

Welcome to the latest issue of the Steptoe & Johnson Employment Law Update. The Employment Law Updates are aimed at providing information on recent developments in UK employment law. It is our desire to provide you with not only an update of the law in the UK, but also a practical insight in managing workplace issues on a pro active basis.

To achieve our objective and to continuously improve the Updates, it is important that we receive feedback from you. With a view to this, please email any comments or suggestions which you may have relating to the Updates to [employmentgroup@steptoe.com](mailto:employmentgroup@steptoe.com).

We look forward to hearing from you.

## 1. Increase in Compensation Limits

With effect from 1st February 2005 the following new limits take effect.

<b>Week's pay for unfair dismissal</b>	Basic award £280
<b>Unfair dismissal</b>	Maximum compensatory award £56,800
<b>Maximum redundancy pay</b>	£8,400
<b>Maximum award in an insolvency</b>	<ul style="list-style-type: none"><li>• arrears of pay £2,240</li><li>• statutory notice pay £3,360</li><li>• holiday pay £1,680</li></ul>

## 2. Disciplinary and Grievance - Companions

The DTI, with just one day's notice, announced that s.37 of the Employment Relations Act, 2004 would come into force on **1 October 2004**. This provision revises the law as it applies to the role of the companion in disciplinary and grievance hearings.

Under the amended law, the employer must allow the companion to address the hearing to put the worker's case; to sum up that case; and to respond on the worker's behalf to any view expressed at the hearing. The companion may still confer with the worker during the hearing. The companion will therefore normally be able to address the hearing both at the beginning and end of the hearing and will also have the opportunity to respond to views expressed.

The amended law also provides that the employer is not required to permit the companion to answer questions on the worker's behalf, address the hearing if the worker indicates that he does not wish the companion to do so, or use the powers in a way that prevents the employer from explaining his case or any other person making his contribution.

Section 37 makes it clear that where a worker attends a hearing as the companion of another worker, he is protected against detriment and dismissal not only in respect of the act of accompanying the worker but also for addressing or seeking to address the hearing.

## 3. Sex Discrimination

### *Brumfitt v Ministry of Defence*

Miss Brumfitt was an acting Corporal in the RAF Military Police. She attended a training course in February 2001. Throughout the course a sergeant used a number of offensive and obscene remarks which were directed at both male and female personnel. She later brought a claim for sex discrimination. The Appeal Tribunal decided that although she found the language to which she had been exposed offensive and humiliating to her as a woman, she had not been exposed to it because of her sex but because like others of both sexes, she had been required to attend the training course.

### *Carlucci v Oracle Corporation*

Karen Carlucci a former employee of Oracle Corporation was awarded £100,000 after she sued for sexual discrimination and unfair dismissal. She resigned from her post following her return from maternity leave when she was given a job well below her abilities. Her boss allegedly "operated in a culture in which no-one had pointed out to him that what might be appropriate in a mixed gender workplace". The award included costs for compensation for sex discrimination, injury to feelings and loss of private health cover. Oracle plans to appeal the award.

### *Villaba v Merrill Lynch*

Former banker Miss Villaba lost her claim for sex discrimination against her former employer. The Bank was found not guilty of persistent sexual discrimination and bullying. The Tribunal accepted the non discriminatory reasons for her treatment put forward by the Bank. She was however successful in her claim for unfair dismissal and she will be able to claim a maximum £55,000 in compensation.

### *Moonsar v Fiveways Express Transport Limited UK EAT/0476/04*

The downloading of pornographic material at work by male colleagues amounted to sex discrimination against a female colleague, even though she made no complaint to her employer. Although no images were circulated to her, she was fully aware of what was happening. Her lack of contemporaneous complaint afforded the employer no defence. By permitting this behaviour or not actively checking that it does not occur, employers could be at risk of potential sex discrimination claims. Employers may be able to defend their position if they have proper policies in place which they actively enforce.

#### 4. TUPE

##### *Astle v Cheshire County Council*

In April 2002, the Council after competitive tendering on a best value basis, created a panel of consultant architects, rather than a single contractor to deal with the Council's projects. None of the previous outsourced contractors' employees were taken on by the Council.

