

DISCRIMINATION/FAMILY FRIENDLY

Psychiatric Injury

The Court of Appeal has ruled in *Essa v Laing* that, in discrimination cases, the test for deciding whether an employer is liable to pay compensation for psychiatric injury is not whether the injury was reasonably foreseeable but simply whether unlawful discrimination caused it - even where the employee's reaction is wholly extreme and unforeseeable.

Disability Law Change

A survey of employer awareness of last October's widening of the Disability Discrimination Act has been published by the Department of Work and Pensions. The report explores understanding of the changes which bring employers of fewer than 15 employees and most currently excluded occupations within the Act's scope. Findings included

- 62 per cent of employers were aware that it was unlawful to discriminate against employees on the grounds of disability
- 24 per cent of employers said they currently employed at least one disabled employee
- 47 per cent felt it would be difficult to retain an employee who became disabled
- the cost of making adjustments for disabled employees was a source of concern

The report is published on the DWP website - www.dwp.gov.uk

Flexible Working

Employers are granting almost eight out of ten requests for flexible working from parents with young children, according to DTI research to mark the first anniversary of the legislation.

However, although 58% of parents with children under six were aware of their rights, only 10% of eligible men were likely to request flexible working compared with 37% of women.

The DTI's research is at odds with voluntary sector studies, including one by the Maternity Alliance which found that 45% of eligible parents said their employer did not know or follow the correct procedure for considering their request and 92% said their employer refused a request for reasons not allowed by the law.

Part-time workers

Part-time workers are seen as less committed to their jobs than full-timers, according to a survey by the Public and Commercial Services Union which also found the negative perceptions continue despite increased flexible and family-friendly working.

UNFAIR DISMISSAL

Effective Date of Termination

Employers and employees are not able to agree to vary the wording of the Employment Rights Act 1996 when it comes to establishing the Effective Date of

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Termination (EDT) in unfair dismissal cases, the Court of Appeal has ruled in *Fitzgerald v University of Canterbury*.

At issue was whether the EDT, which sets the clock running for lodging a claim at the Employment Tribunal, was February 28th (in which case the claim was out of time), or March 2nd as the parties had agreed (which meant it was within time). The Tribunal had found that the earlier date was the EDT, even though the agreement did not occur until the later date.

The Court of Appeal's decision resolves tension between inconsistent EAT decisions and clarifies a complex point of law.

Dispute Resolution

Parliament has approved the final version of the Employment Act (Dispute Resolution) Regulations 2004. These flesh out the framework statutory and disciplinary procedures in the Employment Act 2002. In summary, from October 2004, most dismissals (including redundancy and capability dismissals) will be automatically unfair unless the employer follows a minimum procedure, and the employee also obtains an increased level of compensation. But it is not all bad news for employers - the Act also introduces mandatory grievance procedures and provides that an employee cannot normally bring a tribunal claim unless he has first lodged a grievance with the employer and waited 28 days for the employer to try to resolve matters.

They are available on the HMSO website at www.legislation.hmso.gov.uk/si/si2004/20040752.htm. We will provide further analysis in a future bulletin.

Crisp Decision

Guidance on the difficult issue of using anonymous informants has come from the Employment Appeal Tribunal in *Ramsey v Walkers Snack Food Ltd*, which involved the dismissal for gross misconduct of three employees suspected of stealing promotional bags of cash inserted into crisp packets.

The EAT rejected the employees' complaints that guidelines set out in an earlier EAT case - *Linford Cash and Carry v Thompson* - had not been strictly followed, pointing to the informants' fears of reprisals if they signed a statement or were questioned further.

It was sufficient that the gist of the informants' statements be put to the accused employees, provided there was a good reason (as there was here) for not complying with the existing guidelines, which include the requirement that the employer keep notes of his interviews with informants.

Overseas Workers

The Court of Appeal has overturned a controversial EAT ruling that an employee working anywhere in the world can claim unfair dismissal against any employer with a

place of business in the UK, irrespective of the governing laws or where the employee works.

In his judgment, Lord Justice Pill said the right not to be unfairly dismissed applies only to 'employment in Great Britain' and that although the residence of the parties might be relevant, the emphasis must be upon the employment itself.

