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## EMPLOYMENT LAW NEWSLETTER

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**DISABILITY DISCRIMINATION** A refusal to allow a Claimant to progress in his or her professional life is not an adverse effect on normal day-to-day activities for the purposes of the DDA. General participation in or access to professional life is not a day-to-day activity. The status of disability for the purposes of the DDA is not dependent on the decision of the employer as to how to react to the employee's impairment: Chief Constable of Lothian and Borders Police v Cumming [2010] IRLR 109, EAT. No duty to make reasonable adjustments arises where an employer knows of the employee's disability but could not be reasonable expected to know of the disability's effect: Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283, EAT. Between February and December 2005 the Claimant developed inflammation of the spinal cord. By January 2006 she had developed secondary muscle pain which affected her legs. The Tribunal found that she was not disabled as she had suffered two different impairments, each of which had lasted for less than 12 months and each of which was not likely to have lasted for at least 12 months. The EAT allowed the appeal, holding that the effect of an illness/condition which was likely to develop from another illness or condition or which had developed from another illness/condition could form part of the assessment as to whether the effect of the original impairment was likely to last or had lasted at least 12 months. Fine distinctions between one condition and its development into another were to be avoided: Patel v Oldham Metropolitan Council [2010] IRLR 280 EAT.

**RIGHT TO LEGAL REPRESENTATION** A teaching assistant had a right to be legally represented for the purposes of internal disciplinary proceedings by the school governors under Article 6 ECHR (the right to a fair hearing) due to the fact that those proceedings would have a

substantial influence or effect on the employee's civil right to practice his profession: R v Governors of X School [2010] IRLR 222, CA.

**UNFAIR DISMISSAL** In constructive dismissal cases, the issue as to whether the employer committed a fundamental breach of the contract of employment is not to be judged by the range of reasonable responses test. The test is objective: Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445, CA. An employee who has already committed a repudiatory breach of the contract of employment cannot rely upon a subsequent breach of the contract by the employer to bring a constructive dismissal claim: Aberdeen City Council v McNeill [2010] IRLR 374, EAT.

**CONTRACT OF EMPLOYMENT – UNILATERAL VARIATION CLAUSES** Provisions in a staff hand book which reserved to the employer “the right to review, revise, amend or replace the contents of this handbook, and introduce new policies from time to time reflecting the changing needs of the business” were incorporated into the contracts of employment and allowed the employer to make changes to conditions including pay without obtaining further consent from the employees: Bateman v Asda Stores Ltd [2010] IRLR 370, EAT.

**AGENCY WORKERS** A temporary agency worker was neither an employee with the Prison Service under a contract of employment nor a worker under a contract of services. He therefore had no right to bring unfair dismissal or race discrimination claims against the Prison Service. The decision that the Claimant was not a worker for the purposes of bringing a discrimination claim was based upon the findings that the Claimant was under no obligation to the Prison Service to work for them and could terminate his engagement with them at any time by giving notice to his agency: Muschett v HM Prison Service [2010] IRLR 451, CA.

**WORKERS** Voluntary workers who do not have contracts do not have “worker” status and are, therefore, not protected by the DDA or the Framework Employment Equality Directive: X v Mid Sussex CAB [2010] IRLR 101, EAT.

**PRACTICE AND PROCEDURE** Before striking out a claim, a judge should consider first less severe measures such as an “unless” order: Abegaze v Shrewsbury College of Arts & Technology [2010] IRLR 238, CA. Tribunal judges do not have to undertake specific consideration of all CPR 3.9(1) factors on an application involving relief from a Tribunal sanction such as strike-out. On an application for review the judge must show that he has weighed the factors affecting proportionality and reached a tenable decision: Governing Body of St Albans Girls' School v Neary [2010] IRLR 124,

CA. An agreement between the parties that an out of time claim was lodged in time does not bind the Tribunal: Radakovits v Abbey National PLC [2010] IRLR 307, CA.

**PROTECTION FROM HARASSMENT** In considering whether conduct constituted harassment under the Act, the focus is on whether the conduct is oppressive and unacceptable. The court must keep in mind that the conduct must be of an order which would sustain criminal liability: Veakins v Kier Islington Ltd [2010] IRLR 132, CA

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 Clerks on 020 7404 7000 or email [clerks@thomasmore.co.uk](mailto:clerks@thomasmore.co.uk)

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