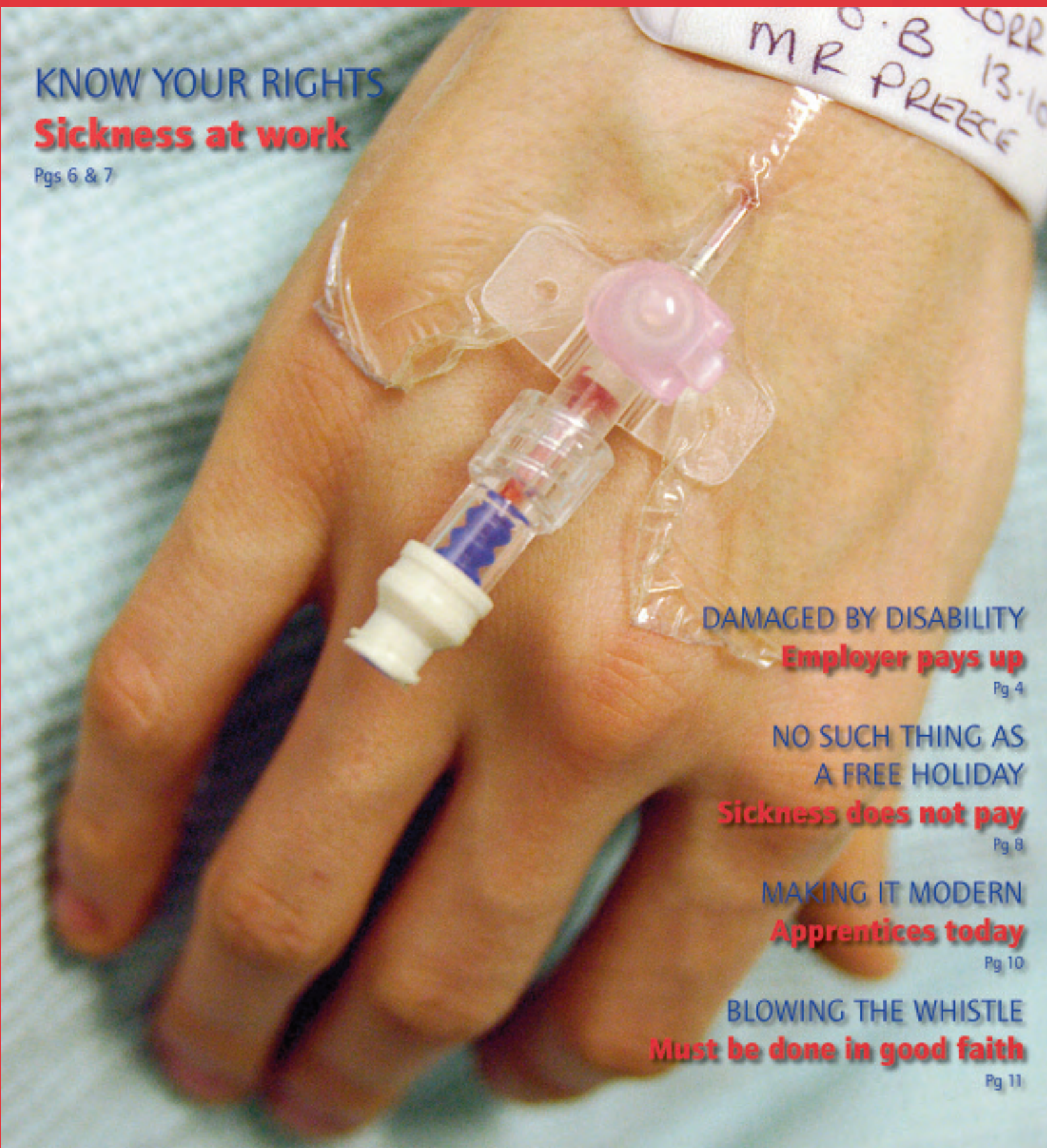
THOMPSONS SOLICITORS

Labour & European Law Review

ISSUE 101 JUNE 2005



KNOW YOUR RIGHTS
Sickness at work
Pgs 6 & 7

DAMAGED BY DISABILITY
Employer pays up
Pg 4

NO SUCH THING AS A FREE HOLIDAY
Sickness does not pay
Pg 8

MAKING IT MODERN
Apprentices today
Pg 10

BLOWING THE WHISTLE
Must be done in good faith
Pg 11

ASSESSING THE RISK

Employers have to carry out a risk assessment if they employ someone of "childbearing age". But they then have to do another assessment once the woman has told her employer that she is pregnant. Unfortunately, according to surveys by the TUC and the Equal Opportunities Commission, not many employers seem to realise this.

