THOMPSONS SOLICITORS

Labour & European Law Review

ISSUE 102 JULY 2005

KNOW YOUR RIGHTS
Holidays during maternity leave
Pgs 6 & 7

TRADE UNION ACCOMPANIMENT
Going to a hearing
Pg4

A COMPROMISE AGREEMENT
The necessary ingredients
Pg5

TIME TRANSFER
When does it happen?
Pg9

E-MAIL GOES ASTRAY
Electronic applications
Pg11

MODERNISATION FUND

Final proposals for the operation of the Government's Union Modernisation Fund (to help unions become more efficient) were published recently by the Department of Trade and Industry.

There will be £5-10 million available to support innovative projects such as training union representatives, reviewing internal union structures; and enabling unions to broaden their dialogue with members by greater use of the Internet and other new technologies.

The fund, created by the Employment Relations Act 2004, cannot be used for the day-to-day work of unions,, supporting recruitment drives, advancing a union's position in collective bargaining or trade disputes, or for representing individuals in disputes with a particular employer.

It is expected that the fund will be formally launched and a first call for bids issued later in the summer.

Go to: *www.dti.gov.uk/er/union_mod_fund.htm* to find out more.

UNIONS WIN MORE RECOGNITION

Unions won 179 recognition deals last year, a slight increase on the year before, according to the TUC's annual *Focus on Recognition* survey.

Although the number of deals has gone down since 2001 (the year after the Employment Relations Act 1999 came into force), unions are still winning twice as many as they were before 1999.

Over 90 per cent of the deals covered collective bargaining over pay, hours and holidays – up from 80 per cent last year.

Just under three quarters (73 per cent) covered collective representation on grievance and disciplinary issues. Over three quarters (78 per cent) dealt with bargaining or consultation over training and learning, and 42 per cent covered bargaining on pensions.

The survey represented 4.6 million members (71 per cent of the TUC's total affiliated membership), a much lower proportion than the year before (91 per cent), so the number of recognition deals recorded is likely to be an underestimate.

To buy a copy, go to: *www.tuc.org.uk/publications*

NO OPT-OUT FROM WORKING TIME

Although the European Parliament voted recently in favour of removing the UK's right to opt out of the 48-hour maximum working week (see *LELR 101*), the Government has now managed to stall those proposals.

The directive's definition of on-call time would also have been amended to include "inactive" time when the worker is on call, but not working.

At a recent meeting of the Council of Ministers, the Government, with the backing of a number of other employment ministers, forced the issue to be dropped. It argued, among other things, that the changes would restrict flexibility in the labour market,

This is a point repeatedly underlined by business organisations and employers' groups. The TUC, however, says that the concerns of Government and business are not well founded and has produced a briefing to counter some of their arguments.

The beriefing infludes a fact file that demolishes the myths that are being peddled by employers about the effect of the 48-hour week on health and safety, worker choice and business success.

These include the myths that long hours are not a health and safety issue; that the UK has a good health and safety record; and that everyone working long hours is happy to do so.

It also examines the areas where employers have maintained a pointed silence, looking at the detrimental effect of long hours on women, families and lifelong learning.

Go to: *www.tuc.org.uk/economy/tuc-9971-f0.cfm* to access a copy of the briefing.

DTI EQUALITY MONEY

Trade unions can make bids for funding from a £2.5m pot set aside by the DTI to raise awareness of employment equality regulations.

The idea is to help voluntary and not-for-profit organisations raise awareness with individuals and employers about their rights and responsibilities under the 2003 Sexual Orientation and Religion or Belief Regulations.

Project proposals have to be submitted to the DTI by 27 July. Go to: *www.womenandequalityunit.gov.uk/cehr/index.htm* for details of the application form.

Agency workers

Both the Court of Appeal and the Employment Appeal Tribunal (EAT) have made decisions recently about the employment status of agency workers.

In Bunce -v- Postworth Limited t/a Skyblue, Mr Bunce tried to bring a claim of unfair dismissal against the agency, but the Court of Appeal has just decided that, because he was not an employee, it had no jurisdiction to hear it.

