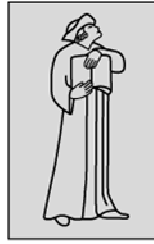


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## EMPLOYMENT LAW NEWSLETTER

SPRING 2007

### STATUTORY DISCIPLINARY AND GRIEVANCE PROCEDURES REVIEW

The recent independent review of the statutory employment dispute resolution procedures, led by Michael Gibbons, has recommended that the statutory procedures be repealed with clear non-prescriptive guidelines being issued in their place. In response the DTI has issued a consultation document "Resolving disputes in the workplace" seeking responses to the issues arising out of the review by 20 June 2007.

### GRIEVANCE PROCEDURES

In order for an employee to comply with step one of the modified grievance procedure he must set out in writing both the grievance and the basis for it. This requirement is considerably greater than the minimal requirements under step one of the standard grievance procedure. In order to ensure compliance (and therefore ensure that any subsequent Tribunal claim is effective) the employee must set out in his grievance the essential reasons for the grievance in sufficient detail to enable the employer to respond: **City of Bradford Metropolitan District Council v Pratt** [2007] IRLR 192, EAT.

### DISCRIMINATION BURDEN OF PROOF

In discrimination cases the burden of proof does not shift from the claimant to the respondent simply because the claimant establishes a difference in status (such as sex or race) and a difference in treatment. This is not, without more, sufficient evidence from which a tribunal "could conclude", pursuant to section 63A(2) SDA 1975, that the respondent had committed unlawful discrimination: **Madarassy v Nomura International plc** [2007] IRLR 246, CA. Whilst it is good practice for a tribunal to apply the two stage approach in relation to the burden of proof in direct discrimination cases, there is no error of law if it fails to do so. A tribunal can move directly to the second stage and conclude that the respondent has discharged the burden of proof incumbent upon it at that stage by proving that the treatment in question was not on the proscribed ground: **Brown v London Borough of Croydon** [2007] IRLR 259, CA.

## IMPLIED TERM OF TRUST AND CONFIDENCE

To establish a breach of the implied term of trust and confidence it is sufficient for a claimant to show conduct by a respondent which, objectively considered, is likely to seriously undermine the necessary trust and confidence in the employment relationship or was intended to do so. The test is disjunctive not conjunctive: ***Baldwin v Brighton & Hove City Council*** [2007] IRLR 233, EAT.

## TRANSFER OF UNDERTAKINGS

The rule, derived from ***Daddy's Dance Hall***, that establishes that a variation in a contract of employment between transferee and employee cannot be legally binding where the reason for the change was the transfer does not prevent an employee from taking advantage of favourable changes agreed with the transferee: ***Power v Regent Security Services Limited*** [2007] IRLR 226, EAT.

## WHISTLEBLOWING

Protection for whistleblowers is limited to victimisation arising from the disclosure itself. There is no protection in relation to a course of conduct that leads to the disclosure. A teacher, therefore, who was disciplined for hacking into his school's computer system for the purpose of demonstrating that it did not comply with data protection requirements was not protected by the public interest disclosure legislation: ***Bolton School v Evans*** [2007] IRLR 140, CA.

## COMPENSATION

In ***Scope v Thornett*** [2007] IRLR 155, CA Pill L] stated that when determining whether an unfairly dismissed employee's employment would have continued if she had not been unfairly dismissed: "The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings, will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely, but, where there is evidence that it may not have been so, that evidence must be taken into account."

## PRACTICE AND PROCEDURE

Covert recordings of the "open" parts of disciplinary and appeal hearings are admissible as evidence. In most cases covert recordings of the private deliberations of the panel when the employee was absent are not admissible on public interest grounds. In very rare cases, however, the public interest may allow for the admissibility of such evidence of private deliberations: ***Chairman and Governors of Amwell View School v Dogherty*** [2007] IRLR 198, EAT.

## **AGENCY WORKERS**

Where there is a contract of employment between the agency and the worker there is no business necessity for implying a contract of service with the end-user: **Cairns v Visteon UK Ltd** [2007] IRLR 175, EAT. In **James v London Borough of Greenwich** [2007] IRLR 168 the EAT held that it is only necessary to imply a contract of employment in circumstances where the way in which the contract is performed is only consistent with such an implied contract. The EAT expressly disagreed with the approach adopted by Sedley LJ in the CA decision of **Dacas v Brook Street Bureau (UK) Ltd** that the passage of time alone can justify such an implied contract.

In **Craigie v London Borough of Haringey** (EAT/0556/06), and in two further decisions of HHJ Peter Clark, **Astbury v Gist** (EAT/0619/06) and **Heatherwood and Wexham Park Hospitals NHS Trust** (EAT/0633/06) the EAT hold that the Court of Appeal decision in **Dacas** is obiter, noting the inconsistency of the reasoning of Mummery LJ and Sedley LJ, whereas the decision of **Cable and Wireless v Muscat** is binding. The EAT held that before a Tribunal can imply a contract of employment in an agency situation, it must be necessary to do so, not just possible or desirable, applying **Aramis** [1989] ILR 213. The cases repeat the desirability for a thorough consideration by Parliament of the rights of agency workers.

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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