So the TUC has produced a useful briefing for workplace safety representatives to make sure that employers do what the law requires of them. It provides a useful step-by-step explanation and suggests the sort of risks that need to be included.

Go to: *www.tuc.org.uk/h_and_s/tuc-9712-f0.cfm* for a copy of the guide.

NO MORE OPTING OUT

The European Parliament has voted in favour of removing the UK's right to opt out of the 48-hour maximum working week under the Working Time Directive.

However, before the change can become law, both the Parliament and the Council of Ministers have to give their approval. This is by no means guaranteed.

Nevertheless, TUC General Secretary Brendan Barber welcomed the move, saying: "If implemented it would mean that employers would have to accept that staff could no longer work more than 48 hours a week on average, but unions would have to concede that the average would be calculated over 12 months, not the current 17 weeks."

A GREMLIN IN THE WORKS

Apologies for the printing gremlin in the last issue which meant that the number and month were missed from the front. It was, of course, May's edition of *LELR*, our centenary issue. The same gremlin neglected to credit the picture on page 4 to JohnHarris/reportdigital.co.uk

RACE TO TRAIN

***Workplace training – a race for opportunity*, a TUC report, shows that, even though job related training is more likely to be offered to qualified workers, those from black and minority ethnic (BME) backgrounds receive fewer opportunities.**

The report says that 28 per cent of BMEs are graduates, compared to just 20 per cent of white workers. And, although having a degree significantly increased access to job related training, only 17 per cent of white graduates had never been offered training, compared to 20 per cent of black workers.

But BME employees who work in the public sector, or in workplaces with trade union recognition, have much more chance of receiving training. The positive action taken by unions, and reinforced by the Race Relations Amendment Act (2000), has had the effect of limiting workplace racism.

Go to: *www.tuc.org.uk/publications/viewPub.cfm?frmPubID=411* to buy the report.

UNION MEMBERSHIP PAYS OFF

Trade union members earn over 17 per cent more than non-union employees, according to a recent report by the Department of Trade & Industry. Yet the number of trade union members in the UK fell by 36,000 compared to the year before.

The report, *Trade Union Membership 2004* found:

- Just under one in five private sector employees in the UK were union members in autumn 2004
- Almost three in five public sector employees were union members
- The number of male union members fell by approximately 54,000 in 2004, while female employees in trade unions rose by approximately 42,000
- The hourly earnings of union members averaged £11.38 in autumn 2004, 17.1 per cent more than the earnings of non-union employees

Download the report at: *www.dti.gov.uk/publications* and search using URN 04/1017. Alternatively call the DTI Publications Orderline on 0845 015 0010, citing the URN 04/1017, or email them at *publications@dti.gsi.gov.uk*

Turning point for part time pilots

Jessica Starmer, a woman pilot working for British Airways who wanted to work part time, won her employment tribunal claim last month. She was supported by her union, the British Airline Pilots' Association (BALPA) who instructed Thompsons.

The tribunal rejected BA's argument that their refusal was due to a shortage of resources. Instead, it noted the airline's £135 million profit in the year in question.

In addition, the tribunal did not find that BA had produced any compelling evidence that there was a threat to safety by granting part time working.

It said that the BA rule on "hours needed before consideration of part time working" had been introduced after Jessica had submitted her claim.

BALPA believes the Starmer case could mark an important turning point for all pilots wanting to work part time – whether as a parent, to look after an elderly relative or to reduce their hours as they near retirement.

Nicola Dandridge, the Thompsons solicitor who took the case said "This case is a warning to employers to change their mindset if they automatically assume that some jobs are not suited to reduced hours working. They also need to realise that relying on a health and safety justification for refusing part time work will not always be accepted by tribunals."

BALPA General Secretary Jim McAuslan said: "British Airways should show the same flexibility in employment practices as they demand of their pilots."

Civil Partnerships

When it comes into force in December this year, the Civil Partnership Act will give same-sex couples many of the rights and benefits that have historically been enjoyed by opposite-sex couples.

The TUC has produced a briefing note to make sure that trades unionists are aware of the important implications of the Act for their members. It looks at the implications for the benefits system, tax credits and co-habitation.

