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## EMPLOYMENT LAW NEWSLETTER

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**AGENCY WORKER REGULATIONS 2010** The Agency Worker Regulations 2010, which introduce a wide range of new rights for agency workers, comes into force on 1 October 2011.

**NO RIGHT TO LEGAL REPRESENTATION IN DISCIPLINARY HEARINGS** The Supreme Court has overturned the Court of Appeal's decision in R(G) v Governors of X School. The Court of Appeal had correctly found that even if disciplinary proceedings do not determine the right to practice in a profession they may nevertheless engage Article 6 (right to a fair and public hearing) where they have a substantial influence or effect on other proceedings which do determine that right. On the facts, however, the test was not met in the present case. The practical effect of this decision is that employers, in the absence of a contractual right to legal representation, may refuse a request for legal representation during internal disciplinary proceedings with reasonable confidence that such a refusal will not amount to a breach of the employee's human rights: [2011] IRLR 756, SC.

**ISSUE ESTOPPEL** When considering Henderson abuse of process claims, Tribunals should follow the approach set out in Johnson v Gore Wood & Co [2002] 2 AC 1 HL and not Divine-Bortey v Brent LBC [1998] IRLR 525 CA. It is not correct to start from the position that the claim is an abuse of process and then ask if special circumstances mean that, exceptionally, the proceedings can continue. The Tribunal should rather make a broad

merits based judgment which takes into account the relevant public and private interests and all the facts of the case. The focus should be on whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised in the earlier proceedings: Parker v Northumbrian Water [2011] IRLR 652, EAT.

**EMPLOYMENT STATUS** When determining employment status, the courts should focus on the reality of the relationship between the parties, which might not be accurately reflected in the written documentation. The question in every case is what was the true agreement between the parties. The relative bargaining power of the parties has to be taken into account in determining whether the terms of any written agreement truly represented what was agreed. The true agreement will often have to be gleaned from all the circumstances of the case of which the written agreement is only a part: Autoclenz Ltd v Belcher TLR 5.8.11, SC.

**SOME OTHER SUBSTANTIAL REASON DISMISSAL** The EAT has given guidance as to the approach to be taken in claims where an employee is dismissed for rejecting a reduction in pay unilaterally imposed by the employer in Garside and Laycock Ltd v Booth [2011] IRLR 735. Such a dismissal is likely to be for “some other substantial reason”. In determining whether the dismissal was reasonable or unreasonable under section 98(4), the focus should be on the reasonableness of the employer’s decision, not on the reasonableness of what the employee has done. It may be highly relevant to consider upon whom of the workforce the cuts would fall. The procedural aspects of the decision to impose pay cuts are likely to be highly relevant on the issue of reasonableness. It may also be relevant to consider other cost saving measures which the employer might have taken.

**AUTOMATIC UNFAIR DISMISSAL ON HEALTH AND SAFETY GROUNDS** Guidance on the approach to be adopted when determining whether a dismissal is automatically unfair on health and safety grounds has been provided in Oudahar v Esporta Group Ltd [2011] IRLR 730, EAT. Section 100(1) ERA 1996 provides that where the reason for dismissal is that ‘in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself from the danger’ that dismissal will be automatically unfair. This section should be applied in two stages. First, are the criteria set out in the section met. Were there circumstances of

danger which the employee reasonably believed to be serious and imminent. Did he take or propose to take appropriate steps to protect himself or others from the danger. Or did he take appropriate steps to communicate those circumstances to the employer by appropriate means. If the criteria are not satisfied, section 100(1)(e) does not apply. Second, if the criteria are met the issue is whether the employer's sole or principal reason for dismissal was that the employee had taken or proposed to take such steps. If it was then the dismissal is unfair. The fact that the employer disagreed with an employee as to whether there were circumstances of danger, or whether the steps were appropriate, is irrelevant.

**DISCRIMINATION – REMEDY** When more than one respondent is found to be liable for the same act or acts of discrimination, compensation should be awarded on the basis of joint and several liability and not by apportioning liability. This means that a successful claimant can recover in full against whichever respondent he or she chooses to enforce judgment against: Hackney LB v Sivanandan [2011] IRLR 740, EAT.

**SEXUAL ORIENTATION** A gay employee who disclosed his sexual orientation at one place of work could not complain that he was discriminated or harassed when he moved to a new place of work with the same employer and his new manager disclosed, against his wishes, his sexual orientation to work colleagues in circumstances where there was an express finding by the Tribunal that the new manager did not have a harassing or discriminatory intent: Grant v HM Land Registry [2011] IRLR 748 CA.

**VICTIMISATION** The contents of witness statements used in proceedings are protected by judicial proceedings immunity and cannot, therefore, form the basis of a victimisation claim: Parmar v East Leicester Medical Practice [2011] IRLR 641, EAT.

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