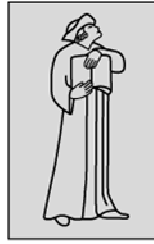


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## EMPLOYMENT LAW NEWSLETTER

WINTER 2007

### COMPENSATION LIMITS INCREASED

The annual increase of compensation limits for Tribunal claims comes into effect in cases where the effective date of termination is on or after 1 February 2007. Increases include a week's pay for basic awards and statutory redundancy payments rising to £310 and the maximum compensatory award for unfair dismissal rising to £60,600. Full details of all the relevant increases can be found in the Employment Rights (Increase of Limits) Order 2006 SI 2006/3045.

### POLKEY REVERSAL

Under section 98A(2) ERA 1996 it is open to an employer to show that where a dismissal was unfair on procedural grounds alone compliance with the procedure would have made no difference. The construction adopted in **Alexander v Bridgen Enterprises Ltd** that "a procedure" under the section means any procedure which the Tribunal considers the employer ought to have followed should be adopted in preference to the approach taken in **Mason v Governing Body of Ward End Primary School** where it was held that section 98A(2) applies only where there was a specific procedure which the employer had adopted: **Kelly v Madden v Manor Surgery** [2007] IRLR 17, EAT.

### COMPENSATION

An employee claiming compensation for unfair dismissal is not entitled to full pay in respect of the notice period when he or she was on sick leave during that period: **Burlo v Langley** [2006] EWCA Civ 1778, CA.

### DISABILITY DISCRIMINATION

In this case the employer's sick pay scheme placed the disabled claimant at a substantial disadvantage in comparison with a non-disabled person thereby placing a duty of reasonable adjustment on the employer. The duty of reasonable adjustment, however, did not require

the employer to pay full pay to employees off work ill as a result of a disability-related illness in circumstances where their entitlement under sick pay rules had been exhausted. It will be a very rare case where giving higher sick pay that would be payable to a non-disabled person who does not suffer the same disability-related absence would be considered necessary as a reasonable adjustment. The EAT further found that reductions in sickness payments amounted to disability related discrimination. This discrimination, however, was justified on the grounds of the expense involved in maintaining full pay for all disabled employees absent due to disability related sickness: **O'Hanlon v Commissioners for HM Revenue & Customs** [2006] IRLR 840, EAT. In a disability discrimination case involving an HIV positive worker the appropriate comparator was someone who had some attribute other than being HIV positive that carried the same risk of causing to others illness or injury of the same gravity. If the comparator would have been dismissed then the claimant was not less favourably treated. In order to shift the burden of proof to the employers, therefore, the claimant needed to prove some evidential basis upon which it could be said that the comparator would not have been dismissed: **High Quality Lifestyles Ltd v Watts** [2006] IRLR 850, EAT. A failure to convert an employment position from full to part-time status prior to the position being applied for by a disabled candidate does not amount to a failure to make reasonable adjustments in breach of section 6(1) DDA 1995: **NTL Group Ltd v Difolco** [2006] EWCA Civ 1508.

## **DIRECT DISCRIMINATION**

Unlawful direct discrimination (with the exception of age discrimination) cannot in law be justified: **Moyhing v Barts and London NHS Trust** [2006] IRLR 860, EAT.

## **AGE DISCRIMINATION**

The Government's decision to amend the Local Government Pension Scheme by abolishing the "rule of 85", which allowed scheme members to take early retirement and receive full benefits if the sum of their age and length of service was 85 years or more was lawful. The Government correctly concluded that the rule of 85 is age discriminatory because it produces different outcomes where the distinguishing characteristic is age: **R (on the application of Unison) v First Secretary of State** [2006] IRLR 926, HC.

## **PRACTICE AND PROCEDURE**

Under the 2004 Rules of Procedure, a response must be filed within 28 days of the date on which a copy of the claim was sent to the respondent, not the date that it was received. This time limit applies even where the claim form is not received by the respondent. If, as a result, a respondent's response is time barred the respondent should apply for the decision not to accept the response to be reviewed: **Bone v Fabcon Projects Ltd** [2006] IRLR 908, CA. A ruling as to the effect of the original claim form can be treated as an aspect of case management and, therefore, can be reconsidered under Rule 10 of the 2004 Rules of Procedure. The power of a Tribunal chairman under Rule 10 is wide and allows for reconsideration of any case management decision although normally parties will be expected to run all their legal arguments on a particular issue at one hearing: **Hart v English Heritage (Historic Buildings & Monuments Commission for England)** [2006] IRLR 915, EAT.

## STATUTORY DISMISSAL PROCEDURES

The information requirement imposed upon an employer under step one of the standard dismissal and disciplinary procedures, setting out the complaint in writing, is low and needs to be considered in the context as to whether the employee understood what the allegations are. If an employee is aware of the allegations against him at the time the step one letter is received, it is likely that step one will be construed as being complied with even if the letter is ambiguous: ***Draper v Mears Ltd*** [2006] IRLR 869, EAT. Suspension without pay of an employee prior to commencing and otherwise complying with the statutory disciplinary and dismissal procedure does not render the dismissal automatically unfair under section 98A of the ERA 1996. Section 98A only applies where the procedure has not been completed in relation to the dismissal: ***A to B Travel Ltd v Kennedy*** EAT.

## EXTENSION OF TIME LIMITS

The three month extension of time limits for presenting a claim if an employee has presented a written grievance within the normal time limit applies in circumstances where the grievance was lodged prior to time starting to run. Therefore a grievance lodged before the date of termination about an unlawful deduction of wages extends the time limit for claiming unlawful constructive dismissal, unlawful deduction of wages and breach of contract to six months after the date of termination: ***H M Prison v Barua*** [2007] IRLR 4, EAT.

## TIME LIMITS

In a discrimination claim, time runs from when the act complained of was done. The act is complete for the purpose of time limitation considerations when the decision is taken not the later date when it is communicated. The contrary position adopted by the EAT in ***Aniagwu v London Borough of Hackney*** was questioned: ***Virdu v Commissioner of Police of the Metropolis*** [2007] IRLR 24, EAT.

## COMPROMISE AGREEMENTS

A “comprehensive” compromise agreement which purported to settle “all claims past or future arising out of the termination of employment” and which stated that it was settlement of all claims for “redundancy payments, unfair dismissal, discrimination on grounds of race, sex and/or disability” but failed to comply with section 72 (4A)(f) of the RRA 1976 that “the contract must state that the conditions regulating compromise under this Act are satisfied” did not compromise the Claimant’s claims of race discrimination: ***Palihakkara v BT plc*** [2006].

## CONFIDENTIAL INFORMATION UNDERTAKINGS

A new employer who fails to give suitably swift undertakings, when requested to do so, not to use confidential information which an employee brings from his old employer should pay the costs of any injunction application. In the present case, the new employer ignored the first letter requesting such undertakings and, in response to a second letter, simply wrote

back and said it was investigating the position without giving any undertaking. The old employer then issued an application for an injunction, following which the new employer gave an appropriate undertaking: **Fox Gregory v Spinks** [2006] EWCA Civ 1508.

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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