



7 Lincoln's Inn Fields London WC2A 3BP

T 020 7404 7000 F 020 7831 4606

DX 90 Chancery Lane E clerks@thomasmore.co.uk

www.thomasmore.co.uk

EMPLOYMENT LAW NEWSLETTER

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DISCRIMINATION

The Claimant, a schizophrenic, unlawfully sublet his flat whilst not taking his prescribed medication and the landlord brought possession proceedings. The Claimant argued that this was disability discrimination. The House of Lords held that the correct comparator was a tenant without a mental disability who had sublet his property, not a tenant who had not sublet his property. The comparator test laid down in Clark v Novacold [1999] IRLR 318, CA was wrong. In a “Novacold” situation (dismissal for long term absence), the correct comparison is with a non-disabled person with the same length of absence. If that person would also have been dismissed, there is no disability discrimination: Lewisham LB v Malcolm [2008] IRLR 700, HL.

The EAT has given guidance on the scope for justifying direct age discrimination in MacCulloch v ICI plc. The employer's redundancy policy provided a severance payment entitlement calculated on a combination of age and length of service. In order to address the proportionality part of the objective justification test the tribunal must consider the degree of difference in the payment made to the Claimant and the chosen comparator and assess whether this was reasonably necessary to achieve the scheme's objectives. The tribunal was entitled to accept the employer's evidence that rewarding loyalty was the reason for linking payments to length of service. Encouraging turnover and preventing blockage in the employment system is capable of being a legitimate aim that might be

supported by increasing severance payments for older workers. It is likely that direct discrimination will be harder to justify than indirect discrimination.

Disability discrimination by association is unlawful under the Equal Treatment Framework Directive. It is unlawful, therefore, to discriminate against a person because she is the carer of a disabled person: Coleman v Attridge Law [2008] IRLR 722, ECJ.

A tribunal only has jurisdiction to consider discrimination that has taken place in the UK, even where treatment abroad could be considered as part of a continuing act: Tradition Securities and Futures SA v X, EAT.

Drawing an inference from a discrimination questionnaire is not a tick box exercise. Failure to answer questions can give rise to inferences, but only in appropriate cases. It is not an automatic conclusion. It is necessary to consider whether the failure in the particular case is capable of constituting evidence supporting the inference that the employer acted in the discriminatory manner that is alleged: D'Silva v NATFHE [2008] IRLR 412, EAT.

A woman who is at an advanced stage of IVF treatment but is not yet pregnant is not discriminated against on the grounds of pregnancy. It is likely, however, that less favourable treatment for this reason would amount to sex discrimination: Mayr v Backerei und Konditorei Gerhard Flocner OHG [2008] IRLR 387, ECJ.

EQUAL PAY

An employee in an equal pay claim cannot compare herself with a successor. Diocese of Hallam Trustees v Connaughton [1996] IRLR 505, EAT was wrongly decided: Walton Centre for Neurology & Neurosurgery NHS Trust v Bewley [2008] IRLR 588, EAT

DISCIPLINARY AND DISMISSAL PROCEDURE

Unreasonable delay is not by itself a breach of the DDP. Consequently a dismissal will not be automatically unfair just by reason of delay. The line of authorities including the most recent case of Yorkshire Housing Ltd v Swanson [2008] IRLR 607, EAT should not be followed: Selvarajan v Wilmot [2008] EWCA Civ 862.

Where an employer waits until the last minute of the limitation period to reject the appeal, an employee may have a right to argue that it was not reasonably practicable to bring an unfair dismissal claim within time: Ashcroft v Haberdashers' Aske's Boys School [2008] IRLR 375, EAT.

GRIEVANCE PROCEDURE

Under the modified grievance procedure, an employee must set out in writing the grievance and “the basis for it”. The grievance statement must set out “that which the employee relies on to substantiate his complaint.” It must “contain the answers to the essential questions that one would expect to arise in a grievance, namely ‘Who? What? Where? When? Why?’”: per Lady Smith in Clyde Valley Housing Association Ltd v MacAulay [2008] IRLR 616, EAT.

There is no general requirement to name a comparator in a grievance. A grievance, however, must relate to the subsequent claim. Whether such a relationship exists is essentially a question of fact and degree: Cannop v Highland Council [2008] IRLR 634, CS.

An employee brought a grievance about her selection for redundancy instead of an appeal against dismissal. This extended the three month time limit for bringing an unfair dismissal claim by a further three months under regulation 15(2) of the Dispute Resolution Regulations in circumstances where the Claimant reasonably believed that a dismissal procedure was being followed: Towergate London Market Ltd v Harris [2008] IRLR 536, CA.

EAT

A new Practice Direction has come into effect from 22 May 2008 in relation to proceedings in the Employment Appeal Tribunal. The practice direction can be found on the EAT website at www.employmentappeals.gov.uk and at [2008] IRLR 621.

The principles in UAE v Abdelghafar [1995] IRLR 243, EAT in relation to extending the time limit for bringing an employment appeal remain good law even after the introduction of the “interests of justice” test into the 2004 EAT Rules: Jurkowska v Hlmad Ltd [2008] IRLR 430, CA.

UNILATERAL VARIATION OF CONTRACT

Where an employee agrees to work unilaterally varied terms under protest, failure to observe those terms may amount to misconduct, rendering a dismissal fair. An employee can acquiesce in the variation, resign and claim constructive dismissal, work under protest and sue for breach of contract in respect of the losses arising from the variation of contract or refuse to work under the new terms and wait for the employer to take what steps it sees fit: Robinson v Tescom Corporation [2008] IRLR 408, EAT.

ILLEGALITY

A genuine error in categorisation of an employment relationship which was unaccompanied by false representations is not tainted with illegality rendering the contract of employment unenforceable: Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace [2008] IRLR 500, EAT.

IMMUNITY FROM SUIT

An employee was not entitled to rely upon the contents of a letter following a Case Management Discussion and prior to a hearing refusing disclosure of a document as an act of victimisation. The doctrine of absolute immunity applies to all documents brought into existence for the purpose of Tribunal proceedings: South London & Maudsley NHS Trust v Dathi [2008] IRLR 350, EAT.

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**THOMAS MORE CHAMBERS
EMPLOYMENT LAW GROUP**