News bites

UK to face EU legal action over working time

The European Commission has finally confirmed that it is to take the UK government to court over a failure to implement the Working Time Directive correctly. The news comes more than three years since AMICUS first complained. Details are sketchy, but we understand that the infringements relate to the facility for working "voluntary hours" and UK regulations on rest breaks.

Tribunal rules and regulations – new consultation on ET1 and ET3

The Employment Tribunals Service is conducting a public consultation on the proposed new tribunal claim and response forms (ET1 and ET3). The forms aim to adopt a user-friendly format to help the parties present their claims in a structured way.

The forms will come into use from 1 October 2004, although they will only become mandatory from 6 April 2005. The consultation closes on 24 May.

See employment insight

The draft National Minimum Wage Regulations 1999 (Amendment) Regulations 2004

The DTI has published draft Regulations to replace the existing provisions relating to output workers. The new system for paying output workers will be called "rated output work". The majority of the provisions will come into force on 1 October 2004.

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The Employment Equality (Religion or Belief) (Amendment) Regulations 2004 (SI 2004/437)

These Regulations come into force on 1 April 2004. They amend Regulation 20 (institutions of further and higher education) of the Employment Equality (Religion or Belief) Regulations 2003.

See employment insight

Report and investigation into treatment of pregnant workers

The Equal Opportunities Commission has published a report on the treatment of new and expectant mothers at work. This is the first part of an 18-month investigation which will result in recommendations to the government in February 2005. The study found that the average compensation awarded by tribunals is more than £2,000 lower than the average award for other forms of unfair dismissal.

See: employment insight

Practice and procedure: settling a case

There is a professional obligation on those advising parties to litigation to alert the court as soon as possible to the likelihood that judicial time would be wasted in preparing for an appeal which either has been settled or is subject to negotiations which might well lead to settlement. Yell Ltd v Garton

Disability Discrimination Bill – amendments

The government has proposed an amendment to extend the Disability Discrimination Act 1995 to cover discrimination by local authorities against their members. Councillors would be protected from disability discrimination when carrying out the official business of their authority.

See employment insight

Employment Relations Bill – trade union funding

The CBI is seeking a safeguard to block abuse of the proposed £10m union modernisation fund. It wants the legislation to make it clear that the money will not subsidise trade union inefficiency, recruitment or campaigns against employers (including strikes).

Variation of contractual terms

The EAT has held that employees’ enhanced redundancy terms had not been varied following two transfers, despite several redundancy exercises where different terms were offered and accepted. Compromise agreements signed by some redundant employees were enforceable. Solectron Scotland Ltd v Roper and ors.
Collective dismissals and meaningful consultation

The EAT has held that an employer’s meeting with a recognised trade union to discuss proposed redundancies amounted to consultation under TULRCA, even though the employer had decided to close down two of its branches before involving the union. The duty is not to consult about the reasons for a decision to close down a workplace; it is to consult over the consequences that flow from that decision. Securicor Omega Express Ltd v GMB.

Features

Keep those on maternity leave informed!

A recent decision by the EAT highlights the importance of bringing job vacancies to the attention of employees who are absent on leave for family or domestic reasons.

The facts

The case of Visa International Service Association v Paul concerned an administrator who had been employed by Visa for some years working on card design. The other area covered by her department was dispute resolution in which she had expressed an interest and attended a course. In June 2000, Mrs Paul started maternity leave. During her absence, two new posts were created and advertised internally and externally. Mrs Paul learned about a vacancy for an operating regulations analyst in December 2000, but by this time it had been filled by an external candidate. She lodged a grievance, complaining that she had not been informed of it even though she had expressed an interest in the area of work covered by the vacancy. Visa argued that she had been told about the post during informal visits by her manager during her maternity leave. Further, she did not have the necessary experience for the job. Mrs Paul resigned with effect from 23 January 2001 and was invited to reconsider her decision because Visa might wish to recoup her enhanced maternity benefit.

Mrs Paul made various claims including unfair dismissal, pregnancy related detriment and dismissal and sex discrimination. She later added a complaint of victimisation relating to the recoupment of enhanced maternity pay.

The tribunal’s decision

The tribunal held that Mrs Paul had not been told of the vacancy before it was filled. Visa was in fundamental breach of the implied term of mutual trust and confidence in not informing her. It upheld her complaint of constructive dismissal. This was automatically unfair as it was for a reason related to maternity leave. The failure to inform her was also an act of sex
discrimination. The employer's failure to notify Mrs Paul was a deliberate act amounting to a detriment under S47C ERA (this affords a pregnant employee the right not to be subjected to any detriment by her employer while on maternity leave if the reason for it relates to her pregnancy, childbirth or the leave itself) and the complaint of victimisation was upheld.

The EAT’s decision
Concentrating on the two most important aspects of its judgment, first, the EAT upheld the finding of constructive dismissal. Visa argued that it could not have committed a fundamental breach of the implied term of mutual trust and confidence in not telling Mrs Paul of a job vacancy for which she was not even suitable to be short listed. The EAT said that this missed the point, which was that Mrs Paul believed that she was suitable for the post and the employer’s failure to tell her about it after 12 years’ service completely undermined her trust and confidence. Her case did not depend on showing that she would have had a chance of obtaining the job.