The agreement between the agency and Mr Bunce explicitly said he was not an employee and that there was no obligation on either party to provide or accept work. Mr Bunce argued that, although he had no overarching contract with the agency, he worked on a series of short term contracts each time he carried out an assignment.

The court said that, although it was possible, in theory, to have a master agreement and individual contracts in respect of specific assignments, the general agreement between the two parties gave such detailed provisions that it could see little room for individual contracts for each assignment.

He also argued that the agency had day-to-day control over what he did, but the court said that the law is concerned with who has control in reality. In this case, it was the client who had the power to direct and control what he did.

In Astbury -v- Gist Ltd, Mr Astbury brought a claim against Gist, saying that he was their employee and that they had made unlawful deductions from his wages. He had started work as a picker for Gist, but using the services of an agency called Pertemps Ltd.

Mr Astbury claimed that he became an employee when he was placed on a fixed term assignment with Gist. He said that Pertemps were agents for Gist, and that there was an implied contract between himself and Gist as contemplated in *Dacas -v- Brook Street Bureau* (*LELR 88*). The EAT agreed and remitted the matter to a fresh tribunal.

It recommended that, in future, tribunals should join parties (either the agency or the client) to the claim so that all three are bound by the result, in the event that the worker has only brought a claim against one of them.

THERE IS NO AUGUST EDITION OF *LELR*. THE NEXT ISSUE WILL BE SEPTEMBER 2005

Substantial reason

In Scott & Co -v- Richardson**, the EAT has said that when someone is dismissed because of a business decision taken by their employer, tribunals should not express their own views about the commercial reasons for the decision. They should concentrate on the issue of reasonableness.**

In this case, Mr Richardson refused to agree to work a shift system that his employers wanted to introduce and was dismissed. The tribunal said it was not enough for the employer to just state that the re-organisation was a substantial reason for the dismissal – they had to "demonstrate that it has discernible advantages."

The EAT said that this was the wrong approach. The employer just has to reasonably believe that the change had advantages – they did not have to prove that was the case.

Pensions consultation

New regulations will soon mean that employers can no longer make major changes to their occupational or personal pension scheme without first consulting the scheme's members.

Originally set out in the Pensions Act 2004, the provisions mean that employers, trustees or managers of a pension scheme, who want to make significant changes to future pension arrangements, must provide information and consult on the proposed changes before making them.

The requirements will affect employers with more than 150 employees from 6 April 2006, those with more than 100 employees from 6 April 2007 and employers with more than 50 employees from 6 April 2008.

Go to: *www.dwp.gov.uk/publications/dwp/2005/occ_pen_schemes/oppscer06.pdf* for the consultation document.

Delay on TUPE regs

In LELR 100, we reported that the DTI was consulting on a draft version of the new Transfer of Undertakings (Protection of Employment) Regulations 2005.

The Department has now said that, because of the large number of responses to the consultation, the regulations will not be laid before parliament until the autumn, and wil not therefore come into effect until 6 April 2006.

TRADE UNION ACCOMPANIMENT

Many trade union officials will be only too familiar with the two issues considered recently by the employment appeal tribunal (EAT) in Skiggs -v- South West Trains Ltd (2005, IRLR 459)**.**

It decided that, although workers are entitled to be accompanied to disciplinary meetings, the right does not extend to investigatory hearings. It also said that trade union officials are entitled to compensation if they are unreasonably refused paid time off to do their duties. The RMT union instructed Thompsons on behalf of Mr Skiggs.

WHAT WERE THE FACTS?

Mr Skiggs was dismissed by South West Trains on 26 September 2002 but reinstated with a written warning on 14 October.

Shortly after his return to work, the depot manager lodged a grievance saying that he was spreading rumours that she was having a relationship with another guard.

The company subsequently decided not to allow Mr Skiggs to go to any depot meetings in his capacity as the RMT rep until the investigations into the grievance had been completed.

The manager in charge of the investigation then asked Mr Skiggs to attend a meeting to discuss the issue. He refused, saying that he had the right to be accompanied. The manager said he was not entitled to representation as it was just an investigatory interview, not a disciplinary hearing.

WHAT WERE HIS COMPLAINTS?

