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EMPLOYMENT LAW NEWSLETTER

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INCREASE IN STATUTORY REDUNDANCY/BASIC AWARD

The cap on the amount of a week's pay used for the purposes of calculating statutory redundancy payments and the basic award for unfair dismissal will increase from £350 to £380 on 1 October 2009.

AGE DISCRIMINATION

The use of length of service as a criterion in a redundancy selection policy is not unlawful age discrimination. The use of length of service constituted a proportionate means of achieving a legitimate aim. The legitimate aim was to reward loyalty and create a stable workforce. It was proportionate to use length of service as a criterion as it was just one of several criteria used and was not determinative of selection. The Court was also of the view (albeit obiter) that use of length of service criterion could constitute a benefit under reg. 32 of the Employment Equality (Age) Regulations 2006: *Rolls-Royce plc v Unite* [2009] IRLR 576, CA.

CONSTRUCTIVE UNFAIR DISMISSAL

The band of reasonableness test does not apply when assessing an employer's conduct for the purpose of determining whether an employee was entitled to resign and claim constructive unfair dismissal. The test for determining constructive dismissal based upon a breach of the implied term of trust and confidence is as set out in *Malik v BCCI SA* [1997] IRLR 462, HL namely the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them: *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606, EAT.

DISABILITY DISCRIMINATION

The term "likely" means an outcome that "could well happen". This is the standard to be met if a Tribunal is to find that an impairment would be likely to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities. This is a lower standard than "more probable than not": *SCA Packaging Ltd v Boyle* [2009] IRLR 746, HL. The

meaning of “normal day-to-day activities” has been considered by the EAT. It is not meant to refer to the special skill case such as the silversmith or watchmaker who is limited in some activity that the use of their specialist tools requires. It does, however, allow a tribunal to take into account an adverse effect that is attributable to a work activity that is normal in the sense that it is to be found in a range of different work situations: Chief Constable of Dumfries & Galloway Constabulary v Adams [2009] IRLR 612, EAT. Section 4A(3) provides that an employer is under no duty to make reasonable adjustments in circumstances where the employer does not know and cannot be reasonably expected to know that the person has a disability. The EAT has held that this exemption applies if each of the four following factors are met: (1) the employer does not know that the disabled person has a disability; (2) the employer does not know that the disabled person is likely to be at a substantial disadvantage compared with non-disabled persons; (3) the employer could not reasonably be expected to know that the disabled person had a disability; and (4) the employer could not reasonably be expected to know that the disabled person is likely to be placed at a substantial disadvantage in comparison with non-disabled persons: Eastern and Coastal Kent PCT v Grey [2009] IRLR 429, EAT.

HOLIDAY PAY

Claims to enforce holiday pay entitlement under the Working Time Regulations can be pursued under the Employment Rights Act 1996. This means that employees will have three months from the last in a series of deductions to put in a claim rather than three months from the date of each deduction as provided for by the Regulations: HMRC v Stringer [2009] IRLR 677, HL.

EMPLOYMENT APPEAL TRIBUNAL

The Court of Appeal has further considered the Burns-Barke procedure, whereby the EAT asks the employment tribunal to amplify its reasons. The procedure is available where the EAT considers that there is possibly an inadequacy in the tribunal’s reasons for its decision. The EAT may, before it finally decides an appeal, refer specific questions to the tribunal at the preliminary hearing of the appeal, requesting it to clarify or supplement its reasons where no reasons were given or where the reasons given were inadequate. The purpose of the procedure is to give the tribunal the opportunity of fulfilling its duty to provide adequate reasons for the decision without the inconvenience that might be involved in the EAT allowing a reasons challenge to the tribunal decision under appeal and having to remit the case to the tribunal for a further hearing: Woodhouse School v Webster [2009] IRLR 568, CA.

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