To download a copy, go to: *www.tuc.org.uk/welfare/tuc-9672-f0.cfm*

Gay worker wins protection

A tribunal has said that Durham City Council discriminated against gay theatre worker, Fausto Gismondi, and that they unfairly constructively dismissed him. His manager was also found to have discriminated against Mr. Gismondi. The case was backed by Bectu who instructed Thompsons.

Mr Gismondi, who was Group Bookings coordinator at Durham's Gala Theatre, was repeatedly referred to as "gay boy" by his manager Ed Tutty, a press officer for Durham City Council.

The tribunal said that the council's failure to protect Mr Gismondi "ought to cause them considerable shame", and added that the process adopted by the council was "an utter shambles" and "they have signally failed in their duty to an employee who has been bullied and harassed, contrary to their own express policies". It also commented: "it is hard to envisage conduct more likely to shatter the trust and confidence of an employee in his employer."

Durham City Council and the harasser were both found by the tribunal to have breached the Sexual Orientation Regulations. This is one of the first cases to have succeeded under the regulations since they became law in December 2003.

Claim forms

Under new procedural rules for tribunal cases, claimants must ensure their forms contain adequate "details of their claim".

In Grimmer -v- KML Cityhopper UK, Ms Grimmer simply put "flexible working" in the box asking her to identify the type of complaint she was making. In the box asking for details she wrote that "the company's business argument for refusing my application is based upon their assumption that, if they concede to my request, others would be requesting similar/same working arrangements."

The tribunal said her claim could not be accepted because she had not provided details. The EAT overturned the tribunal's refusal, saying the test should be "*whether it can be discerned from the claim as presented that the claimant is complaining of an alleged breach of an employment right which falls within the jurisdiction of the Employment Tribunal*."

It also made clear that "details of the claim" is not the same thing as "particulars of the claim". But if the claim does not have enough particulars, the EAT said the correct approach was to ask for more, not to refuse to admit it.

DAMAGED BY DISABILITY

Unlike unfair dismissal compensation, which has a maximum basic and compensatory award, damages for disability discrimination are unlimited.

The Court of Appeal has decided (not surprisingly), in Beart -v- HM Prison Service, that damages for loss of earnings as a result of discrimination should not stop at the date of the unfair dismissal. Otherwise, employers would effectively be rewarded for unfairly dismissing their employees.

WHAT WAS THE BACKGROUND TO THE CASE?

Mrs Beart brought a successful claim against the prison service for disability discrimination as a result of depression, brought on by an argument with her immediate manager about a request to work part-time. She ended up in a lower status job, with considerably less pay and went off sick in September 1997.

Her employer obtained a medical report in May the following year that said she should be redeployed to another prison. This option was not pursued and she was eventually dismissed in February 1999, allegedly because she had been working in her own shop part-time during her sick leave.

Mrs Beart then made a successful claim of disability discrimination and unfair dismissal. The employment tribunal said that by failing to relocate her, the prison service failed to make a reasonable adjustment and were therefore guilty of disability discrimination. Had they done so, she would probably still be working for them.

It also found she had been unfairly dismissed because, although the deputy governor honestly believed in Mrs Beart's guilt, she had been unreasonable in that belief. It said, as a matter of fact, that the investigation had been seriously flawed, that the disciplinary hearing had itself been unfair, and that dismissal was not within the range of reasonable responses.

WHAT HAPPENED NEXT?

The prison service then appealed – unsuccessfully – to the employment appeals tribunal (EAT) and the Court of Appeal against the findings of disability discrimination and unfair dismissal.

At a subsequent remedies hearing, the tribunal awarded her loss of earnings from 1 November 1998 (when the prison service should have relocated her), until retirement age (62). She was also awarded damages for personal injury, injury to feelings and unfair dismissal.

The prison service then appealed again to the EAT, arguing that the fact of her dismissal (even though it had already been shown to be unfair), terminated their liability for the disability discrimination.

On that basis, it reasoned that all further losses from the time of dismissal had to be assessed as part of unfair dismissal compensation and should therefore be capped. The EAT disagreed.

WHAT DID THE COURT OF APPEAL DECIDE?

The prison service then appealed to the Court of Appeal against the award of loss of earnings. It relied again on the argument that by dismissing Mrs Beart, it had broken the chain of causation between the earlier disability discrimination (which went back to 1 November 1998) and her subsequent dismissal (of 11 February 1999).