The Tribunal held that the principal reason for the Council entering into a new structure which had no need for a workforce was not to thwart TUPE but to implement a market economy as the best method of delivering the architectural services. The situation was not one in which the structure which the Council put in place had no commercial or economic justification.

#### 5. Disability Discrimination

##### *ATOS Origin IT Services UK Limited v Haddock*

Mr Haddock had worked for ATOS since 1983. In 1999 he developed a depressive illness. Although he benefited from permanent health insurance, he presented a claim to the Employment Tribunal under the Disability Discrimination Act when his new manager moved him to a new post. The Tribunal found that he had been discriminated against by being moved to another position. He was awarded compensation of £35,000 for psychiatric injury, £20,000 for injury to feelings and £10,000 as aggravated damages. The assessment of his claims for financial loss has yet to be decided.

##### *Spencer v O2 UK Case No. 1805496/03*

Mr Spencer was diabetic. He worked for O2 UK for six years. During his employment his absence was poor. The vast majority of the absences were directly related to his diabetes. No specialist report was obtained before he was dismissed and the most recent specialist report was at least ten or eleven months out of date. Mr Spencer claimed unfair dismissal and disability discrimination and was successful. O2 had failed to comply with its duty to make a *reasonable adjustment*. The failure to properly consider and offer Mr Spencer part time employment was the unanimous opinion of the Tribunal a failure to make a reasonable adjustment. Following the decision, O2 UK agreed to pay Mr Spencer £10,000 in full and final settlement of his claim.

#### 6. Collective Agreements

##### *Kaur v MG Rover Group Limited EWCA Civ 1507*

Miss Kaur was an employee who had been at Rover's Longbridge plant for more than 14 years. When she was faced with the threat of compulsory redundancy, she alleged that the Collective Agreement was expressly incorporated into her contract and one of the terms of which was that there would be no compulsory redundancies. She applied to the Court for a declaration that the agreement was incorporated into her contract and that she had a contractual right not to be made compulsorily redundant. The Court of Appeal disagreed. The sentiments were aspirational rather than contractual.

#### 7. Race Discrimination

##### *Madden v Preferred Technical Group Cha Limited EWCA Civ 1178*

Mr Madden was Irish and did not get on with his direct supervisor Mr Guest. He brought proceedings against Mr Guest and the Company alleging direct race discrimination because he was Irish. The Tribunal did not find that he had been discriminated against on grounds of race, notwithstanding that it found that he had been less favourably treated than a hypothetical comparator of similar status. The reason for the less favourable treatment was a longstanding personality clash between himself and his manager, which had nothing to do with the fact that he was Irish. There were no other evidence from which the Tribunal could infer race discrimination.

##### *Newton v Homeview Limited Case No. 2201648/03*

A female employee of Turkish origin who had a black boyfriend was racially discriminated against when a colleague made racist comments to her about black men. An Employment Tribunal awarded her compensation of £1,000 for injury to feelings.

#### 8 Race Equality Guidance

The Commission for Racial Equality in collaboration with the Home Office has issued a step by step **Race Equality Impact Assessment guidance**. Primarily designed for policy makers in the public sector, all employers will find compliance with this guidance a very useful step in establishing the statutory defence against vicarious liability for employees' acts. *A complimentary copy is available on request.*

#### 9. Human Rights

##### *McGowan v Scottish Water EAT 23.9.04*

The Employment Appeal Tribunal held that an employee who was dismissed following his employer's discovery through *covert surveillance* that he was falsifying timesheets was not unfairly dismissed. The right to private and family life under Article 8(1) of the European Convention of Human Rights had not been breached. Accordingly, he could not argue that there had been an infringement of his right such as to render the dismissal process unfair. Covert surveillance of his house was appropriate, having regard to the seriousness of the problem and the practical issues.

##### *Hanlon v Kirklees Council*

Mr Hanlon refused to consent to the disclosure of his *medical records*, arguing it was a breach of his right to respect for privacy under the European Convention for Human Rights. The Employment Appeal Tribunal held that the right to respect for privacy must be balanced against protection for the rights of others and in litigation the rights of the other party to have a fair trial must always be important.

