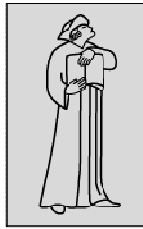


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EMPLOYMENT LAW NEWSLETTER SUMMER 2007

SEX DISCRIMINATION ACT 1975 INCORRECTLY AMENDED The 1975 Act has been incorrectly amended by the Employment Equality (Sex Discrimination) Regulations 2005. Section 4A(i)(a) which defines unlawful harassment of a woman by a person “on the ground of her sex” impermissibly imports causation and will have to be recast in order to eliminate the issue of causation. Section 4A(i)(a) also needs to be recast in order to permit claims against an employer who failed to protect an employee from repeated harassment by a third person, such as a customer or supplier. Section 3(A)(1) of the Act needs to be recast to remove the requirement for a comparator who is not pregnant or who is not on maternity leave. Section 6A of the Act needs to be recast so as to provide that claims which are permitted by virtue of Land Brandenburg v Sass [2005] IRLR 147, ECJ are permitted: EOC v S of S for Trade and Industry [2007] IRLR 327, HC. The Government is not appealing the decision.

VICTIMISATION An employer who sends letters directly to employees who have brought an equal pay claim warning them of the potential consequences in the event the claim is successful which go further than what was reasonable in protecting the employer's interests in the litigation amounts to victimisation under SDA 1975: St Helens MBC v Derbyshire [2007] IRLR 540, HL.

DISABILITY DISCRIMINATION The duty of reasonable adjustment does not require an employer to pay full pay to employees absent on grounds of ill health resulting from a disability related illness after the employees entitlement under sick pay rules have been exhausted: O’Hanlon v Commissioners for HM Revenue & Customs [2007] IRLR 404, CA.

CONSTRUCTIVE DISMISSAL In a constructive dismissal case involving a resignation in the context of a failure to uphold a grievance of bullying the correct test to determine whether the employer had a reasonable and proper cause for the conduct in question is to ask whether the employer’s conduct of the grievance procedure fell within the band of reasonable responses to the grievance: Abbey National Plc v Fairbrother [2007] IRLR 320, EAT.

STATUTORY GRIEVANCE PROCEDURES The statutory grievance procedure does not apply where an employee is claiming that they have been dismissed and that the dismissal involved unlawful discrimination: Lawrence v HM Prison Service [2007] IRLR 468, EAT.

UNLAWFUL DEDUCTION OF WAGES In order to bring a claim for an unlawful deduction of wages under Part II ERA 1996 there needs to be a specific obligation to pay a specific “identifiable” sum: Coors Brewers Ltd v Adcock [2007] IRLR 40, CA.

WHISTLEBLOWING The EAT has provided guidance with regard to the burden of proof in a whistleblowing case. First, the Claimant has to raise a prima facie case that there is a real issue as to whether the reason put forward by the employer is the real reason for the dismissal. If the Claimant establishes this then the burden of proof shifts to the employer who must prove that the dismissal was not on the grounds of the protected disclosure: Kuzel v Roche Products Ltd [2007] IRLR 309, EAT. Where an employee claims his dismissal was automatically unfair because he had made a protected disclosure, it is sufficient that he reasonably believed that the matters relied on amounted to a criminal offence or failure to comply with a legal obligation. He does not have to establish an actual criminal offence or actual breach of a legal obligation: Babula v Waltham Forest College [2007] IRLR 346, CA. An employer can be vicariously liable for detrimental treatment of an employee by a fellow worker resulting from a protected disclosure under section 47B ERA 1996 provided that the connection between the breach of duty by the fellow worker and

their employment is sufficiently close: Cumbria County Council v Carlisle-Morgan [2007] IRLR 314, EAT.

PART TIME WORKERS The Court of Session had adopted a highly restrictive approach to the protection provided by the Part Time Workers Regulations holding that a part time worker must establish that the employer intends to treat him less favourably than a comparable full time worker on the sole ground that he is a part time worker: McMenemy v Capita Business Services Limited [2007] IRLR 400, CS.

EMPLOYMENT STATUS In order to be a “worker” for the purposes of the National Minimum Wage Act the obligation to provide personal service must be the dominant feature of the contract. The approach is analogous to the test used for determining “employment” under the discrimination acts. The lack of any mutuality of obligation when no work is being carried out does not determine the status of the individual when work is being carried out: James v Redcats (Brands) Limited [2007] IRLR 296, EAT.

FIDUCIARY DUTIES There is some flexibility both in the reach and the extent of the duties that a director must (a) act towards his company with honesty, good faith and loyalty and (b) avoid any conflict of interest. It was, therefore, open to the High Court judge to find that there had been no breach of fiduciary duties in circumstances where the Defendant director had been forced to resign, had not diverted any business opportunity from the company to himself but had merely acquiesced to the proposal of the company’s principal customer that he work for the customer under a retainer arrangement: Foster Bryant Surveying Ltd v Bryant [2007] IRLR 425, CA.

WORK RELATED STRESS The provision by employers of a counselling service and medical assistance to an employee suffering from work related stress does not amount to “a panacea by which employers can discharge their duty of care in all cases”: Intel Corporation (UK) Ltd v Daw [2007] IRLR 355, CA.

EMPLOYEE PRIVACY The collection and storage of information by an employer of an employee’s telephone, e-mail and internet usage at the place of work was, in the absence of any legal provisions regulating the circumstances in which employers could monitor such

usage, unjustified and a breach of Article 8 ECHR (the right to respect for private life):
Copland v UK 2.4.07, TLR, ECHR.

RESIGNATION The law in relation to forced resignation has been reviewed by the Court of Appeal in Sandhu v Jan de Rijk Transport Ltd [2007] IRLR 519, CA.

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