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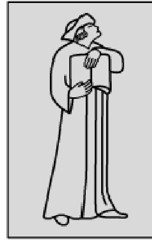

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EMPLOYMENT LAW NEWSLETTER
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COMMERCIAL AGENTS The House of Lords has held that compensation for termination of a commercial agency agreement does not require application of the French method of calculation (normally twice the annual average gross commission). Compensation should be calculated "by reference to the value of the agency on the assumption that it continued: the amount which the agent could reasonably expect to receive for the right to stand in his shoes, continue to perform the duties of the agency and receive the commission which he would have received": Londsdale v Howard & Hallam Ltd [2007] IRLR 825, HL.

SEX DISCRIMINATION When determining whether an indirect discriminatory provision, criterion or practice is objectively justified the question is whether the means to achieve the objective were proportionate to that objective. "The fact that the objective might be achieved by using unlawful, even dishonest, practices does not necessarily mean that the means are disproportionate once it is accepted that the aim itself is legitimate: GMB v Allen [2007] IRLR, 753, EAT. The EAT has held that a boss who instantly dismisses his female employee with whom he was having a personal relationship when he became aware that she was seeing another man did not commit sex discrimination. The EAT held that the dismissal occurred because of the relationship breakdown not because of the Claimant's gender. The appropriate comparator was held to be a homosexual male employer and a homosexual male employee and that since such an employee would have received exactly the same treatment there was no discrimination on grounds of sex: B v A

DISABILITY DISCRIMINATION In order to succeed in a claim that an employer has failed to make a reasonable adjustment there must be some evidence before the tribunal as to what adjustment it is alleged should have been made, even if such adjustments are not identified until after the alleged failure to implement: Project Management Institute v Latif [2007] IRLR 579, EAT. In determining whether a Claimant is disabled within the meaning of the Act the tribunal has to determine whether the disability has an adverse effect on the Claimant's normal "day-to-day activities". This includes activities which are relevant to participation in professional life. A chief inspector diagnosed with dyslexia which placed him at a substantial disadvantage in taking promotional exams but otherwise had only a minor adverse effect on his normal day-to-day activities was therefore disabled within the meaning of the Act: Paterson v Commissioner of Police of the Metropolis [2007] 763, EAT. For a Claimant to be disabled within the meaning of the Act the effect of the disability must be long term. This is satisfied where "the period for which it lasts is likely to be at least 12 months". When determining this issue the tribunal should consider events subsequent to the alleged act of discrimination: McDougall v Richmond Adult Community College [2007] IRLR 771, EAT.

POLKEY GUIDELINES Detailed guidelines have been provided by the EAT as to how tribunals should deal with an employer's alleged failure to follow proper procedures in dismissal: Software 2000 Td v Andrews [2007] IRLR 568, EAT.

DEDUCTION FROM WAGES An employer is entitled not to pay an employee who unreasonably refuses to work under the principle "no work, no pay": Luke v Stoke-on-Trent City Council [2007] IRLR 777, CA.

SICK PAY An agency worker who had a contract of service for less than three months was not entitled to statutory sick pay: HMRC v Thorn Baker Ltd 27.7.07, TLR, CA.

RESTRICTIVE COVENANTS AND EMPLOYER'S PROPERTY A covenant in restraint of trade between a holding company and its employees is not rendered unenforceable by the fact that the employees provided services to clients through subsidiary companies within a corporate group: Beckett Investment Management Group Ltd v Hall 11.7.07, TLR CA. An address list contained on Outlook which is part of the employer's e-

mail system and backed up by the employer, is the property of the employer. That remains the case even where the actual contacts may be those of the employee, whether personal or from his previous employment, if such 'old' data is added to the employer's computer: Penn Well Publishing (UK) Ltd v Ornstien [2007] IRLR 700, HC.

STRIKING OUT Where facts central to the claim are in dispute, it will only be in exceptional circumstances that such the claim will be struck out on the grounds of having no reasonable prospect of success. An example of such a case may be where the facts alleged by the claimant are, without explanation, utterly inconsistent with undisputed documentation: North Glamorgan NHS Trust v Ezsias [2007] IRLR 603, CA.

EMPLOYMENT APPEAL TRIBUNAL The discretion to allow a new point of law to be argued in the EAT is only to be exercised in exceptional circumstances. It is even more exceptional to allow such new points of law to be argued if it means that fresh issues of fact would have to be investigated. In particular the discretion is not to be exercised where the issue arises as a result of lack of skill, or tactical decisions by a represented party. A helpful summary of the principles to be applied by the court in exercising such discretion is set out paragraph 50 of the decision: Secretary of State for Health v Rance [2007] IRLR 665, EAT. Time limits in the EAT are stricter than in the ET. The discretion to extend time will only be exercised in rare and exceptional circumstances. The EAT will look at the entirety of the 42 day period to decide whether it could have been presented in time. A helpful summary of the law on this area is found at paragraph 5 of the decision: Muschett v London Borough of Hounslow [2007], EAT ukeatpa/028107.

WITHOUT PREJUDICE When determining whether "without prejudice" communications are admissible in subsequent litigation the issue is how proximate are those communications to the dispute that is subsequently litigated. The key consideration is whether in the course of the negotiations the parties considered or might reasonably have considered that litigation might occur if they did not reach agreement: Framlington Group v Barnetson [2007] IRLR 598, CA.

COMPROMISE AGREEMENT In a case where the former employer entered into a compromise agreement (to waive payment of £1million) as a result of fraudulent representations made by the former employee (a football manager), the High Court would not rescind the contract, as it was impossible to return the parties to the positions before the compromise agreement was entered into (i.e. to revive his employment). Practical justice means the making of appropriate orders for damages or financial relief, and the available options to the Court could be adjusted to fit the case: Crystal Palace FC (2000) Limited v Dowie [2007] IRLR 682, HC.

HEALTH AND SAFETY An offence is committed by an officer of a body corporate under section 37(1) of the Health and Safety at Work Act 1974 if he had subjective knowledge of the material facts giving rise to the offence by the body corporate or, if he did not know, should have been put on inquiry by reason of the circumstances as to whether the relevant safety procedures were in place: Regina v P Ltd and another 13.8.07, TLR, CA Crim. Div. Judges should consider the Code of Practice issued by the Health and Safety Commission when determining whether a place of work was unsafe: Ellis v Bristol City Council 21.8.07, TLR, CA.

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