Accordingly, striking out a case because he refused to consent to disclosure of medical records did not offend the right to respect for privacy under the European Convention.

## 10. Patents and Employee Inventions

UK patent laws and procedures are to go through significant change with effect from **1st January 2005**. The relevance of this for employees relate to compensation which it will be easier to claim. Under the 1977 Act, employees are able to apply for compensation in respect of a patented invention that they have made which belongs to their employer. However, the employee must show that the patent itself is of "outstanding benefit" to the employer. The 2004 Act intends to make claims easier by lowering the threshold. The new provisions will not have retrospective effect and will only apply to inventions for which patents are applied for after the changes have come into force.

## 11. Equal Pay

*Cadman v Health & Safety Executive 2004 EWCA Civ 1317*

The Court of Appeal has referred the question of whether employers can automatically justify differences in pay on grounds of *length of service* to the European Court of Justice. The essential issue in the case is whether an ostensibly gender neutral ground for differentiating pay, such as length of service, which is transparently applied, needs to be objectively justified as a necessary and proportionate way of addressing a particular business need.

## 12. Pregnancy Related Dismissal

*Ramdoolar v Bycity Limited EAT/0236/04*

*Actual knowledge* of a pregnancy is required before an employer can be found to have automatically unfairly dismissed an employee for a reason connected with the pregnancy. Circumstances however may arise where an employer had detected the symptoms of pregnancy and suspecting that the employee may be pregnant, dismissed her before their suspicion was proved right. In these circumstances, a dismissal may well be automatically unfair.

## 13. Tax and Staff Parties

The VAT inclusive cost of an annual staff party can now be tax free up to **£150** per employee.

## 14. Statutory Maternity Pay

New rates of Statutory Maternity, Paternity and Adoption Pay will come into effect in **April 2005**. Pay will now rise to **£106** per week and the earnings threshold will rise to **£82** per week.

## 15. Data Protection - Workers' Health

The Information Commissioner has published Part 4 of the Employer's Code of Practice on Data Protection which deals with keeping records on workers' health. The Information Commissioner has issued the main guidance, supplementary guidance and Guidance for Small Businesses. Health information may include data contained in health questionnaires, the results of drug and alcohol tests, fitness to work assessments and vaccination records. *A complimentary copy is available on request.*

## 16. Fixed Term Employees

*Departments of Work and Pensions v Webley*

The Court of Appeal has held that the non renewal of a fixed term contract cannot constitute less favourable treatment towards a fixed term employee. The case is one of the first on the new Regulations which came into force on 1st October 2002. The Applicant worked for the DWP on a succession of fixed term contracts, the last of which terminated 51 weeks after her initial engagement. Such contracts are common in the Civil Service. The Applicant complained that the termination constituted less favourable treatment. The relevant question for the purposes of the Regulations is whether the termination or non renewal of the contract constituted less favourable treatment. The answer was no.

*Allen v National Australia Group Europe Limited*

Mr Allen entered into a fixed term contract for nine months. There was also a clause in his contract that either party could terminate the employment by giving one month's *notice*. That clause did not prevent the contract having fixed term status under the Regulations.

## 17. ACAS and Employee Appeal Tribunal Appeals

There is a new EAT conciliation protocol which is to run as a four month pilot project from **1st January 2005**. In cases involving allegations of bias or pure money appeals, the EAT will now consider referring the case to ACAS for conciliation.

## 18. Non Compete Clauses

The Labour and Employment Practice Group of Lex Mundi of which Steptoe & Johnson is a member has produced a European newsletter on non compete clauses throughout the EEA. *A complimentary copy is available on request.*

## 19. Constructive Dismissal

*El Hoshi v Pizza Express Restaurants Limited*

Mr El Hoshi discovered that his manager had employed an illegal immigrant. As a result of raising this with his manager, he was punished by his branch manager. He went off sick and never returned to work. He waited two months before his solicitors wrote saying that he was claiming constructive dismissal. The Employment Tribunal held that he was not too late to do so. The fact that he was off sick and received sick pay was not an affirmation of the contract. An important factor in this case was that he continued to protest during his period of delay even though he was too ill to attend any meetings to discuss his grievance. The case may have turned on the fact that he was a whistleblower.