Secondly, on the victimisation complaint, the EAT held that no victimisation had taken place when Visa first informed Mrs Paul by letter that it might seek to recoup monies from her upon her resignation. The act of victimisation was that Visa had only brought proceedings to recoup the money after Mrs Paul had brought her complaint of sex discrimination. The tribunal had not been satisfied with the employer’s explanation for its not having proceeded against two comparators who had failed to return from maternity leave but who had not brought proceedings against Visa and had not been asked to repay the benefits. It had concluded that Mrs Paul would not have been sued if she had not brought the sex discrimination claim. In the EAT’s view, the employer could have no complaint about this decision.

An employer should notify any employee who is absent on leave for family or domestic reasons of any job vacancy for which it knows the employee might wish to apply, even where the employer’s belief is that the absent employee would be neither suitable nor qualified. A failure to do this could breach the implied duty of trust and confidence and lead to a constructive dismissal. This principle could also apply to employees on other forms of long-term leave, such as long-term sick leave or secondment.

No compensation for loss of chance to claim unfair dismissal!
The Court of Appeal has upheld the decision of the EAT in Virgin Net Ltd v Harper and decided that compensation cannot be awarded for loss of the opportunity to claim unfair dismissal when an employee has less than one year’s service.

Ms Harper was summarily dismissed. She did not have one year’s service (usually needed to claim unfair dismissal), but would have done if she had been given the correct notice period under her contract. She claimed damages for loss of the chance to receive compensation for unfair dismissal.
The Court of Appeal referred to the decision of the House of Lords in *Johnson v Unisys* which held that the existence of a statutory remedy for unfair dismissal precluded the development of a common law obligation on an employer to exercise a power of dismissal in good faith. Lord Justice Brooke stated that Parliament has had ample opportunity to change the legislation to allow the effective date of termination to be the date on which a contractual period of notice *would have expired* where a contract of employment is terminated with no or inadequate notice. It is not open to the courts, through the machinery of an award of damages for wrongful dismissal, to rewrite the legislation.

Even if the effective date of termination had been extended by the statutory minimum notice period in this case, Ms Harper would still have fallen short of the one-year qualifying period. She had not lost the right to claim unfair dismissal because she had never had the right in the first place.

**Whistle-blowing compensation – use discrimination principles**

The EAT has clarified that, for the purposes of assessing compensation, whistle-blowing cases should be treated as any other form of discrimination.

In *Virgo Fidelis Senior School v Boyle* the EAT said that it was open to a tribunal to award compensation for injury to feelings (a common ground of compensation in discrimination claims) as well as compensation for aggravated damages (which is additional compensation for an employer's particularly high-handed behaviour!).

The EAT made it clear that, if a tribunal is going to award compensation for injury to feelings, then it must do so in accordance with the Court of Appeal's earlier decision in *Vento v Chief Constable of West Yorkshire Police (No. 2)*. This provided three bands of compensation for injury to feelings: a top band of £15,000 - £25,000 (for the most serious cases, such as those involving a lengthy campaign of discrimination or harassment), a mid band of £5,000 - £15,000 (for serious cases not meriting an award in the highest band) and a low band of £500 - £5,000 (for less serious cases, such as those involving an isolated act of discrimination).

After considering and accepting the *Vento* approach to damages for injury to feelings, the EAT commented that it should always be borne in mind that

“…detriment suffered by ‘whistle-blowers’ should normally be regarded by Tribunals as a very serious breach of discrimination legislation”.

This would suggest that an award of £15,000-£25,000 would not be unusual.
Agency workers – who is the employer?

There has been a line of cases over recent months analysing the legal status of workers involved in triangular arrangements with employment agencies and their clients. Are such workers employed by the agency, the client or by neither?

The Court of Appeal has attempted to allay the confusion in Brook Street Bureau (UK) Ltd v Patricia Dacas. Recognising the importance of providing guidance on the point, it held that the tribunals should always consider whether an implied contract of service exists between the agency worker and the client (“end-user”).

The facts were typical of the kind of situation that has troubled the tribunals. Mrs Dacas was a cleaner who worked for Wandsworth Council for four years. She was not employed directly by the Council but engaged as a temp through the Brook Street Bureau. She had a written agreement with Brook Street, expressed to be a contract for services and not a contract of service. Brook Street in turn entered into an express contract with the Council (ie the end-user of work done by Mrs Dacas) for the provision of agency staff. There was no formal contract of any kind between the end-user and Mrs Dacas.

The Court of Appeal pointed out that a worker in a triangular situation like this could have a contract of service with the end-user, the contract usually being an implied one, or with the employment agency, depending on the construction of the express contract between the applicant and the agency, or with the agency and the end-user jointly.

The Court of Appeal held that the tribunal should not have focused so intently on the express terms of the written contracts entered into by Brook Street with Mrs Dacas and the Council that it was deflected from considering finding facts relevant to a possible implied contract of service between Mrs Dacas and the Council. There was mutuality of obligation between the Council and Mrs Dacas. The fact that the obligations were contained in express contracts between Mrs Dacas and Brook Street and between Brook Street and the Council did not prevent them from being read across the triangular arrangement into an implied contract and taking effect as implied mutual obligations as between Mrs Dacas and the Council.

Because of the way in which the appeal was framed, no findings were made about the Council’s obligations and the Court’s guidance is confined to future cases. On the facts, Brook Street was not the employer. It did not exercise any real control over the work done by Mrs Dacas.

One of the judges commented that it is just not “credible” that agency workers are not employed by someone. The clear message from the Court of Appeal is that the emphasis must be on analysing the reality of such working relationships. In future, employers will need to think carefully about the terms on which they engage temporary agency workers if they are to avoid the implication of a contract of service.
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