On 19 December 2002 Mr Skiggs complained to an employment tribunal that his right to be accompanied at a hearing under section 10 of the 1999 Employment Rights Act (ERA) had been breached; and that his employer had refused to allow him time off work for union duties under section168 of the 1992 Trade Union and Labour Relations (Consolidation) Act (TUL(C)RA).

The tribunal dismissed the first complaint and upheld the second, but did not award him any compensation. Mr Skiggs appealed on both counts.

WHAT DID THE EAT DECIDE?

Right to be accompanied: The EAT said this depended on whether the meeting was a "disciplinary hearing" under the meaning of section 10 (see box).

The appeal tribunal said that there was a difference between informal investigative meetings and hearings that were part of a disciplinary process. And although an investigatory meeting can sometimes lead on to a disciplinary hearing (in which case management has to make clear that has happened), it decided that the interview in this case remained on the investigatory side of the line.

This is in line with the ACAS code of practice which says that it is not generally good practice for a worker to be accompanied at the informal stage of the process.

Time off for trade union duties: The next question was whether the tribunal was wrong to have granted only a declaration, and not to award compensation under section 172 of TULR(C)A. This says that any compensation should be "*just and equitable in all the circumstances, having regard to the employer's default in failing to permit time off to be taken by the employee, and to any loss sustained by the employee which is attributable to the matters complained of.*"

The EAT said that the word "compensation" in this context was wide enough to include the concept of a cash reparation to Mr Skiggs for a wrong that had been done to him. He did not have to show any specific or economic loss that he had suffered. The case was remitted to the tribunal to decide the amount.

EMPLOYMENT RIGHTS ACT 1999, SECTION 13 (4)

(4) For the purposes of s.10 a disciplinary hearing is a hearing which could result in –

- **(a) the administration of a formal warning to a worker by his employer;**
- **(b) the taking of some other action in respect of a worker by his employer; or**
- **(c) the confirmation of a warning issued or some other action taken.**

A COMPROMISING AGREEMENT

Generally speaking, workers cannot agree to contract out of their rights to bring a tribunal claim. This rule does not apply, however, if they want to settle a dispute once and for all by signing a compromise agreement that satisfies certain statutory requirements.

In Hinton -v- University of East London (IDS, 782) the Court of Appeal has now said that, to compromise a potential claim, the agreement has to specifically identify the claim, either by describing it or by referring to the relevant section of the statute.

WHAT WAS THE BACKGROUND TO THIS CASE?

Dr Hinton, a senior lecturer with the University of East London, took voluntary redundancy in July 2003 and signed a compromise agreement that purported to settle all outstanding claims that he has or "may have".

The agreement then set out a long list of claims that had been compromised. However, it did not refer to whistleblowing claims under section 47B of the 1996 Employment Rights Act (ERA) which protects employees from being disadvantaged by their employers if they blow the whistle. This was remarkable because Dr Hinton had previously complained that he had been.

When Dr Hinton then brought a tribunal claim on that basis, the tribunal had to decide whether his claim had been compromised. It decided that it had not, since the agreement did not specifically refer to the complaint he was bringing.

The appeal tribunal, however, disagreed, saying that the list was only meant to be illustrative and not exclusive. It said that the general settlement clause was enough to compromise his claim.

WHAT DOES THE LAW SAY?

Compromise agreements are governed by the law of contract and by section 203 of the 1996 ERA. Basically it says that employers cannot enforce agreements that stop their workers from bringing tribunal proceedings.

However, the statute does not "*apply to any agreement to refrain from instituting or continuing ....any proceedings*" as long as the conditions regulating compromise agreements are satisfied, as follows:

- They must be in writing
- The employee must get independent legal advice before signing
- They must relate to the "particular proceedings"

WHAT DID THE COURT OF APPEAL DECIDE?

The Court had to decide, first of all, whether Dr Hinton's claim was covered by the compromise agreement, from a contractual perspective. If it was not, he could pursue it, irrespective of what section 203 said.

However, the Court decided the terms of this agreement were wide enough to cover the section 47B claim raised by Dr Hinton against the University. The agreement "*made it as plain as it could be that the intention of the parties was to settle all their differences, actual and potential, arising under statute and at common law.*"

It was not, therefore, contractually necessary for an effective compromise agreement to refer expressly to section 47B or to the legal nature and factual basis of Dr Hinton's allegations that he had been disadvantaged from having blown the whistle.

