

## EMPLOYMENT LAW NEWS ROUND UP

AUGUST / SEPTEMBER 2003

### DISCRIMINATION

Requiring an employee who wishes to return to work before the end of parental leave to inform her employer that she is pregnant and/or taking an employee's pregnancy into consideration in refusing to allow her to return to work before the end of her parental leave is contrary to Article 2(1) of the Equal Treatment Directive even in circumstances where the employee will be unable to carry out all her duties because of legislative provisions: **Busch v Klinikum Newstadt GmbH** (2003) IRLR 625, ECJ. A pre-operative transsexual is not necessarily discriminated against by the refusal of the employer to permit her to use female toilet facilities. Section 82 SDA 1975 prohibits discrimination against persons at all stages of gender reassignment but it does not follow that all such persons are entitled immediately to be treated as members of the sex to which they aspire. The appropriate gender test is not based solely on self-determination nor is it based on completion of surgical intervention. The moment at which a person is entitled to use female toilets depends upon all the circumstances, including, the employee's self-determination and the susceptibilities of other members of the workforce: **Croft v Royal Mail Group plc** (2003) IRLR 592, CA. The decision in **Rhys-Harper v Relaxion Group and others**, detailed in the June/July issue of this Newsletter, has now been reported at (2003) IRLR 484, HL.

### DISABILITY DISCRIMINATION

A failure by an employer to carry out an assessment to enable a decision to be reached as to what steps would be reasonable to prevent a disabled employee or prospective employee from being at a disadvantage amounts to a breach of the duty of reasonable adjustment under section 6 of the 1995 Act: **Mid Staffordshire General Hospitals NHS Trust v Cambridge** (2003) IRLR 566, EAT.

### WORKING TIME

A contractual provision for rolled-up holiday pay that identifies an express amount or percentage by way of addition to basic pay does not breach the Working Time Regulations: **Marshall's Clay Products v Caulfield** (2003) IRLR 552, EAT. It should be noted that this decision is contrary to that reached by the Scottish Court of Sessions in **Munro v M. P. B. Structures Ltd** (2003) IRLR 350 where it was held that such provisions were not lawful.

### TRANSFER OF UNDERTAKINGS

Employers are contractually obliged to pay to employees pay increases agreed by the NJC for local government following the transfer of an undertaking to them from a local authority where the employees written particulars state that pay "will normally be in

accordance with" NJC rates "as adopted from time to time" and the transferee employers had not given the transferred employees notice that they intended to depart from the agreed NJC rates: **Glendale Managed Services v Graham** (2003) IRLR 465, CA.

## RIGHT TO PRIVACY

The employee, a development officer for young persons in the Respondent charity, received a police caution for gross indecency after engaging in sexual activity with another man in a public toilet and failed to disclose that fact to his employers. His dismissal for gross misconduct was fair. The right to respect for private life under Article 8 ECHR was not infringed. All sexual relations cannot be regarded as private: **X v Y** (2003) IRLR 561, EAT.

## PRACTICE AND PROCEDURE

Two cases relating to the 42 day time limit for appealing the decision of an employment tribunal have been reported. In **Kanapathiar v London Borough of Harrow** (2003) IRLR 571, the EAT made it clear that the previously lenient approach with regard to granting of extensions of time where a notice of appeal, unaccompanied by extended reasons, was put in within 42 days would now stop. The time limit will now be relaxed only in rare and exceptional circumstances where the EAT is satisfied that there is a full, honest and acceptable explanation of reasons for the delay. In **Peters v Sat Katar Co Ltd** (2003) IRLR, EAT it was held that the fact that a letter has been lost in the post through no fault of the applicant, a litigant in person, is a relevant consideration on an application to extend the 42 day time limit. Employment tribunals should treat submissions of no case to answer when hearing cases of unfair dismissal with great caution. Only in exceptional or frivolous cases would it be right to allow the submission. In cases where the burden of proof is not upon the applicant it would be difficult to envisage cases where the submission should succeed: **Logan v Commissioners of Customs and Excise** TLR, CA. A bankrupt has standing to pursue an unfair dismissal claim: **Grady v H M Prison Service** (2003) IRLR 474, CA.

## REDUNDANCY

Voluntary acceptance of redundancy was retirement for the purposes of a company pension scheme which provided for pension payment before the normal retirement date if retirement was requested by the employer after the employee's fiftieth birthday: **AGCO Ltd v Massey Ferguson Works Pension Trust Limited** TLR 24.7.03, CA.

The Thomas More Chambers' Employment Law Group provides a full compliment of employment law services, ranging from representation, for both employers and employees, at all tribunal and court levels; legal advice on all areas of employment law; and drafting (from contracts of employment to settlement agreements). If you would like further details of the services provided and/or information about our fee structure, please contact our Senior Clerk, Chris Hallett, on 020 7404 7000 or email [clerks@thomasmore.co.uk](mailto:clerks@thomasmore.co.uk).

The information and any commentary on the law contained in this bulletin are provided free of charge and are for information purposes only. No responsibility is assumed for its accuracy or for any consequences of relying upon it. The information and commentary does not and is not intended to amount to legal advice and the writers do not intend that it should be so relied upon. You are strongly advised to obtain specific personal advice from a lawyer about any legal proceedings or matters and not to rely on the information or comments in this bulletin.