



7 Lincoln's Inn Fields London WC2A 3BP

T 020 7404 7000 F 020 7381 4606

DX 90 Chancery Lane E clerks@thomasmore.co.uk

www.thomasmore.co.uk

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## SEPTEMBER 2005 EMPLOYMENT LAW BULLETIN

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### UNFAIR DISMISSAL

The Applicants were dismissed for refusing to sign new contracts of employment containing unfairly wide and unreasonable restraint of trade clauses. The dismissal was unfair. An employer cannot assert as a potentially fair reason for dismissal the fact that the employee refused to agree to unreasonable terms of employment: Forshaw v Archcraft Ltd [2005] IRLR 600, EAT. The employer gave lawful notice that if the employee did not agree to new terms, including a reduction in holiday entitlement and a six day working week, his employment would terminate at the end of the notice period and he would be offered immediate re-engagement on the new terms. The employee resigned and claimed unfair constructive dismissal on the grounds that the employer had committed a repudiatory breach of the implied term of trust and confidence. He was unsuccessful. An employer's service of lawful notice coupled with an offer of continuous employment on different terms cannot by itself amount to a repudiatory breach of contract as there is no breach of existing terms nor any anticipatory breach in indicating lawful termination of the contract on proper notice: Kerry Foods Ltd v Lynch [2005] IRLR680, EAT. Article 9 ECHR, freedom to manifest one's religious beliefs, is not infringed by an employee's dismissal for refusing to agree to Sunday working. A reasonable and fair employer was entitled to change his work practices despite the fact that that interfered with an employee's right to manifest his religion: Copsey v WWB Devon Clays Ltd 25.8.05, TLR, CA.

### DISCRIMINATION/JUSTIFICATION

The test for justification under section 1(2)(b)(ii) of the 1975 Sex Discrimination Act requires the employer to show that the proposal is justified objectively. The tribunal has to take into account the reasonable needs of the business but it has to make its own judgment as to whether the proposal is reasonably necessary. That the term "necessary" is qualified by "reasonably" does not provide the employer with a margin of discretion or a range of reasonable responses. The submission, in the present case, that the tribunal needs to consider only whether the employer's decision was within the range of reasonable decisions could not be accepted: Hardys & Hansons plc v Lax [2005] IRLR 726, CA.

## **VICTIMISATION**

The employer did not victimise the claimants by sending them a letter warning of the consequences if their claim were to succeed. In line with Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL it was open to an employer, against whom proceedings of a protected kind were pending, to take reasonable steps to protect its position in that litigation without infringing the victimisation provisions: St Helens MBC v Derbyshire 26.8.05, TLR, CA.

## **PRACTICE AND PROCEDURE**

The EAT has laid down the test to be applied in determining whether an application contains the required “details of claim”. The test is whether it can be discerned from the claim as presented that the claimant is complaining of a breach of an employment right falling within the employment tribunal’s jurisdiction: Grimmer v KLM Cityhopper UK [2005] IRLR 596, EAT. Where a claimant attempted to present her application by email on the afternoon of the final day of the prescribed period and had no reason to suspect or believe that the transmission had not been successful although, in fact, it was not received, it was not reasonably practicable for the claimant to present her application in time. The reasonable expectation of the sender of an electronic mail communication is that, in the absence of any contrary indication, that it will be delivered within a very short period after transmission, normally 30 to 60 minutes: Initial Electronic Security Systems Ltd v Avdic [2005] IRLR 671, EAT. An appeal to the EAT will be out of time if the Notice of Appeal and all attendant documents are not received by 4pm on the date on which the 42 day period for appealing to the EAT expires. If an appellant begins the fax transmission of these documents before 4pm on the day in question but they are not fully received by the EAT’s fax until after 4pm they are out of time: Woodward v Abbey National plc EAT.

## **COMPENSATION**

A tribunal is entitled to make an award for compensation in a sex discrimination claim on a joint and several basis as against the respondents. It should make clear, however, its reason for doing so and must have regard to section 2(1) of the Civil Liability (Contribution) Act 1978 which states that: “in any proceedings for contribution... the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question.” This means that an award that is made on a joint and several basis which is 100% against each respondent is almost never appropriate: Way v Crouch [2005] IRLR 603, EAT.

## **EMPLOYMENT STATUS**

The fact that the written agreement entered between the parties and which stipulates that the worker is not an employee contains an “entire agreement” clause does not necessarily determine the status of the worker. Contractual documentation is not necessarily conclusive, especially if “it does not reflect and contain the entire bargain between the parties”: Royal National Lifeboat Institution v Bushaway [2005] IRLR 674, EAT.

*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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