Picture: RexClusive

But did the agreement relate to the "particular proceedings" under section 203? The Court said that the opening part of clause 9 was very general, referring to all claims "arising under statute", but did not mention any particular statute. And although it related to "proceedings", it did not relate to "particular proceedings."

This was fatal to the university's case. It said that it was not enough to use a rolled-up expression such as "all statutory rights". To comply with section 203, "*the particular claims or potential claims to be covered by the agreement must be identified, either by a generic description such as 'unfair dismissal' or by reference to the section of the statute giving rise to the claim.*"

a brief overview of

MATERNITY LEAVE

The regulations governing maternity rights in the UK state that all pregnant employees have the right to 26 weeks' ordinary maternity leave (OML). Women with 26 weeks' service at the 15th week before the baby is due are entitled to a further 26 weeks' additional maternity leave (AML) which is unpaid.

In this article, ***Nicola Dandridge***, Head of Equality at Thompsons' Employment Rights Unit in London, looks at holiday entitlement during both periods of leave.

DOES HOLIDAY ACCRUE DURING OML?

Under the Maternity and Parental Leave Regulations 1999, women on ordinary maternity leave (OML) retain all their contractual rights (except for pay), as though they were still at work.

That means the woman still has the right to accrue holiday during her OML as she would have done at work. In practice this means that she can take whatever paid holiday she has accrued before or after her maternity leave.

CAN SHE CARRY HOLIDAY OVER?

The right to carry holiday over from one leave year to the next depends, however, on the terms of the woman's contract (and not the legislation governing maternity leave). If the contract says she can carry the holiday over, then no problem. That principle also applies to holiday accrued during maternity leave just as much as it would to normal leave.

But what happens when the contract does not allow for holiday to be carried over, or says nothing about it? This is a particular problem for women who do not have time to take their holiday after their maternity leave and before the end of the leave year. The obvious answer is that they should take it before the maternity leave starts.

WHAT HAPPENS IF SHE CANNOT TAKE THE HOLIDAY BEFORE OML?

But if the woman cannot use up her holiday entitlement before going on leave (perhaps because of the demands of the business, or because she has already gone on leave), what happens then?

Until recently, employers have basically said that if the woman does not "use it", she "loses it". However, following the decision by the European Court of Justice (ECJ) in *Gomez -v- Continental Industrias del Caucho (2004, IRLR 407; LELR 90)*, there may now be a way round this (although this does depend on how the case is interpreted in the courts here).

Basically, Ms Gomez' contract was governed by a collective agreement, which stated that all staff had to take leave during one of two specified periods over the summer shutdown. However, those periods coincided with Ms Gomez' maternity leave.

The ECJ said that the employer could not get round the requirement to give four weeks' annual leave under the Working Time Regulations (WTR), nor 14 weeks' maternity leave under the Pregnant Workers Directive, by relying on the collective agreement. It said that Ms

Picture: Duncan Phillips/reportdigital.co.uk

IS NO HOLIDAY

Gomez was therefore entitled to take her annual leave after the summer shut down.

This decision may, therefore, mean that employers have to allow holidays to be carried over in situations where the woman has not been able to take her holiday before going on maternity leave.

CAN CONTRACTUAL LEAVE BE CARRIED OVER?

The ECJ did not answer the question of contractual holiday entitlement in Gomez as it was concerned with the issue of statutory leave under the WTR.

However, it did say that rights connected with the employment contract (other than pay) must be protected:

"*a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed for the whole period*."

The word "including" is significant. This suggests that, in the view of the ECJ, contractual rights may receive the same protection as statutory rights. This would include the right to carry over contractual entitlement when the worker cannot take the leave during the current leave year, for whatever reason.

WHAT ABOUT WORKERS WITH FIXED HOLIDAYS?

Workers with fixed holidays, such as teachers, may be able to argue that maternity leave that falls during any fixed holiday period (say, half term or the summer holidays) can be taken outside the holiday period.

WHAT ABOUT AML?

