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## OCTOBER 2005 EMPLOYMENT LAW BULLETIN

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### IMPLEMENTATION OF LEGISLATION

A number of legislative provisions came into effect in October. Of particular relevance:

The mandatory claim and response form requirements for proceedings in the Employment Tribunal proscribed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 came into force. Unless the appropriate forms are used, a claim or response will be ineffective.

National Minimum Wage Increase. The principal rate was raised from £4.85 to £5.05 per hour. The lower rate was raised from £4.10 to £4.25 per hour.

The Employment Equality (Sex Discrimination) Regulations 2005 amends the SDA 1975 by bringing the definition of indirect discrimination into line with the amending Equal Treatment Directive. The Regulations also provide a new definition of harassment that includes both sexual harassment and harassment related to a person's sex, which need not be sexual in nature.

### UNFAIR DISMISSAL

An employer cannot unilaterally reduce an employee's retirement age below the contractual retirement age. An employee dismissed in such circumstances is entitled to claim unfair dismissal: Payne v Royal and Sun Alliance [2005] IRLR 848, EAT. A Claimant's dismissal because of his refusal, on religious grounds, to agree to a variation of the contract of employment which meant that he could be required to work on Sundays was fair and reasonable. The employer had compelling economic reasons for requiring the variation, had done everything that it could reasonably do to accommodate the Claimant's wish not to work on Sundays and had explored all alternatives to dismissal. In such circumstances the Court of Appeal were of the opinion that the dismissal was fair regardless of whether Article 9 ECHR (protection of the freedom to manifest one's religions or beliefs) applied. The three judges, however, were divided as to whether the case fell within the ambit of Article 9: Copsey v WWB Devon Clays Ltd [2005] IRLR 811, CA. An employee dismissed for complaining about the employer's failure to pay her salary on time had been dismissed for

asserting that the employer had breached a statutory right. The dismissal was therefore automatically unfair under section 104 ERA 1996: Elizabeth Claire Care Management Ltd v Francis [2005] IRLR 858, EAT.

## **CHANGE OF JOB DUTIES**

Employers were in fundamental breach of contract when they tried to change the employee's duties from a hands on role as an architect to a managerial one, notwithstanding the fact that the contract of employment contained a flexibility clause requiring the employee to perform any other duties "reasonably required of you". Such a clause did not permit the employers to impose any duties that they wished upon the Claimant but expressly imposed a requirement of reasonableness on the employer. Once it was found that the duties required by the employers were unreasonably required of the employee, the fact that there may have been valid, commercial grounds, as opposed to a wholly arbitrary basis, for the employers requiring the employee to undertake them, cannot in a contract of employment cure the unreasonableness of the requirement insofar as the employee is concerned: Land Securities Trillium Ltd v Thornley [2005] IRLR 765, EAT.

## **CERTAINTY OF CONTRACT**

A promise made at an office Christmas party to an employee that he would receive a pay increase in future could not legally be relied upon. What was said was too vague and uncertain to amount to a binding contractual promise: Judge v Crown Leisure Ltd [2005] IRLR 811, CA.

## **MITIGATION OF LOSS**

The Court of Appeal has laid down guidelines as to the correct approach in determining mitigation of loss in circumstances where a dismissed employee has set up his own business. First, the Tribunal must decide whether mitigation in that way is reasonable. If it is reasonable, the Tribunal should then calculate what sum represents loss of remuneration. Next the Tribunal should consider the costs incurred in mitigating loss and, if reasonably incurred, that sum should be added to the overall loss. Finally, the earnings from the new business should be deducted: Aon Training Ltd v Dore [2005] IRLR 891, CA.

## **PREGNANCY/SICK PAY**

A sick pay scheme can treat women off work with a pregnancy related illness in the same way as employees with an illness unrelated to pregnancy. Employees can, therefore, count pregnancy related absences against sick pay entitlement and can reduce the pay of a pregnant woman off work: North Western Health Board v McKenna [2005] IRLR 895, ECJ.

## **PROTECTIVE AWARDS**

Administrators are not liable to pay protective awards (under section 189 Trade Union Labour Relations (Consolidation) Act 1992) or make payments in lieu of notice to employees whose employment contracts they adopted in priority to the expenses of the administration: Krasner v McMath Duggins 26.9.05, TLR, CA.

## **CONTINUITY OF EMPLOYMENT**

An employee whose employment begins on 8 April and ends on 7 April the next year has the requisite one year's continuous service to bring an unfair dismissal claim: Pacitti Jones v O'Brien [2005] IRLR 888, CS.

## **SETTLEMENT**

Where parties agree settlement and a claim is dismissed on withdrawal, there is no requirement in law that the Tribunal has to ensure that the settlement is binding within the SDA and RRA before it permits the claim to be dismissed: May-Deman v University of Greenwich [2005] IRLR 845, EAT.

## **PRACTICE AND PROCEDURE**

Where a Claim has been struck out due to failure to comply with the Employment Tribunal Rules of Procedure 2004, a Tribunal has the jurisdiction to review that decision on the grounds that an order to strike out is a "judgment" and not an "order": Sodexho Ltd v Gibbons [2005] IRLR 836, EAT.

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