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EMPLOYMENT LAW NEWS ROUND UP

JUNE / JULY 2003

AGE DISCRIMINATION

Government consultation document published on the implementation of rules on age discrimination required by the EC Equal Treatment Framework Directive (No. 2000/78). Key proposals include the prohibition of both direct and indirect discrimination on the grounds of age in employment and vocational training. It is proposed than any retirement age set for employees will be unlawful unless objectively justified although views are sought as to whether there should be a default retirement age of 70 after which employees can be forced to retire without the need for justification. Timetable: consultation ends on 20 October 2003. Draft regulations anticipated by the end of 2004 with the rules coming into force on 1 October 2006. Full details of the consultation document can be obtained at www.dti.gov.uk/er/equality/age.htm.

DIRECTORS' COMPENSATION AND SEVERANCE

The Government has published a Consultation document looking at the issue directors' contracts, performance and severance payments in light of shareholders' concerns with regard to directors who leave companies that have performed poorly but who still receive large compensation payments. Views are sought as to whether and how measures are required to enable shareholders to ensure that such compensation reflects performance. Options suggested include: reduction of contract and notice periods to less than a year; specifying at the outset the amount a director will receive if removed from office; payment of compensation by instalments rather than a lump sum, with payments ceasing once the former director commences new employment. The consultation period ends on 30 September 2003. Full details of the Consultation document can be obtained at www.dti.gov.uk/cld/4864rewards.pdf.

DISCRIMINATION

Guidance has been provided by the EAT concerning the correct approach to the burden of proof in sex discrimination cases regulated by section 63A of the 1975 Act (as introduced by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001). In particular, the EAT held that where the applicant had proved facts from which sex discrimination inferences could be drawn the burden of proof moves to the respondent who then has to prove that the treatment was in no sense whatsoever on the grounds of sex: **Barton v Investec Henderson Crosswaite Securities Ltd** (2003) IRLR 332, EAT. Note: this is a materially different approach to that suggested by Simon Brown LJ in the Court of Appeal decision of **Nelson v Carillion Services Ltd** TLR 15.4.03 (referred to in the May 2003 Newsletter and now reported at (2003) IRLR 428) where he stated, obiter dicta, that the purpose of section 63A was to codify rather than alter the pre-existing position established by case law. Tribunals have jurisdiction to hear complaints of sex, race and disability discrimination by employees in respect of acts occurring after their period of employment has ended: **Relaxion**

Group plc v Rhys Harper and others TLR 23.6.03, HL. The Sex Discrimination Act does not extend to discrimination on grounds of sexual orientation: **MacDonald v MoD; Pearce v Mayfield Secondary School Governing Body** TLR 20.6.03, HL. (Note: the draft Employment Equality (Sexual Orientation) Regulations 2003, which will prohibit discrimination on the grounds of sexual orientation, were placed before Parliament on 8 May 2003. Pursuant to the Equal Treatment Framework Directive (No. 2000/78) these Regulations must be implemented by 2 December 2003.)

COMPENSATION

Johnson v Unisys Ltd (2003) 1 AC 518 and, in particular, the speech of Lord Hoffman did not overrule **Norton Tool Ltd v Tewson** (1972) ICR 501. The comments of Lord Hoffman in **Johnson** in relation to recovery of non-economic loss could be distinguished as obiter dictum. The correct approach for Tribunals to adopt on a purposive interpretation of the legislation set down by Parliament was to disallow the recovery of non-economic loss in claims for unfair dismissal or breach of contract Damages for injury to feelings in pure unfair dismissal claims, therefore, is not recoverable: **Dunnachie v Kingston upon Hull City Council** (2003) IRLR 384, EAT. Compensation for discrimination is not limited to cases of reasonably foreseeable harm. An applicant who has been the victim of unlawful race discrimination is entitled to compensation where they can show a direct causal link between the act of discrimination and their loss: **Essa v Laing Ltd** (2003) IRLR 346, EAT. Guidance has been provided by the Court of Appeal with regard to the application of discounts in respect of accelerated receipt of compensation for future loss. This should be done on the basis of an appropriate percentage year on year and not on the basis of a single deduction. The Court of Appeal also questioned whether the 5% discount rate normally applied by Tribunals remained appropriate especially as the discount rate now applied in personal injury cases is 2.5%: **Bentwood Bros (Manchester) Ltd v Shepherd** (2003) IRLR 364. The EAT has provided guidance in respect of injury to feelings awards where the employee was discriminated against on grounds of trade union activities: **London Borough of Hackney v Adams** (2003) IRLR 402.

UNFAIR DISMISSAL - FAIR INVESTIGATION

In determining whether an employer's investigation was fair and reasonable in all the circumstances, such circumstances included the gravity of the charges and the potential effect upon the employee. Allegations of serious criminal misbehaviour must, where disputed, be the subject of the most careful investigation. The investigator must focus no less on any potential evidence that may exculpate the employee as he should on evidence that may prove the charges against him, especially in circumstances where the employee is suspended and unable to contact potential relevant witnesses. In such cases, anything less than an even handed approach to the investigation process would not be reasonable: **A v B** (2003) IRLR 381, EAT.

AGENCY WORKERS - EMPLOYMENT STATUS

The Court of Appeal has held that an agency worker can be employed by the end user under an implied contract of service. Whether or not such an implied contract exists depends upon all the relevant evidence, including how the relationship worked in practice and the duration of that relationship: **Franks v Reuters Ltd** (2003) IRLR 423, CA.

PRACTICE AND PROCEDURE

There was a real possibility that lay members of an EAT would be subconsciously biased when Counsel appeared before them with whom they had previously sat in Counsel's capacity as a part-time judge. The practice that allowed such appearances should cease: **Lawal v Northern Spirit Ltd** TLR 27.6.03, HL (overturning CA decision).

CONTRACT - CONSTRUCTION OF PHRASE "UNABLE TO WORK"

The Court of Appeal in **Jowitt v Pioneer Technology (UK) Ltd** (2003) IRLR 356 considered the meaning of the phrase "unable to work" in a contract of employment when determining a contractual right to long term disability benefit. An employee is "unable to work" if there is no continuous remunerative full time work when he can realistically be expected to do. This approach is similar to that in the recent Court of Appeal decision in **Walton v Airtours plc** (2003) IRLR 161.

EMPLOYERS DUTY OF CARE

The Ministry of Defence had no duty to service personnel to maintain a safe system of work in combat situations. There was no basis, however, for holding that as a matter of principle all claims for personal injury sustained in combat were non-justiciable. Four of the 2,000 claimants were successful in establishing that the MoD breached the duty of care owed in regard to its systems for the prevention, detection and treatment of psychiatric reactions to the stress and trauma of combat: **Multiple Claimants v Ministry of Defence** TLR 29.6.03, HC.

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