Agency Workers

Temporary agency workers are entitled to employment rights against the 'end-user' company following the Court of Appeal's ruling in *Dacas v Brook Street Bureau*.

Such workers have thus far been able to claim unfair dismissal, often leading to the bizarre situation where they were deemed by the courts not to be employed by anyone - neither by the agency nor by whomever they actually worked for on a daily basis.

Now the Court of Appeal has overturned this long-standing position saying that once the temp has been working for a year, they obtain the right to claim unfair dismissal against the 'end-user' company.

Unfair Dismissal Compensation

The Court of Appeal has held that employment tribunals can award compensation for distress and injury to feelings in unfair dismissal claims, in addition to awarding the employee his financial losses.

In overturning the decision of the Employment Appeal Tribunal, the Court of Appeal upheld an employment tribunal's award of GBP 10,000 to Mr Dunnachie, when he was constructively dismissed by Kingston Upon Hull City Council following serious workplace bullying, to reflect the injury to feelings he had suffered.

This brings the law for unfair dismissal in line with discrimination claims, where it has always been possible to recover damages for injury to feelings.

However, the issue (which raises very technical legal questions) has not been finally resolved. The Court of Appeal invited an appeal to the House of Lords and cautioned "In the meantime employment tribunals should manage, list and decide cases in the knowledge that the last word has not been said, but is going to be said in the foreseeable future".

MISCELLANEOUS

Informing and Consulting with Employees

From March 2005, a system of European-style of 'works councils' will be introduced to the UK. It gives employees new rights to a minimum standard of information and involvement in major business decisions. Initially, the new laws will apply to any 'undertaking' with 150 or more employees. Two years later, the new laws will extend to 'undertakings' with 100 employees, and in March 2008 the threshold will drop to just 50 employees.

The right to information and consultation is triggered if 10% of the workforce request negotiations. In that scenario, the employers and employees must agree a suitable consultation framework, detailing exactly what information must be provided, when, to whom and what level of consultation is required. If a framework cannot be agreed, a 'default' framework, set out in the legislation, will apply.

However, if an employer voluntarily sets up a framework before the 10% of the workforce requests negotiations, it can be highly advantageous. First the employer may be able to establish an agreement which avoids union involvement or the need to elect employee representatives. Second, employers can avoid the inflexibility of the 'default' framework agreement. An employer can agree the extent of the information it is obliged to provide, and the issues it must consult over, rather than having the information and consultation requirements in the default framework foisted upon it.

This legislation is a ticking time-bomb for all employers (except those with less than 50 employees). Even if businesses ultimately decide not to act now and pre-empt an employee demand for information and consultation rights, it is necessary to weigh up the advantages and disadvantages of a voluntary agreement whilst the voluntary agreements remains possible.

At the moment, the legislation is in almost final form. We will keep you informed as matters progress.

Agency Update

The DTI has issued guidance to accompany the new employment agency regulations, which came into force on April 6. It is available from www.dti.gov.uk

Among provisions in the Conduct of Employment Agencies and Employment Business Regulations 2003 are rules:

- obliging agencies to state whether someone seeking work is to be employed under a contract of service or for services (i.e. to state whether they are employees or self-employed)
- obliging agencies to specify who pays the worker and what terms will apply
- restrictions on when employment business can charge 'temp to perm', 'temp to temp', or 'temp to third party' fees
- prohibiting the withholding of a temporary worker's wages because they cannot produce an authenticated time sheet

Data Protection Move

Vital guidance on interpreting the Data Protection Act has been issued by the Information Commissioner, who has clarified two new matters arising from a recent Court of Appeal decision, namely:

- what makes data 'personal', given that the DPA only

applies to 'personal data'

- what kind of manual records constitute a 'relevant filing system' for DPA purposes

Details at www.informationcommissioner.gov.uk

Violence at Work

The Home Office and Health and Safety Executive have published their latest survey of violence at work and found that in 2002-03 there were an estimated 849,000 incidents in England and Wales.

Workers in the protective services - such as police officers - remain most at risk, although the figure has fallen appreciably since 1995's high of 1.3m incidents, according to the British Crime Survey.

The HSE defines work-related violence as any incident in which a person is abused, threatened or assaulted in circumstances relating to their work, including verbal abuse or threats as well as physical attacks.

