints under other discrimination legislation; and
- amendments to exempt age discrimination claims from the requirement for a fixed ACAS conciliation period of 13 weeks (¶9223). Again, this brings age in line with the other discrimination procedures.

Employment Equality (Age) (Consequential Amendments) Regulations 2007 SI 2007/825

Claims management services

¶9400 General note: From 23 April 2007, it is now an offence to provide claims management services without authorisation or exemption. Consequently, claims management firms must now be registered before they can advise and handle employment compensatory claims.

Those exempted include:

- legal practitioners acting in the normal course of practice;
- charities and not-for-profit advice agencies;
- trades unions certified as independent; and
- individuals acting otherwise than in the course of business. This includes networks of individuals, operating through a website for example, provided it is not done for reward.

For further information, see the Department of Constitutional Affairs's guidance note on who needs to be registered, which can be found at: www.claimsregulation.gov.uk/pdfs/Who_needs_to_be_authorised_under_the_Compensation_Act_2006_guidance_note_6_April_07.pdf

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EAT claims: ACAS conciliation

¶¶9745+, ¶¶9218+ The EAT has issued a Conciliation Protocol (called EAT/ACAS Protocol 2007), which will enable ACAS to be involved in certain EAT cases. Those that may be suitable for conciliation include cases:

- relating to monetary awards only;
- where the overwhelmingly likely result of a successful appeal would be a remission to the ET;
- that concern remedies; or
- where the parties' employment relationship is continuing.

This reflects in modified form a pilot scheme introduced in 2004/05, and it will take effect for one year from 1 June 2007 when this modified pilot scheme will be reviewed. Further details as to how the Protocol will operate can be found at www.employmentappeals.gov.uk/publications/publications.htm.

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Proposals and consultations

Right to work: Consultation on implementation of new powers

¶780 The Government has powers under the Immigration Asylum and Nationality Act 2006 to introduce fines and new policing measures in order to prevent illegal migrants from working. The Government is consulting on the implementation of new penalties for employers who employ illegal migrants, including:

- civil penalties of up to £10,000 per worker illegally employed;
- imprisonment for up to 2 years or an unlimited fine for procuring fraudulent identity documents;
- imprisonment for up to 2 years or an unlimited fine for knowingly employing an illegal migrant worker;
- disbarment as a company director for knowingly employing an illegal migrant worker; and
- imprisonment for up to 2 years or an unlimited fine for facilitation or trafficking.

The text of the consultation is available on the Border and Immigration Agency website, www.bia.homeoffice.gsi.gov.uk. It closes on 7 August 2007.

Right to minimum wage: Employment Simplification Bill

¶2868, ¶39 In general, a worker's average hourly rate must be no less than the national minimum wage. Certain workers are however excepted from this protection, including students on sandwich courses, teacher trainees on work experience, family members working for a family business, voluntary workers and volunteers. Voluntary workers are workers employed in the voluntary sector who receive no monetary payment beyond subsistence or other expenses. Volunteers are workers in any sector who are under no obligation to perform work or provide services, and offer their time and effort for free, although they may receive reimbursement by way of expenses.

The government is now consulting on new proposals to extend the definition of voluntary workers, in order to include workers on certain government schemes, voluntary instructors in the army and volunteers for specified educational charities. The text of the consultation is available at www.berr.gov.uk/consultations. It closes on 4 September 2007. Parliament's draft legislative programme for 2007–08 includes the Employment Simplification Bill. This among other things may seek to clarify provisions in the NMW Act relating to voluntary workers, depending on the outcome of current consultation which closes on 4 September.

¶2903+ Where a worker who qualifies for the National Minimum Wage (NMW) is remunerated by his employer at a rate which is less than the NMW, the worker can bring a claim for an unauthorised deduction from wages (¶3050). Arrears are calculated as the difference between the remuneration received by the worker and the NMW rate applying at the time they should have been paid. The worker may not claim interest. As a result, workers who bring a successful claim receive compensation which has less real worth than they would have received if the correct payment had been made at the outset.

The Government is therefore consulting on proposals to introduce "fair arrears", which might include an interest component, or sums fixed by a percentage of the claim, or additional compensation at a fixed rate. The text of the consultation is available on the BERR (previously DTI) website, www.berr.gov.uk/consultations. It closes on 8 August 2007. Further to this, Parliament's draft legislative programme for 2007–08 includes the Employment Simplification Bill. This among other things will seek to clarify and strengthen the enforcement framework for the NMW, specifically through the introduction of a straightforward penalty that can be levied against all non compliant businesses and a fairer method of calculating arrears.