Picture: Duncan Phillips/reportdigital.co.uk

In other words, that by dismissing Mrs Beart, the prison service should no longer be liable for the disability discrimination. The Court of Appeal decisively rejected that argument, saying: "The argument that the Prison Service's own act of unfair dismissal can be said to break the chain of causation is very puzzling".

Apart from anything else, it said that the dismissal could not be justified and therefore could not be relied on to escape liability for the acts of disability discrimination against Mrs Beart.

In effect, the prison service had committed two wrongs: the act of unfair dismissal and the failure to make a reasonable adjustment by relocating their employee. It could not rely on one of those wrongs to escape liability for the other.

First Manchester Ltd -v- Kennedy

SICK NOTE

It is well established in law that tribunals must consider whether an employer acted within the band of responses of a reasonable employer when deciding whether a dismissal is unfair.

In First Manchester Ltd -v- Kennedy, the employment appeal tribunal (EAT) has confirmed that, in capability dismissals, the question is whether the employer acted reasonably in relying on the medical evidence.

WHAT WERE THE FACTS?

Mr Kennedy was a bus driver for First Manchester Ltd. He was seen by the occupational health doctor (Dr Farrand) in December 2001, who discovered that he had just had an operation for a serious heart condition. Mr Kennedy had not disclosed any of this to his employer, despite the obvious safety implications. He was given a final warning and returned to work in April 2002.

In January 2003, he suffered chest pains at work. He was taken to hospital but discharged himself before he was given a diagnosis, saying that a doctor had told him it was probably indigestion. Dr Farrand thought he might have had a minor heart attack and recommended that the DVLA be informed.

Mr Kennedy was then referred to an independent cardiologist for an assessment, who confirmed that he had a serious heart condition, but that he thought he was fit to work and that the DVLA would pass him as fit.

Dr Farrand then wrote a risk assessment based on this report and other medical evidence he had obtained, but concluded that Mr Kennedy should not be allowed to return to work because of the risks involved. He specifically referred to Mr Kennedy's reluctance to disclose all the available medical evidence to him.

The company dismissed him.

WHAT DID THE TRIBUNAL DECIDE?

Mr Kennedy claimed unfair dismissal and the tribunal agreed, saying that the employer's actions fell short of what a reasonable employer would be expected to do. It specifically criticised First Manchester Ltd for not getting a third, medical opinion and for not consulting the DVLA's medical advisors. It felt this would have been reasonable "in view of the applicant's twenty years' service".

The central aspect of its decision, however, was its conclusion that Dr Farrand was biased against Mr Kennedy. As a result he had been "hostile" to Mr Kennedy's specialist and his judgement had been affected.

WHAT DID THE EAT DECIDE?

Relying on the lead cases of East Lindsey *District Council -v- G E Daubney (1977, IRLR 181)* and *Liverpool Area Health Authority (Teaching) Central & Southern District -v- Edwards (1979, IRLR 471)*, the EAT said that the bus company was entitled to rely on the OHD's opinion.

It was particularly critical of the tribunal's accusation that Dr Farrand was "biased" against Mr Kennedy. It said that although he was not a cardiologist, he was entitled to come to a different conclusion to that of the independent consultant, not least because he had to consider different factors to compile a risk assessment for the company.

In any event, the EAT pointed out that the tribunal's job was not to question the veracity or otherwise of the occupational health doctor. Rather, it was to decide whether the company had acted reasonably in relying on Dr Farrand's report.

The right question would have been "*whether this employer knew that the advice was flawed, or ought reasonably to have known it, and that no reasonable employer would have been entitled to rely upon this report*".

The issue was remitted to a new tribunal for a re-hearing.

Picture: Paul Herrmann/reportdigital.co.uk

a brief overview of

SICK AND

According to the Chartered Institute of Personnel and Development, sickness absence costs employers about £567 per employee every year. This equates to about nine working days for every member of staff per year.

Hardly surprising, then, that managing sickness absence at work often leads to misunderstandings and recriminations, sometimes even dismissal.

In this article, ***Iain Birrell***, a solicitor from Thompsons' Employment Rights Unit in Newcastle, highlights some of the most common scenarios facing trade union advisors whose members find themselves in the firing line.

WHAT INFORMATION SHOULD EMPLOYERS PROVIDE?