Under the 1999 regulations contractual rights do not accrue during AML, and that includes contractual holiday entitlement.

The position in relation to the four weeks' statutory minimum leave under UK law remains unclear, however, pending the outcome of the appeal to the House of Lords in *Commissioners of the Inland Revenue -v- Ainsworth* (*LELR* 101).

For the time being, the law remains as set out by the Court of Appeal in *Ainsworth*, which overturned *Kigass Aero Components Ltd -v- Brown (2002, ICR 697)*. It said that employees could not accrue rights to statutory annual leave during AML.

It is worth repeating that *Ainsworth* and *Kigass* concerned rights to statutory leave only. Rights to accrue contractual leave (subject to the *Sass* case below) depend on the contract of employment. If the contract allows for accrual of contractual rights during AML then leave will accrue. If it does not, or is silent, it will not accrue.

WHAT ABOUT THE *SASS* CASE?

The case of *Land Brandenburg -v- Sass (2005 IRLR 147)* is also of relevance (see page 8). Ms Sass had a statutory entitlement to 20 weeks' maternity leave. She also had a service-related right to be appointed to a higher salary. Her eight weeks of minimum maternity leave were taken into account in terms of appointing her to the higher salary, but not the full 20 weeks' maternity leave.

The ECJ held that this was a breach of the Equal Treatment Directive, and in exercising her rights to maternity leave she could not "*be made subject to unfavourable treatment regarding conditions to be fulfilled in order for her to attain a higher grade*."

This applied not just to her minimum maternity entitlement but to the full (statutory) maternity leave that she was entitled to take. It would seem that the *Sass* case means that rights should accrue during AML as well as OML. Whatever the outcome in *Ainsworth*, there is a strong argument that both statutory and contractual rights to holiday will accrue during AML.

PREGNANT PAUSE

European community law requires all member states to provide women workers with a minimum period of maternity leave, and to provide adequate protection for them when pregnant.

In an important case – Land Brandenburg -v- Sass (2005, IRLR 147) – the European Court of Justice (ECJ) has said that all periods of statutory maternity leave must protect the woman's employment relationship and the rights she derives from it.

WHAT WERE THE FACTS?

Mrs Sass, an East German national, had been employed since 1 July 1982 at a film school in Potsdam. She went on maternity leave for 20 weeks in 1987, as she was entitled under East German law.

Following the reunification of Germany, her employment relationship (now governed by an agreement known as BAT-O) was transferred to Land Brandenburg. The agreement stated that workers with 15 years' service would be promoted as long as they had not had any breaks in service. The only exception was maternity leave – eight weeks under German law.

Mrs Sass was duly promoted in May 1998, but her employer only counted the first eight weeks of her maternity leave towards her qualifying service. She argued that Land Brandenburg had discriminated against her by not counting all 20 weeks, and asked for the difference in salary for the 12 weeks between 12 February 1998 and 7 May 1998.

The lower German courts said that although the BAT-O was consistent with community law, they agreed that Mrs Sass had ended up in a worse position than a male colleague.

The appeal court, however, asked the ECJ to clarify whether article 141 and the equal treatment directive prohibit a collective agreement from excluding periods of maternity leave from a qualifying period that are not provided for under German legislation.

WHAT DOES THE LAW SAY?

Article 141 of the EC treaty lays down the principle of equal pay for male and female workers for equal work or work of equal value.

The equal treatment directive prohibits discrimination on grounds of sex in terms of working conditions and access to employment. It specifically allows national provisions to protect pregnant women and those on maternity leave.

The pregnant workers directive encourages improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding. This provides for a minimum period of 14 weeks' leave. During that time, an employee's contractual rights must continue (apart from her right to pay).

WHAT DID THE ECJ DECIDE?

The Court said that the 20 weeks' leave offered under East German law was for much the same reasons as the eight weeks under German law – to ensure the health of the mother following the birth and to allow her to look after her new baby.

It decided therefore that the equal treatment directive does not allow a collective agreement to exclude any of the time a woman is on maternity leave from a qualifying period for a promotion.

