

# Neil Ashley's Employment Bulletin – 8<sup>th</sup> May 2005

If you are new to the Bulletin, welcome! Please see the information at the bottom of this page.

## New Case Law

### Practice and procedure; Claim forms

#### **Grimmer v. KML Cityhopper [2005], EAT**

Held: In order for a claim to be adequately 'presented' to a tribunal, it is sufficient to identify the statutory right that it is alleged has been breached.

Comment: In this case the claimant lodged a claim form which simply said 'flexible working' but provided no other relevant details. The tribunal (rightly *I* think, but who cares) refused to admit the claim. The EAT overturned the tribunal's decision, HHJ Prophet holding that the test is '*...whether it can be discerned from the claim as presented that the claimant is complaining of an alleged breach of an employment rights which falls within the jurisdiction of the Employment Tribunal*'. He went on to say that the 'details of the claim' was not the same thing as 'particulars of the claim' and said that if a chairman thought that the claim was insufficiently particularised, the correct approach is to order further particulars rather than refuse to admit the claim.

Practical Relevance: This seems to me to be a bizarre decision but effectively the EAT seem to be saying that one can put in a 'holding' claim, just identifying the cause(s) of action and wait until the chairman asks for particulars! I don't recommend it, but at 5pm on a Friday night it's tempting isn't it.....

### Practice and procedure; Breach of contract

#### **Doherty v. British Midland Airways [2005], EAT**

Held: An infringement of a statutory employment right does not also give rise to a contractual claim.

Note: It may be the case, of course, that an infringement of a statutory right goes to trust and confidence, *thereby* entitling an employee to resign and claim constructive or wrongful dismissal

### Practice and procedure; Agency workers

#### **Astbury v. Gist Limited [2005], EAT**

Held: Tribunals should exercise their own power to join parties in order to add as respondent to an agency worker claim the *other* party where the claimant has proceeded only against either the agency or the end user.

Comment: Since *Dacas v. Brook Street Bureau*, tribunals have been finding implied contracts of employment between agency workers and end users. However, employees often only bring a claim against either the end-user or the agency, presenting a risk that the tribunal will find the

other *non*-party to be the employer and thereby be unable to do justice to the claimant. This new direction aims to enable the tribunal to undertake a fuller review of the 'employment' relationship as between the three relevant parties. Presumably, if a tribunal fails to join an absent party in an agency case without having/giving adequate reasons, this will give rise to a ground of appeal.

### **Unfair dismissal; Interest**

#### **Melia v. Magna Kansei [2005], EAT**

Held: It is legitimate to award interest (as long as it is not described as that) on awards for unfair dismissal. (It is 'just and equitable' and is effectively an increase for decelerated receipt).

### **\*\* Working Time Regulations; Unlawful deductions; Holiday pay**

#### **Commissioners of Inland Revenue v. Ainsworth, 22<sup>nd</sup> April 2005**

Held:

The right to four weeks' statutory paid holiday under the *Working Time Regulations 1998* does not continue to accrue whilst an employee is off on long-term sick-leave. *Kigass Aero Components v. Brown* [2002] overruled.

Non-payment of statutory holiday entitlement does not amount to a non-payment of wages for the purposes of Part II of the Employment Rights Act 1996. *List Design v. Douglas* [2002].

Comment: This is a huge decision, particularly the second part. *List Design* allowed a claimant to go back a number of years by relying upon the 'series of deductions' provision. The effect of *Ainsworth* is that claimants can only claim under the Working Time Regulations 1998 in respect of the one relevant holiday year.

### **\*\* Discrimination; Burden of proof**

#### **Igen Ltd v. Wong [2005] IRLR 258, CA**

Comment: This is now the definitive decision and guide on the correct approach for a tribunal to take when approaching discrimination cases and particularly the vexed question of the reversed burden of proof. The Court of Appeal also took the opportunity to slightly modify and then approve the *Barton v. Investec* guidelines. Practitioners should find the 'Annex' at the end of the decision useful.

### **Discrimination; Inferences**

#### **Dattani v. Chief Constable of West Mercia Police [2005], EAT**

Held: Evasive, incorrect, or nil replies to questions asked in a race discrimination case can lead to drawing an inference of discrimination under s65 of the *Race Relations Act 1976*, even if the questions were not asked under the statutory procedure.