Although employers are not obliged to offer a sick pay scheme, they have to give employees details of any contractual terms or provisions about incapacity for work due to illness or personal injury. These must be given in writing within two months of starting a new job. If the employer fails to provide this information, an employee can (in some circumstances) claim between two and four weeks' pay at an employment tribunal.

CAN THE EMPLOYER MAKE CONTACT DURING SICK LEAVE?

Some employees feel harassed by their employer when they are on sick leave because they are in contact so often. Others, however, complain that they feel abandoned because their employer never gets in touch.

There are no hard and fast rules, but employers need to use tact and common sense if someone is off sick. Likewise, trade union advisors need to be alert to the fact that an employer may well be harassing an employee if he or she is ringing every day asking when the person is going to return to work.

Trade unionists should, ideally, negotiate a sickness absence policy governing when and how often the employer can make contact with someone on sick leave. It should also determine whether the employer will proceed with disciplinary or grievance issues during an employee's sick absence – an area as yet unresolved by the law.

For instance, in *Harlow -v- General Healthcare Group Ltd (2002, All ER (D) 84)* the employee's grievance was put on ice by the employer due to sick leave. The EAT said this was fine. However, in *Hill -v- Staffordshire (2003, All ER (D) 310)* the EAT upheld the employer's decision to continue with disciplinary proceedings while the employee was off sick.

WHAT HAPPENS TO HOLIDAYS ON SICK LEAVE?

If an employee falls sick during a period of holiday, they cannot claim that day back from their employer as sick leave (unless their contract says so).

However, does statutory holiday entitlement accrue while a worker is on sick leave? The EAT said that it did in the case of *Kigass* but the Court of Appeal has just overruled it in *Inland Revenue -v- Ainsworth* (see page 8). Unfortunately this decision is not entirely clear, but it appears that entitlement to holiday may be suspended during periods of long term sick leave. The union is appealing the decision.

Remember, though, if an employee's contract contains no provisions preventing them from accruing or taking holiday entitlement on sick leave, they are entitled to paid holiday at the full rate - a valuable benefit if sick pay has run out, or been reduced.

Trade union advisors should be careful to ensure that employers using a measure known as the Bradford Factor for identifying short term absence do not treat this as generating a separate spell of absence.

CAN THE EMPLOYER REFUSE TO ALLOW A RETURN TO WORK?

Sometimes employers refuse to allow an employee to return to work until the occupational health doctor has certified them as fit to do so, even though their own GP has given them the all-clear.

If that happens, the employee should be paid at their normal rate (as opposed to sick pay) as the employee is being prevented from working by the employer.

WHEN DOES THE DDA APPLY?

As the period of sickness absence increases, so does the possibility that the person will be protected under the

TIRED

Disability Discrimination Act 1995 (DDA). If the Act does apply, the person's absence on long term leave must be discounted for certain situations (such as redundancy).

In addition, the employer may have to make some reasonable adjustments to facilitate a return to work. Two recent cases illustrate the point.

In *Archibald -v- Fife County Council (2004, IRLR 651; LELR 92)* the House of Lords said that the employer should have moved the employee to a vacant post even if it was more senior to her previous one and even if there was a better candidate.

In *Meikle -v- Nottinghamshire County Council (2004, IRLR 703; LELR 93)*, the Court of Appeal said that the duty to make reasonable adjustments could include a duty to pay employees during sick pay periods (even if they are only entitled to reduced pay or SSP), if the failure to carry out reasonable adjustments caused the sick leave in the first place.

To constitute a "mental impairment" under the DDA, the condition must be clinically well-recognised by a body such as the World Health Organisation (although this requirement will be removed by the end of 2005 under a bill going through Parliament).

To constitute a personal injury, work-related stress has to have been something that an employer could have reasonably "foreseen". This can be very difficult to prove (see the conjoined cases of *Hartman and ors*, *LELR* 99).

WHAT ABOUT SUSPENSION?

It is not uncommon for a suspension to lead to a period of stress-related sick leave. Generally, however, it is not in the interests of the employee to go off on sick leave. Sick pay usually runs out at some point (or future entitlement to it may reduce), leaving the employee without an income unless they can claim benefits. By contrast the employer is usually obliged to provide full pay during the period of the suspension.

CAN EMPLOYERS SPY ON EMPLOYEES ON SICK LEAVE?