It made clear that, under community law, any statutory leave should not "*interrupt the employment relationship of the woman concerned, nor the application of rights derived from it.*"

The fact that countries had legislation that gave women longer than 14 weeks did not affect their rights. Longer periods of leave would still constitute leave within the meaning of the directive, with the result that the employee's contractual rights must be protected for the whole period of leave.

COMMENT

This decision could have significant implications for UK law, under which contractual rights accrue during ordinary, but not additional maternity leave (AML). Although it probably will not help a woman claiming additional pay under AML, it is likely to mean that she can claim that AML should count towards her entitlement to all service-related benefits, including annual leave.

TIME TRANSFER

The European Acquired Rights Directive (ARD) was introduced with one main objective – to safeguard workers' rights in the event of the transfer of an undertaking.

The European Court of Justice (ECJ) has just decided in Celtec Ltd -v- Astley that even if the transfer takes place over a long period, the relevant date is the one on which responsibility as the employer transfers from the transferor to the transferee.

WHAT WERE THE BASIC FACTS?

The three claimants were all civil servants employed by the Department of Employment in local area offices in Wales. In 1989 some of their youth training responsibilities were transferred to private Training and Enterprise Councils (TECs). It took until 1991 for all the TECs to become operational.

The Wrexham local area office was taken over by the North East Wales TEC (Newtec) and started operating in September 1990. On 1 April 1997, Newtec merged with another local TEC to form Celtec.

The three claimants were seconded for three years to Newtec, at the end of which they decided to resign from the civil service and become employees of Newtec in 1993. None of them had a break in service.

In 1998, Ms Hawkes was dismissed by Celtec. It refused to recognise that she had continuity of service from the date on which she joined the civil service in 1986. The other two claimants – Mr Astley and Ms Hawkes – were worried that the same thing would happen to them and they asked the same tribunal to decide their length of service as well.

WHAT DID THE NATIONAL COURTS DECIDE?

The tribunal said that there had been a transfer of an undertaking, and that the three former civil servants had continuity of employment from the date they joined the civil service.

This was overturned by the appeal tribunal because the transfer of the undertaking was completed in September 1990, three years before the three claimants became employees of Newtec.

The Court of Appeal then quashed that decision. It said that the ARD could cover a transfer that took place over several years. The House of Lords took up the cudgels and asked the ECJ to decide the following questions:

1. Do the words in article 3(1) of the directive "on the date of a transfer", refer to a particular point in time when the transfer is deemed to have been completed?
2. If yes, how can that point in time be identified?
3. If no, how should the words be interpreted?

WHAT DID THE ECJ DECIDE?

The Court answered the first two questions as follows:

1. Article 3(1) of the directive must be interpreted as meaning that the date of a transfer is the date on which responsibility for carrying on the business transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be changed by the transferor or transferee

2. Contracts of employment or employment relationships existing on the date of the transfer between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee

Because of the answers to the first two questions, the Court did not need to answer the third.

COMMENT

The ECJ has therefore made clear that the "date of a transfer" refers to a particular point in time in the transfer process and not to the length of time over which that process extends.

However, it did not make clear how that point in time should be identified. Given the circumstances in this case, the House of Lords still has some unravelling to do.

Bailed out of jail

Frustration of contract is a notoriously difficult concept to prove, even when the employee is unable – because of bail conditions – to attend his or her place of work.

This was the scenario in Four Seasons Healthcare Ltd (formerly Cotswold Spa Retirement Hotels Ltd) -v- Maughan (2005, IRLR 324), and the EAT has confirmed that it did not satisfy the common law (or judge made) rules about frustration.

WHAT WERE THE FACTS?

Mr Maughan was employed as a registered mental nurse in a care home. In January 2003 he was alleged to have abused a patient and was suspended from duty for seven days without pay.

He was then arrested and charged with a number of offences. He was granted bail, but on the condition that he would not enter the care home or get in touch with other employees.

When the union representing Mr Maughan asked in May 2003 for his full pay to be reinstated in arrears, the employer said he would remain suspended without pay until the court prosecution was over. In October 2003 he was convicted and sentenced to two years' imprisonment.

Mr Maughan then made a claim for arrears of wages, on the basis that his continued suspension without pay amounted to unauthorised deduction of wages. His employer argued that the contract had been frustrated because he had not been able to work during the bail period.