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Annual leave: increased entitlement to statutory leave

¶4005 At present, all full-time workers have a statutory entitlement to 4 week's leave (i.e. 20 days' annual leave when working 5 days a week). There is no extra entitlement to bank and public holidays. The Government has long proposed to increase this entitlement (¶4005). The Government has now published draft Working Time (Amendment) Regulations. Once introduced, their effect will depend on when the worker's leave year begins (¶4020).

A worker whose annual leave year begins before 1 October 2007 will be entitled to a proportion of an additional 0.8 weeks (or 4 days) statutory leave, depending on what proportion of their leave year is after 1 October 2007. So, for example, a worker whose annual leave year begins on 1 July 2007, will have 8 months of their annual leave year after 1 October 2007, or three-quarters of the total. Accordingly, they will be entitled to an additional 3 days statutory leave, making a total of 23 days altogether. A worker whose annual leave year begins after 1 October 2007 but before 1 April 2008, will be entitled to an additional 0.8 weeks' statutory leave. This addition will take their entitlement to statutory leave in that year to 24 days. A worker whose annual leave year begins on 1 April 2008, will be entitled to an additional 0.8 weeks' statutory leave. This addition will take their entitlement to statutory leave in that year to 24 days. A worker whose annual leave year begins after 1 April 2008 but before 1 April 2009, will be entitled to 24 days statutory leave, as well as a further additional 0.8 weeks, depending on what proportion of their leave year is after 1 April 2009. So, for example, a worker whose annual leave year begins on 1 July 2008, will have 4 months of their annual leave year after 1 April 2009, or one-quarter of the total. Accordingly, they will be entitled to a further additional 1 day of statutory leave, making a total of 25 days. A worker whose annual leave year begins after 1 April 2009, will be entitled to an additional 1.6 weeks' statutory leave. This addition will take their entitlement to statutory leave in that year to 28 days.

Comment The above scheme sets out a worker's entitlement to statutory leave. If an employer is giving more generous contractual terms, for example, by giving his workers more holiday than the existing statutory leave entitlement, he may already be complying with the draft increases.

Consultation on additional paternity leave and pay

The Work and Families Act 2006 introduced a new entitlement, where a mother has returned to work after a period of maternity leave without using her full entitlement to maternity leave and/or pay, and chooses to transfer that right to her partner, for the partner to take additional paternity leave and/or pay.

The Government is now consulting on proposals to administer that entitlement by means of self-certification. Mothers and fathers would fill in a standard form. Revenue and Customs would be charged with investigating allegations of fraudulent claims. There would be no need for the father's employer to carry out checks with the mother's employer.

The text of the consultation is available on the BERR (previously DTI) website, www.berr.gov.uk/consultations. It closes on 3 August 2007.

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Health and safety: Consultation on guidance for boards

¶4800 At the request of the Health and Safety Commission, the Institute of Directors (IOD) is consulting on a new draft of its guidance for boards on the issue of health and safety good practice. The draft guidance sets out four core actions to be taken along with good practice guidelines on how these actions should be effected. The actions are:

– Planning: this involves complying with the legal requirement for companies with more than five employees to have a written health and safety policy, as well as ensuring that health and safety is a core part of the company's culture, values and performance standards, e.g. having in place effective strategies for communication about health and safety within the company, a regular review procedure, allocating responsibility for health and safety matters and making sure that the issue is regularly addressed by the board.

– Delivering: by putting the appropriate management systems and practices into place. This includes ensuring that adequate resources are devoted to the issue and risk assessments are carried out.

– Monitoring: both incident-led and routine reporting need to form part of a company's monitoring strategy. Companies need to review changes in work practices and procedures to make sure that health and safety issues continue to be addressed, as well as investigating major failures. Companies also need to keep up to date with developments in health and safety regulation and adapt their policies and practices as necessary.

– Reviewing: health and safety performance should be reviewed by the board on an annual basis (as a minimum).