*Omilaju v Waltham Forest LBC*

If a final straw was to be successful and relied on by an employee as a repudiation of a contract of employment, it had to be the last of a series of acts or incidents which cumulatively amounted to a

repudiation of the contract by the employer. The final straw might not be unreasonable or blameworthy conduct. It might not always have to be unreasonable, but it had to contribute however slightly to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of an employer could not be a final straw.

#### *Judge v Crown Leisure Limited*

The Employment Appeal Tribunal has upheld Tribunal's decision that a conversation between an employee and his manager at the office Christmas party did not amount to an enforceable promise to an increase in pay. At the end of the company's annual dinner dance, the manager promised the employee a substantial pay rise over the following two years. Two years later, although he did receive a substantial pay rise, it was not quite as large as he had been promised. He resigned and claimed constructive dismissal. The Appeal Tribunal held that the original promise was not contractually enforceable as there was no intention to create legal relations. The Tribunal had been right to take into account that the conversation took place during a social event when spouses attended and was made during the convivial spirit of the evening.

## 20. Stress at Work

ACAS has published a booklet and the Health & Safety Executive has published Standards containing guidance for employers on combating work related stress. The following key aspects of working life if not properly managed can give rise to stress: Demands; Control; Support; Relationships; Roles; and Change. *A complimentary copy is available on request.*

## 21. Redundancy: Failure to Consult

#### *Smith v Cherry Lewis*

The Respondent employer was insolvent and the Receiver dismissed all 45 employees on the grounds of redundancy without any consultation. The Tribunal held it would not be just and equitable to give any protective awards since an award would have no punitive effect on the employer who was insolvent and the DTI fund would pay any awards. The EAT reversed this. In assessing the protective award, the Tribunal should look at the employer's fault at the time of the failure to consult, not at the time of the claim form being lodged or the Tribunal case being held. The fact that the employer was insolvent and that the DTI would pay any award were irrelevant factors and should not have been taken into account. A maximum award of 90 days' pay was awarded to each of the employees.

## 22. Terms of Employment: Duty of Mutual Trust and Confidence

#### *Horkulak v Canter Fitzgerald International 2004 EWCA Civ 1287*

Mr Horkulak claimed he was entitled to a discretionary bonus. The Company disagreed. The Court of Appeal agreed that Mr Horkulak was so entitled. The discretion provided for in a contract which was prima facie of an unlimited nature would be regarded as subject to an implied term that it will be exercised genuinely and rationally. An employer is contractually obliged to exercise its discretion rationally and in good faith in awarding or withholding a benefit provided for under the contract. Where the employer fails to do so, the employee is entitled to be compensated in respect of such failure.

## 23. Religious Discrimination

#### *Williams v South Central Limited Case No 2306989/03*

Mr Williams claimed he was constantly abused at work because he wore an American flag patch on his uniform and that he was eventually sacked because he had stood up for his belief as an American citizen. The Tribunal held that loyalty to one's national flag or country could not possibly fit in with the definition of belief contained in the Regulations. He was not discriminated against.

## 24. Procedure - Legal Advice

#### *Three Rivers v Bank of England House of Lords*

The House of Lords have clarified legal advice privilege. Not all communication with lawyers are privileged. Advice of a general commercial nature is unlikely to be privileged. Requests for commercial practical advice therefore should be kept separate from requests for legal advice.

## 25. Employment Status

#### *Staffordshire Centinal Newspapers Limited v Potter 2004*

An express contractual term providing that the Applicant was not required to do the work personally is inconsistent with an employment contract of service.

*and finally*

## 26. Information and Consultation 2005

The DTI has now published its guidance notes on the new Information and Consultant Regulations. They make easier reading than the Regulations themselves. *A complimentary copy is available on request.*

**For more detailed information or advice or copies of the guidance, codes and newsletter please contact  
Alison Wallace at: [awallace@steptoe.com](mailto:awallace@steptoe.com)**

**This information should not be treated as a substitute for specific legal advice on individual situations.**

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