Practical Relevance: Although this decision is undoubtedly correct because, amongst other reasons, a tribunal *should* be entitled to draw inferences from any facts which it considers relevant, there is a danger of unfairness to employers. Whereas a formal questionnaire under the discrimination legislation will contain appropriate warnings as to the ramifications of failing to answer or evasive answers, ordinary questions will not. Further, whilst a claimant needs leave (which they may not get) to ask questions outside of the statutory questionnaire time limits, they can apparently now overcome this by merely asking questions in a letter. Whether tribunals mitigate this effect in practice by treating such failures less seriously remains to be seen. However, practitioners putting ordinary questions may be able to pre-empt such an approach by including a warning in letters asking relevant questions, thereby having the best of both worlds.

**Sex discrimination; Maternity leave; Pay and bonuses**

### **Hoyland v. Asda Stores [2005], EAT**

Held: Employers are entitled to make a *pro rata* reduction in bonuses paid to staff, to reflect periods when a woman is absent on maternity leave. The exception is that the bonus must be paid in respect of the two week period of compulsory maternity leave provided for under the Pregnant Workers Directive.

**Disability discrimination; Work-related stress; Occupational Health Advisors**

### **Hartman v. South Essex Mental Health and Community Care NHS Trust [2005] IRLR 293.**

Comment: This was the lead case in six cases on work-related **stress**, intended to restate the law in order to take account of the decision of the House of Lords in *Barber v. Somerset County Council*. The general principle remains that an employer is liable for psychiatric injury caused by stress at work where this is a foreseeable injury arising from the employer's breach of duty. The Court of Appeal reaffirms the employer-friendly line taken by Lady Justice Hale in *Hatton v. Sutherland*.

Of particular interest is the court's decisions that it is not right to attribute to an employer knowledge of confidential information disclosed by an employee to the employer's occupational health department. According to the Court of Appeal, the BMA's publication *Medical Ethics Today* 'correctly summarises the position' when it says: "*The fact that a doctor is a salaried employee gives no other employee of that company any right of access to medical records or to the details of examination findings ... If an employer explicitly or implicitly invites an employee to consult the occupational physician, the latter must still regard such consultation as strictly confidential.*" This issue has direct relevance for disability discrimination claims, and especially the duty to make an adjustment, meaning that disabled people seeking an adjustment, and those advising them, may have to reconsider the circumstances in which they will disclose their disability and waive their right to confidentiality.

## **Other News**

The Government has delayed the coming into force of the rules requiring claims to be presented and defended on the new claim forms until 1st October 2005.

## About Neil Ashley

I am an employment law specialist, practising from East Anglian Chambers. I cover all aspects of contentious and non-contentious employment work, acting for both Claimants and Respondents. I include within my Respondent client base the police, the fire service and almost all of the local authorities within Anglia as well as a large number of the region's leading private employers and charities. I have an established reputation and presence in the region's tribunals in addition to appearing all over the UK and in the appellate courts.

In addition to publishing this bulletin approximately once per month I regularly conduct training for managers, HR professionals and solicitors. I also organise regular 'mock tribunals' for clients, tailored to their individual requirements. **I am now able to receive instructions direct from companies and other organisations i.e. without the client needing to instruct a solicitor, in accordance with the Bar Council's Direct Access provisions.**

Those wishing to instruct me should contact my clerk, Fraser McLaren on 01206 572756.

Further information about my professional services or training can be obtained from Fraser McLaren on 01206 572756 or myself on 07770 601209.

Comments, queries or requests to join the mailing list should be sent to: [neilashley@ukonline.co.uk](mailto:neilashley@ukonline.co.uk). Alternatively, see the East Anglian Chambers' website at: [www.ealaw.co.uk](http://www.ealaw.co.uk).

Neil Ashley  
East Anglian Chambers  
DX: 3611 Colchester  
Tel: 07770 601209 or  
01206 572756

**Disclaimer: The matter contained within this bulletin is provided free of charge, for information purposes only and should be independently verified. No reliance should be placed upon any information or commentary given and no responsibility for its accuracy or for any loss or damage caused by the placing of reliance upon it or the electronic receipt of it will be accepted. Nothing contained within this bulletin constitutes legal advice. Any views expressed are those of the author only and not representative of East Anglian Chambers as a whole or of any other member. Legal advice can only be provided following formal instruction by a solicitor, a member of a recognised professional body approved by the Bar Council for the purpose of direct professional access work, or a BarDIRECT client and in accordance with the provisions of the Bar Code of Conduct.**