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EMPLOYMENT LAW NEWSLETTER SPRING 2008

AGENCY WORKERS The Court of Appeal has held that the issue in agency worker cases is whether an implied contract should be implied between the worker and end user in a tripartite situation of worker, agency and end user. The question is whether it is necessary, in the tripartite situation, to imply mutual contractual obligations between the end user to provide the worker with work and the worker to perform the worker for the end user. In the vast majority of cases it will not be necessary to imply a contract of service between agency worker and end user: James v London Borough of Greenwich [2008] IRLR 302, CA.

PROTECTION FROM HARASSMENT For an employee to be able to bring a successful civil claim under the 1997 Act the conduct at issue must be “of such gravity as to justify the sanctions of the criminal law”: Conn v Council of the City of Sunderland [2008] IRLR 324, CA.

RESTRICTIVE COVENANTS It is a defence in claims to enforce restrictive covenants that such covenants are unenforceable because the employer has repudiated the contract of employment. In RDF Media Group v Clements [2008] IRLR 207 the High Court held that if the employee had already repudiated the contract of employment prior to the employer’s repudiatory breach the employee was not entitled to accept the employer’s repudiatory breach and the restrictive covenants remained effective.

DISABILITY DISCRIMINATION The Court of Appeal has held that the point in time for determining whether an impairment is likely to last for at least 12 months so as to qualify as having a “long term effect” is at the date of the decision that is the alleged discrimination and not at the date of the Employment Tribunal hearing: Richmond Adult Community College v McDougall [2008] IRLR 227, CA.

UNFAIR DISMISSAL Failure by an employer to consider an employee’s entitlement to the benefit of ill health retirement prior to dismissal for long term sickness will render the dismissal unfair: First West Yorkshire Ltd t/a First Leeds v Haigh [2008] IRLR 182, EAT.

TERRITORIAL JURISDICTION In Bluese v MBT Transport Ltd [2008] IRLR 264 the EAT held that the House of Lords decision in Lawson v Serco Ltd does not preclude a claim from an employee working outside the United Kingdom who is seeking to enforce directly effective rights under EU law. A claim under the Working Time Regulations brought by a German national working in Germany for a company owned by an Austrian but registered in the UK could be heard by the English Courts. This decision has been followed, albeit reluctantly, by the EAT in Duncombe v Department for Education and Skills UK/EAT/0433/07/DM in respect of workers who worked abroad and brought claims under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

WHISTLEBLOWING Where an employee alleges automatic unfair dismissal for having made a protected disclosure the burden is on the employer to show a potentially fair reason for the dismissal. Where an employee positively asserts there was a different and inadmissible reason for the dismissal he must produce some evidence in support. If the tribunal is not convinced by the employer’s explanation of the reason for the dismissal the tribunal may find that the dismissal was for the reason asserted by the employee but there is no legal obligation on it to do so. It is open to a tribunal to find that the “true reason for the dismissal was not advanced by either side”: Kuzel v Roche Products Limited [2008] EWCA Civ 380, CA.

INJURY TO FEELINGS Where more than one form of discrimination arises out of the same facts a single injury to feelings award may be appropriate. Where, however, certain acts fall into distinct categories of discrimination then the injury to feelings should be considered separately with respect to those acts. Each is a separate wrong for which damages should be provided: Al Jumard v Clwyd Leisure Ltd [2008] IRLR 345, EAT.

EMPLOYMENT STATUS The fact that a claimant is a controlling shareholder in the respondent company may raise doubts as to whether the individual is truly an employee but of itself does not resolve the issue one way or another and can never on its own justify a finding that there was no contract of service: Clark v Clark Construction Initiatives Ltd [2008] IRLR 364, EAT.

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