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## DECEMBER 2005 / JANUARY 2006 EMPLOYMENT LAW BULLETIN

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### INCREASE IN COMPENSATION LIMITS

The annual increase in compensation limits for Tribunal claims comes into effect on 1 February 2006. The maximum compensatory award for unfair dismissal rises to £58,400 and the cap on a "week's pay" rises from £280 to £290. The increases apply where the effective date of termination is on or after 1 February. Full details of all the increases are contained in the Employment Rights (Increase of Limits) Order 2005 SI 2005/3352.

### GRIEVANCE PROCEDURES

The EAT has provided two recent decisions as to what amounts to a grievance letter for the purposes of step one of the statutory grievance procedures. In Shergold v Fieldway Medical Centre (Appeal No. UKEAT/0487/05/ZT) it was held that step one was complied with when the employee submitted a letter giving notice of resignation. The EAT held that there was no need for the document to set out the exact nature of the case or for it to be identical to the content of subsequent Tribunal proceedings provided there was material similarity. Further, the document does not have to invoke or mention the provisions of the Employment Act 2002 or refer to the employer's grievance procedure. In Commotion Ltd v Ruddy the employee wrote to her employer requesting a variation in her working patterns pursuant to the flexible working provisions of the ERA 1996. Following her employer's unreasonable refusal of that request, the employee resigned and claimed constructive dismissal. She did not send a subsequent grievance letter. The EAT held that the original written request satisfied step one of the grievance procedure.

### DISABILITY DISCRIMINATION

The first tranche of provisions under the Disability Discrimination Act 2005 came into effect on 5 December 2005. The most important change is the amendment of the definition of

“disability”. Cancer, multiple sclerosis and HIV are now automatically included. This means that individuals diagnosed with one of these conditions are now protected from disability discrimination even before becoming symptomatic. Disability discrimination legislation does not, as a matter of law, preclude the creation of a new post in substitution for an existing post from being a reasonable adjustment. Whether or not it is a reasonable adjustment is fact dependent: Southampton City College v Randall [2006] IRLR 18, EAT. Consultation with a disabled employee prior to taking a decision to dismiss him on grounds of ill health is a reasonable adjustment: Rothwell v Pelikan Hardcopy Scotland Ltd [2006] IRLR 24, EAT. The Court of Appeal has provided detailed guidance as to the approach for deciding whether a failure to make an adjustment is unreasonable compared with whether disability discrimination was justified. Guidance was also provided as to the appropriate comparator for reasonable adjustment purposes: Smith v Churchill Stairlifts plc [2006] IRLR 41, CA.

## **DISMISSAL FOR SOME OTHER SUBSTANTIAL REASON**

A dismissal because an employee refuses to sign a new restrictive covenant whether or not the covenant is too wide is for some other substantial reason within the meaning of section 98(1) ERA 1996. The approach taken in the recent EAT decision of Forshaw v Archcraft Ltd is disapproved. Whether or not the restrictive covenant is too wide is a matter relevant to determining whether or not the dismissal was reasonable under section 98(4): Willow Oak Developments Ltd v Silverwood [2006] IRLR 28, EAT.

## **LUMP SUM PAYMENTS UPON TERMINATION/PENALTY OR LIQUIDATED DAMAGES**

The Court of Appeal has given important guidance as to how to determine whether provisions in senior executive contracts of employments for lump sum payments in the event of wrongful dismissal are unenforceable penalties or effective liquidated damages clauses. A clause will only be held to be a penalty if the party seeking to avoid the term can establish that the sum payable upon termination is extravagant or unconscionable: Murray v Leisureplay plc [2005] IRLR 946, CA.

## **THE TORT OF INTERFERENCE WITH CONTRACTUAL RIGHTS**

The Defendant provided finance to two employees of the Claimant company which was used to develop a property in breach of their contracts of employment. It was not disputed that the Defendant’s acts amounted to an interference with the contracts of employment as he had provided finance to allow the employees to obtain for themselves an opportunity that belonged to the Claimant. This was not sufficient, however, to establish the necessary intention on the Defendant’s behalf to commit the tort of interference with the contracts of employment. The tort requires a specific subjective intention to interfere with the contract. Such intention is only established where there is an intention to cause harm to the Claimant as an end in itself, or an intention to cause economic harm to the Claimant because it is a necessary means of achieving some other motive: Mainstream Properties Ltd v Young [2005] IRLR 964, CA.

## WHISTLEBLOWING

Where an employee has been subjected to a detriment as a result of having made a protected disclosure and has subsequently resigned claiming constructive dismissal, compensation in respect of that detriment should be calculated up to the date of dismissal, not the earlier date at which the employer's conduct amounted to a repudiatory breach of contract: Melia v Magna Kensei Ltd CA. Section 47B ERA 1996 (right not to suffer detriment on grounds of having made a protected disclosure) does not apply where the alleged detriment was inflicted after the worker ceased to be employed: Woodward v Abbey National plc [2005] ICR 1750, EAT.

## DISCRIMINATION

Where a manager fostered and encouraged a culture of discrimination against a pregnant employee and ran the company which employed that pregnant employee it is open to a Tribunal to find that manager jointly and severally liable together with the employee company for the damages awarded: Miles v Gilbank 16.11.05, TLR, EAT.

## EMPLOYMENT STATUS

The mere absence of an obligation upon an employer to provide work does not mean that there is no mutuality of obligation and, therefore, no employment. The test is the absence of mutual obligations. "There has to be an absence of an obligation of the employer to provide work and an absence of obligation on the part of the employee when work is offered to accept that work": Serota HHJ Wilson v Circular Distributors Ltd [2006] IRLR 38, EAT. For an individual to be a "worker", as defined by the Working Time Regulations, he must work under a contract and perform the work personally. The work must not be carried out in circumstances where the person for whom it is provided is a customer of a business carried on by that individual. "Worker" will normally exclude those who are self-employed: Bacica v Muir [2006] IRLR 35, EAT.

## SOLICITORS

Intervention by the Law Society in a sole principal's solicitor's firm does not automatically terminate contracts of employment with the sole principal: Rose v Dodd [2005] IRLR 977.

*The Thomas More Chambers' Employment Law Group provides a full complement of employment law services, ranging from representation, for both employers and employees, at all tribunal and court levels; legal advice on all areas of employment law; and drafting (from contracts of employment to settlement agreements). If you would like further details of the services provided and/or information about our fee structure, please contact our Employment Law Clerk, Nick Bryant, on 020 7404 7000 or email [clerks@thomasmore.co.uk](mailto:clerks@thomasmore.co.uk).*

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