The simple answer is yes. If an employer thinks his or her employee is swinging the lead, they are entitled to carry out surveillance of them during sick leave. Whether this would amount to a breach of human rights or the duty of mutual trust and confidence will depend on the facts of the case, but one thing is certain - it is an increasingly common practice (*McGowan -v- Scottish Water, 2005, IRLR 167; LELR 97*).

HOW DOES SICK LEAVE IMPACT ON REDUNDANCY?

Attendance and/or sickness absence is often a criterion in redundancy selection. This is not unreasonable, but it is discriminatory for employers to penalise employees for certain absences such as pregnancy related or disability related illness. These periods should therefore be discounted.

ARE EMPLOYEES ENTITLED TO A PERIOD OF PAID NOTICE?

Employees on sick leave are entitled to be paid at their full contractual rate for the duration of their notice period, whether or not their sick pay has run out. They can bring a claim for unlawful deduction of wages if the employer fails to pay for the period of notice.

Picture: Justin Tallis/reportdigital.co.uk

NO SUCH THING AS A FREE HOLIDAY

Most workers (and all employees) are entitled to four weeks' paid holiday under the Working Time Regulations (WTR) 1998. But what happens when someone has been off work on sick leave for any period of time – are they still entitled to holiday pay?

The Court of Appeal has decided in Commissioners of Inland Revenue -v- Ainsworth and ors that when the entitlement to sick pay has run out, workers cannot then claim holiday pay, whether or not they are still officially "on the books" of their employer. PCS instructed Thompsons on behalf of its members.

WHAT DID THE COURT OF APPEAL HAVE TO DECIDE?

The Court of Appeal had to answer two questions:

- Was the employment appeal tribunal (EAT) right to decide in *Kigass Aero Components Limited -v- Brown (2002, ICR 697)*, that employees on long term sick leave who had exhausted their right to sick pay were still entitled to claim holiday pay, whether or not they were still in employment?
- Do workers have to enforce entitlement to holiday pay under the Working Time Regulations or can they also make a claim for unauthorised deduction of wages under the Employment Rights Act 1996, as the EAT decided in *List Design Group Limited -v- Douglas (2002, ICR 686)*?

WHAT DID THE COURT OF APPEAL DECIDE ABOUT KIGASS?

The Court of Appeal agreed with the Inland Revenue that it did not make sense for a worker who had been off work for possibly a year or more as a result of some serious illness to then tell his or her employer that they were taking leave. Leave from what exactly, it asked?.

It also agreed with the Revenue that, as the purpose of the regulations was to promote the health and safety of workers, it made no sense for someone who was not at work to claim that they needed to take a break from it. It would amount to nothing less than a windfall to pay them for it.

It decided, therefore, that workers on long-term sick leave who were still in employment could not claim holiday pay. It followed that it did not make sense to argue that employees who had been dismissed could be entitled to paid holiday, although it might produce some unfortunate anomalies (see comment).

WHAT DID THE COURT DECIDE ABOUT LIST DESIGN?

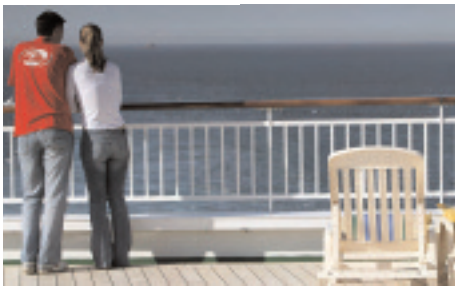
Regulation 30 of the WTR allows workers to bring a claim for non-payment of holiday pay within three months of when it should have been made. However, section 23 (1) of the Employment Rights Act (ERA) allows workers to bring claims against unauthorised deductions from wages, but only if there has been a series of them.

Mr Ainsworth had successfully relied on the ERA and the Inland Revenue challenged the decision in *List Design* that workers can bring a claim for non-payment of holiday pay under the ERA.

Again, the Court of Appeal agreed with the employers that Parliament cannot have intended to circumvent the WTR which were introduced to "*provide a single and exclusive regime for the enforcement of the new statutory rights*".

It concluded that if *List Design* were correct, it would not be possible to make a claim for statutory holiday pay under regulation 30. This also meant that the EAT decision in *Canada Life Ltd -v- Gray and anor* (*LELR* 89) was also wrong.

Picture: Paul Box/reportdigital.co.uk



COMMENT

As the court itself pointed out, this decision will lead to significant inequalities for workers. It will mean, for instance, that someone who is off sick for three months (say January to March) but who returns to work and is dismissed three months later can claim holiday pay for six months, but someone off sick for the whole six-month period cannot.