Details on the HSE website www.hse.gov.uk

HSE under Scrutiny

The Health and Safety Executive and the Health and Safety Commission are to be scrutinised by MPs to see how effectively they promote high standards of health and safety at work.

The House of Commons work and pensions select committee will be taking oral evidence in the spring. Details from workpencom@parliament.uk.

New Legislation

Three pieces of new employment law came into force on April 6:

- The conduct of Employment Agencies and Employment Businesses Regulations: these affect the private recruitment industry and update existing regulations.
- Maternity leave and paternity, and adoption leave and pay regulations: amendments fine-tuning the new laws for working parents introduced in April 2003.
- The extension of the ACAS arbitration scheme to Scotland: it extends the present arbitration service ACAS offers in England and Wales north of the border. It impacts only on those employers and employees seeking arbitration to resolve a complaint.

ACAS Guidance on Bullying and Harassment

ACAS has updated its guidance on workplace bullying and harassment in two guides - one for employers and one for employees.

Both provide an overview of the law, give examples of behaviour that might amount to bullying or harassment and offers a list of useful contacts.

The guides are available from www.acas.org.uk/publications

Pensions Bill

The long-awaited Pensions Bill has now been published and contains measures aimed at improving security for members of final salary pension schemes and protect employees' pension rights following a TUPE transfer.

Among the measures is a Pension Protection Fund guaranteeing benefits payments to members whose firms become insolvent with insufficient funds in their schemes to meet their final salary pension obligations.

Under the TUPE measures, if the 'old' employer provided a pension scheme, the 'new' employer will either have to provide one too or offer another scheme that meets minimum standards. It will, however, still be possible for employers and employees to agree not to apply the rules.

ACAS website

The ACAS website has had a thorough makeover and is now much more user-friendly with a clear layout and simpler links. Among the sections accessed from the new home page are an 'A-Z of work', which flags up leaflets and booklets available for a wide range of employment issues, as well as rights at work, training, online learning and publications sections. www.acas.co.uk

Internet and Email Guidance

ACAS has updated its guide to internet and email policies, setting out what should be covered in a policy and the relevant legal considerations involved.

ACAS states a written policy helps an organisation:

- protect itself against liability for actions of its workers (vicarious liability)
- educate users about legal risks
- make clear to users who they should contact for guidance
- notify users about privacy expectations

Details are available from www.acas.org.uk/publications/AL06.html

Damages for Stress

The House of Lords has ruled in Barber v Somerset County Council that teacher Leon Barber can recover £72,547 in damages for stress at work.

However, the decision turned on the facts of the case and the judges made it clear that the Court of Appeal's restrictive interpretation of the law in Sutherland v

Hatton (to which Mr Barber's case was co-joined) was correct - that is, that a distinction must be made between an individual believing they suffered from work-related stress and telling their employer that they did. The House of Lords made it clear that if an employee says he can cope with the job, an employer is entitled to take that a face value.

Illegal Working

Under the Asylum and Immigration Act 1996, it is a criminal offence to employ anyone aged 16 or over who is subject to immigration control without fulfilling certain conditions. If the employer can show that an acceptable document appearing to relate to the employee was produced before employment began, and that the original or a copy was kept on file, or a record of it made, they have a complete defence.

However, under the Immigration (Restrictions on Employment) Order 2004 important changes are introduced on 1st May 2004 to both the list of acceptable documents and to the acceptable methods of copying them. Details on the Home Office website at www.homeoffice.gov.uk/docs3/si2004_755.pdf.

Working Time Poll

Seven out of ten people who work more than 48 hours a week do so from choice, according to research by the Chartered Institute of Personnel and Development which found senior managers and professionals the most likely to log long hours.

The survey found around 30% claimed an element of compulsion from their employers, up from 11% in 1998, and 45% believed their employers encouraged long hours.

Of those who had heard of the opt-out clause under the Working Time Regulations, 37% had signed an agreement to work more than 48 hours. Only a tiny minority did so when signing their contract of employment - a concern identified by the European Commission when launching its consultation exercise on the issue which closed on March 31.

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This newsletter is a guideline only to recent changes in employment law. You are advised to seek Legal Advice from our Employment Group on any specific queries you may have.