The tribunal allowed Mr Maughan's claim and awarded him just over £15,000. It then went on to find that his conviction did frustrate the contract and his entitlement to wages came to an end on 30 October 2003.

WHAT DID THE TWO PARTIES ARGUE?

The care home argued that it was unlawful to employ Mr Maughan under the Care Homes Regulations 2001, which states that he must be a fit person. Although his guilt had not been established until his conviction, it said that the contract was frustrated at the moment of the assault. It was also impossible for him to come to work because of the bail conditions.

Mr Maughan's representative argued that, to establish frustration, there has to be some outside event (as opposed to the employee's own actions) or change of circumstance not foreseen by the parties when they agreed the contract which made it more or less impossible to perform.

As far as the regulations were concerned, he said that they could not frustrate the contract until it was established – either by the court or by the employer's investigation – that the employee was not fit to work in the home. Otherwise the presumption of innocence would be meaningless.

> *'the care home had a detailed disciplinary procedure that made specific reference to the physical abuse of residents that it could have relied on to terminate the contract'*

As for the bail conditions, his representative said that Mr Maughan could have worked at another home owned by his employer, and that by suspending him until the criminal proceedings had been concluded, the employers clearly did not think that they had brought the contract to an end.

WHAT DID THE EAT DECIDE?

The EAT agreed with the tribunal and said that there were a number of reasons why the contract had not been frustrated. For starters, the care home had a detailed disciplinary procedure that made specific reference to the physical abuse of residents that it could have relied on to terminate the contract.

As far as the regulations were concerned, the EAT said that an employee can only cease to be "fit" once a proper investigation has been carried out. If it turns out they are not, the employer cannot then backdate their "unfitness".

Nor could the imposition of bail conditions frustrate the contract. Although the employers had been asked by the police not to carry out detailed investigations, they still had information available to them to allow them to dismiss Mr Maughan. Instead they continued to suspend him without pay. In those circumstances, the tribunal had correctly held that the contract continued and was not frustrated.

e-mail goes astray

Nearly all claims to employment tribunals have to be "presented" within three months (less a day) of the event leading to the complaint.

The employment appeal tribunal (EAT) has now decided in Tyne and Wear Autistic Society -v- Smith (2005, IRLR 336) that an application submitted electronically has been "presented" when the sender has received acknowledgement of it.

WHAT WERE THE FACTS?

Following his dismissal on 24 November 2003, Mr Smith was aware that the deadline for lodging his tribunal complaint was Monday 23 February 2004. He finally submitted his application on 20 February.

Having sent his form electronically, he received a message that receipt of his application would be confirmed within one working day by the tribunal office dealing with his case. Mr Smith assumed – quite reasonably – that he was dealing directly with the employment tribunals' office and that his application must therefore have reached them.

He did not know, however, that the website was operated through an e-mail service, and that that service was hosted by a third party and not the ETS itself.

On receipt of on-line submissions, the host was supposed to transfer them to the central mailbox of the ETS and the regional mailbox of the relevant office. For some reason Mr Smith's application was not received at any of the offices.

As a result, he did not receive any acknowledgement and when he enquired on 8 March about what had happened to it, he was told there was no trace of his application. He then sent another form which was received on 10 March 2004, 16 days out of time.

The tribunal concluded that if the host received the application, then that amounted to presentation to the employment tribunal. As Mr Smith's application had reached the host on 20 February, it had, therefore, been presented in time.

WHAT DID THE PARTIES ARGUE ON APPEAL?

The Society argued that an application could only be deemed to be "presented" to a tribunal when it arrived at the actual office. Or, in this case, their e-mail box. It was not enough for it to be received by the ETS website, hosted by a commercial organisation. It said that the risk of failure in transmitting the application rested with the person sending it.

Mr Smith, not surprisingly, agreed with the tribunal's decision. It had relied on the case of *Lang -v- Devon General Ltd (1987, ICR 4)* in which there was a special agreement that all mail received on Saturday (when the tribunal office was closed) should be held over by the post office until Monday. Had there not been this special arrangement, the application would have been received on Saturday and therefore been on time.

