

## EMPLOYMENT LAW NEWS ROUND UP

SPRING 2002

### INCREASE IN AWARDS

The Employment Rights (Increase of Limits) Order (2002 No.10) increased the limits on awards in respect of cases where the appropriate date falls on or after 1 February 2002. The said increases include raising the limit for unfair dismissal compensation from £51,700 to £52,600 and the maximum "week's pay" for the purpose of calculating statutory redundancy or basic unfair dismissal awards has risen from £240 to £250.

### EMPLOYER LIABILITY FOR WORK RELATED STRESS

The Court of Appeal has laid down important guidelines for determining liability in the burgeoning field of stress related employment personal injury cases. Such claims are to be determined in accordance with the ordinary principles of employer liability. Unless an employer knows of a particular vulnerability, he is usually entitled to assume the employee can withstand the normal pressures of the job. In determining whether a duty on the employer to take steps to safeguard an employee from impending harm to health arising from work stress has arisen, the key question is whether this kind of harm to this particular employee was reasonably foreseeable. The answer to this question will depend upon the particular characteristics of the employee concerned and the particular demands which the employer casts upon him. If the employee or his doctor makes it clear that unless steps are taken to assist there is a material risk of a mental and/or physical breakdown, the employer will have to consider what can be done about it. If the risk to health is foreseeable, it is essential to consider whether and in what respect the employer has broken the duty of care. The employer is only in breach of this duty if he has failed to take reasonable steps in the circumstances. Relevant considerations include: the magnitude of the risk of harm; the gravity of the potential harm; costs and practicability of prevention; and the justifications for running the risk. Once a breach of duty has been established, it is then necessary to show that the particular breach of duty caused the harm: **Sutherland v Hatton and others** (2002) IRLR 263, CA.

### UNFAIR DISMISSAL

The implied duty of trust and confidence subsists during the period when employers investigate allegations against the employee. The H of L decision in *Johnson v Unisys* (2001) IRLR 279, which establishes that the said term is not implied once the decision to dismiss has been taken, does not apply to any investigation occurring prior to the dismissal decision: **King v University Court of the University of St Andrews** (2002) IRLR 252 C of S.

### PROCEDURE

ETs must not rely upon authorities which have not been cited by the parties' legal representatives in reaching their decisions. Where an ET considers an authority that has not been cited relevant and significant, the authority should be referred to the parties

and their submissions invited before a decision is reached. Failure to do so may amount to a breach of natural justice and of the right to a fair hearing: **Albion Hotel (Freshwater) Ltd v Maia E Silva** (2002) IRLR 200, EAT.

## DISCRIMINATION

Section 3(4) RRA requires comparing like to like. It is often the case that there may be no actual comparator whom can be shown to have been treated more favourably than the applicant. In such circumstances it is necessary to consider a hypothetical comparator to show how a person of the other racial group would have been treated: **Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting** (2002) IRLR 289 CA. £750 is close to the very bottom end of the scale for injury to feelings awards: **Doshoki v Draeger Ltd** (2002) IRLR 340, EAT.

## PUBLIC INTEREST DISCLOSURE

A legal obligation arising from a contract of employment falls within the definition of a qualifying disclosure under section 43 PIDA 1996: **Parkins v Sodexo Ltd** (2002) IRLR 109, CA. ETs have jurisdiction to hear public interest disclosure unfair dismissal claims in cases where the "protected disclosure" took place several years prior to the implementation of the PIDA 1998: **Miklaszewicz v Stolt Offshore Ltd** (2002) IRLR 344, C of S.

## RESJUDICATA

Cause of action estoppel is not applicable to ET cases where it is clear that the withdrawal of the application is, in substance, a discontinuance of proceedings. A court must have regard to the matrix of fact in order to understand the meaning and effect of a consensual act of withdrawal. Reasons for withdrawal are relevant if they assist in determining whether the party withdrawing the claim intended thereby to abandon the claim: **Ako v Rothschild Asset Management Ltd** (2002) IRLR 348, CA. A similar approach was taken in **Sajid v Sussex Muslim Society** (2002) IRLR 113 CA where it was held that no estoppel arose because an earlier ET breach of contract claim, arising from the same facts, had been withdrawn at the applicant's request once proceedings in the High Court had been issued because the amount of damages claimed exceeded the ET limit.

## ENTITLEMENT TO FAIR HEARING

Conferring state immunity on foreign states with regard to discrimination claims which would otherwise be brought against them is not a breach of Article 6(1) ECHR (right to a fair and public hearing) or Article 14 (non-discrimination): **Fogarty v United Kingdom** (2002) IRLR 148, ECHR. The issue of a national security certificate blocking proceedings claiming (Northern Ireland) religious discrimination where the applicant was rejected for a civil service post constituted a disproportionate restriction on the right of access to a court and, accordingly, was a breach of Article 6(1) ECHR: **Devlin v United Kingdom** (2002) IRLR 155, ECHR.

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