The draft guidance stresses the benefits to employers of dealing with health and safety issues properly, including reducing costs by minimising employee absences and potential legal actions, and improving the company's reputation. It also reminds directors and other officers of their potential personal liability (¶2150) for health and safety breaches, and the fact that directors can be disqualified for conviction of this offence as well.

The draft guidance is available on the IoD website: www.iod.com. Responses on the content and accessibility of the draft guidance were invited by 22 June 2007. The IoD proposes to issue a version suitable for smaller companies and other organisations in due course.

Health and safety: Consultation on damages

¶4810 An employer has duties to his employees under the law of tort, contract and statute. Where the employer breaches these duties, he may be liable for damages. The government is currently consulting on a package of measures which would substantially reform the law of damages. Proposals include:

- widening the class of dependants who are entitled to claim bereavement damages and increasing the value of bereavement damages;
- allowing sick pay to be disregarded in the assessment of damages; and
- introducing a new scheme to allow those who bring mesothelioma claims (¶4822) to recover damages during their own lifetime (this reform is particularly necessary as a majority of those diagnosed with the condition die within a few months of diagnosis).

The consultation document also discusses, although it recommends no action to reform, the law with regard to:

- the relationship between damages and redundancy payments; and
- the category of people who may make claims for psychiatric illness.

The text of the consultation is available on the website of the Ministry of Justice, www.justice.gov.uk/publications/consultations.htm. Responses were sought by 27 July 2007.

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Discrimination – proposals for an Equality Bill

¶5200 The Government has long been subject to pressure for the introduction of a single Equality Bill, which would serve to consolidate and simplify anti-discrimination law. The Government has previously agreed to introduce such a bill in the course of the current Parliament. It has now gone further and begun a consultation as to what should be included in the bill. Among the many proposals are suggestions to:

- remove the need for a comparator in direct discrimination cases;
- extend protection to those perceived to be disabled or associated with disability;
- harmonise the definition of indirect discrimination across all the strands;
- harmonise the test of objective discrimination across all the strands;
- remove the need for a comparator in victimisation cases;
- remove the current defence of genuine occupational qualifications, and subject all the strands to the genuine occupational requirement defence;
- allow hypothetical comparators in equal pay cases;
- extend the public sector duties to age, sexual orientation and religion;
- give the Commission for Equality and Human Rights greater powers to issue compliance notices;
- further promote alternative dispute resolution in discrimination cases;
- remove the list of “capacities” from the DDA; and
- remove the current protection against discrimination on grounds of marital status.

The text of the consultation is at www.communities.gov.uk/index.asp?id=1511211. Responses are sought by 4 September 2007.

Statutory disciplinary and grievance procedures: Employment Simplification Bill

¶¶6501+ Following an independent review of employment dispute resolution procedures (see update in newsletter 1 to ¶6501), which calls for a radical overhaul of the current dispute resolution procedures, the Government consulted on what changes are necessary (see update to ¶6501).

This has now led to Parliament’s draft programme for 2007–08 including an Employment Simplification Bill, which will seek to implement the outcome of the review of employment dispute resolution procedures (including repeal of the statutory dispute resolution procedures and implementation of a package of replacement measures to encourage early/informal resolution and changes to the employment tribunal system).

Trade unions excluding or expelling a member: Employment Simplification Bill

¶7148 A trade union may not lawfully expel a member on the grounds of their membership of a political party. The union may however expel a member on the grounds of their political activities. Following Aslef’s recent appeal to the European Court of Human Rights, the government has accepted that the legislative framework is no longer compatible with the European Convention on Human Rights. Accordingly, the government is consulting on two possible amendments to the Trade Union and Labour Relations (Consolidation) Act 1992. The text of the consultation is available on the BERR (previously DTI) website, www.berr.gov.uk/consultations. It closes on 8 August 2007.

Further Parliament’s draft legislative programme for 2007–08 includes the Employment Simplification Bill. This among other things will seek to amend to trade union membership law in light of the ECHR’s judgment in *Aslef v UK* (such that trade unions can expel members on the basis of their membership of a political party).

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Disputes not resolved in the workplace: Employment Simplification Bill

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This has now led to Parliament's draft programme for 2007–08 including an Employment Simplification Bill, which will seek to implement the outcome of the review of employment dispute resolution procedures (including repeal of the statutory dispute resolution procedures and implementation of a package of replacement measures to encourage early/informal resolution and changes to the employment tribunal system).

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