WHAT DID THE EAT DECIDE?

The EAT said that the critical question was when the claim was "presented".

It decided that, because the ETS now offered the facility for making an online application, it should be deemed as "presented" when it was successfully submitted to its website.

To be successfully submitted, however, the EAT stressed that it had to reach the website and be accepted there. In Mr Smith's case, this happened when he received the message acknowledging it.

As long as the application reached the website on time, it said that it did not matter "*if it was forwarded by the website host to the Tribunal Office computer on a later date, or date stamped on a later date.*"

Although the acknowledgement advised claimants to contact the tribunal service if they did not receive confirmation, there was nothing on the website to make people think that they could not submit their application successfully in that way.

COMMENT

Following a series of similar decisions, the EAT and the Court of Appeal seem to be taking a tolerant approach to this area of law (see *Midland Packaging -v- Clark*; *Blake Envelopes -v- Cromie*; *Marks and Spencer -v- Williams-Ryan*).

THOMPSONS IS THE LARGEST SPECIALISED PERSONAL INJURY AND EMPLOYMENT RIGHTS LAW FIRM IN THE UK WITH AN UNRIVALLED NETWORK OF OFFICES AND FORMIDABLE RESOURCES

HEAD OFFICE
Congress House, Great Russell Street, LONDON
020 7290 0000

BELFAST
028 9089 0400

BIRMINGHAM
0121 2621 200

BRISTOL
0117 3042400

CARDIFF
029 2044 5300

DURHAM
0191 3845 610

EDINBURGH
0131 2254 297

GLASGOW
0141 2218 840

HARROW
020 8872 8600

ILFORD
020 8709 6200

LEEDS
0113 2056300

LIVERPOOL
0151 2241 600

MANCHESTER
0161 8193 500

MIDDLESBROUGH
01642 554 162

NEWCASTLE-UPON-TYNE
0191 2690 400

NOTTINGHAM
0115 9897200

PLYMOUTH
01752 253 085

SHEFFIELD
0114 2703300

SOUTH SHIELDS
0191 4974 440

STOKE ON TRENT
01782 406 200

VISIT US AT **www.thompsons.law.co.uk**
EMAIL US AT **lelrch@thompsons.law.co.uk**

LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS

THIS PUBLICATION IS **NOT** INTENDED AS LEGAL ADVICE ON PARTICULAR CASES

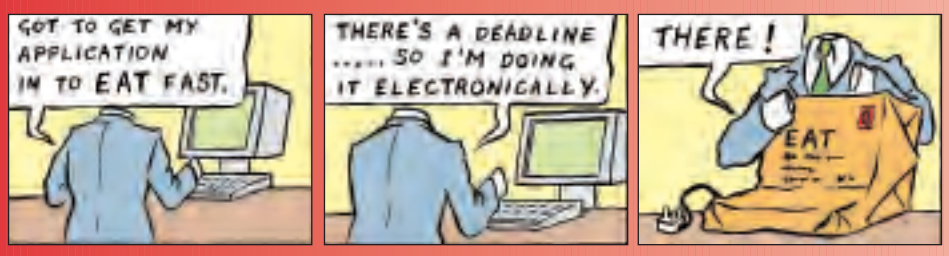
DOWNLOAD THIS ISSUE AT www.thompsons.law.co.uk

TO RECEIVE REGULAR COPIES OF THE LELR EMAIL lelrch@thompsons.law.co.uk

CONTRIBUTORS TO THIS EDITION **Richard Arthur**
Iain Birrell
Nicola Dandridge
Victoria Phillips
Caroline Underhill
Anita Vadgama

EDITOR **ALISON CLARKE**

DESIGN & PRODUCTION **REXCLUSIVE**
PRINT **www.talismanprint.co.uk**
ILLUSTRATIONS **BRIAN GALLAGHER**
PHOTOGRAPHS **REPORT DIGITAL**
FRONT COVER **DUNCAN PHILLIPS/REPORTDIGITAL.CO.UK**



"LAW SUIT"
BY
BRIAN GALLAGHER

brian@bdgart.com
www.bdgart.com

(No.16)

19926/0705/1097