It accepted, however, that "*to the extent that it may produce some unfortunate anomalies in sickness cases, it may merit consideration of legislative amendment at an early date.*"

The union will appeal the decision

MAKING AMENDS

The law says that during paid maternity leave, a woman is entitled to all the same terms and conditions had she not been away from work, with the exception of pay (defined as "wages or salary").

But do bonuses fall under this heading? The employment appeal tribunal (EAT) has just said – in the case of Hoyland -v- Asda Stores – that they do. As a result, employers are entitled to reduce them during the period that the woman is on paid leave.

WHAT WERE THE FACTS OF THE CASE?

Mrs Hoyland returned to work as an events co-ordinator for Asda at the beginning of December 2002, after a period of ordinary and additional maternity leave.

During 2002, Asda had operated a bonus scheme to reward staff for their contribution to the financial performance of the business during the year. The rules said that the payment would be pro-rated to reflect part-time employment and absences of eight consecutive weeks or more during the year, including maternity leave.

Mrs Hoyland did not know this and was surprised when she received her bonus in February 2003 to find that it had been reduced from £189.47p to £94.48 because of her absence on maternity leave.

WHAT DID THE TRIBUNAL DECIDE?

Relying on the lead case of *Gillespie -v- Northern Health and Social Services Board (1996, ICR 498)*, the tribunal said that the bonus was part of her "wages or salary" and was therefore a contractual payment. They said it was designed to reward attendance at work, and was paid in recognition of work undertaken by employees as a whole.

However, it said that the employer could not deduct the bonus for her two-week period of compulsory leave (as required by the Pregnant Workers Directive) and awarded her the additional princely sum of £5.20.

WHAT DID THE EAT DECIDE?

The EAT agreed with the tribunal. It came to the following conclusions:

Sex discrimination: This argument hinged on whether the bonus payment was discretionary (and therefore sex discrimination), or contractual (governed by the Equal Pay Act). Although the bonus was described as discretionary in the scheme, it had never actually been withheld from anyone.

The EAT said it was therefore due under her contract. The decisive period for eligibility was the period when it accrued – in this case during the period of maternity leave – not the date when it was paid.

Although on her return from leave, the legislation says she was entitled to be treated as though she had never been away, the court said that is not "*the same as saying that she must be paid for the period of the maternity leave as if she had never been on leave.*"

Mrs Hoyland was therefore only entitled to be paid a pro-rated amount of the bonus for the time she was at work in 2002 (plus the fortnight of compulsory maternity leave).

Pregnancy Related Detriment: Employees also have the right not to suffer any disadvantage (or detriment) by their employer to do with being pregnant or taking maternity leave. The EAT said, however, that the reduction of the bonus did not constitute a "detriment" under the Employment Rights Act 1996 because the Act explicitly excluded "terms and conditions about remuneration".

Article 141: Finally Mrs Hoyland argued that she was entitled to be credited for a proportion of the bonus for the whole 18 weeks of ordinary maternity leave (or else the 14-week period stipulated by European law). The EAT dismissed this argument saying that Asda was not "an emanation of the State" and was therefore not directly affected by the treaty. It also said it flew in the face of all the case law.

Picture: John Harris/reportdigital.co.uk

Making it modern

Modern apprentices, who work for an employer but are sent elsewhere to get trained, do not fit the traditional definition of "employee", that is: someone working under a contract of service or apprenticeship. The question, of course, is what legal status do they have?

In Flett -v- Matheson the employment appeal tribunal (EAT) has said that where the training responsibility is not that of the employer, the apprentice will, in most instances, have an ordinary contract of employment, overlaid by a training contract.

WHAT WERE THE FACTS IN THIS CASE?

Mr Flett started working for EAB Electricals in January 2002, but subsequently entered into a tripartite "individual learning plan" with a third party training provider, JTL, in September the same year. The company was then involved in a transfer of its business to one of two other companies (it was not clear which) under legislation known as TUPE.

Having established that EAB had failed to consult and inform him of certain things under TUPE, this liability passed to the transferee and he was awarded just over £1,000. Mr Flett also claimed he was unfairly dismissed, but to succeed he had to show that he had been working under either a contract of apprenticeship or a contract of employment. If successful, the transferee would again be liable.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal said that establishing his employment status was crucial. If he could prove he was an apprentice he could claim damages for the remaining period of his training (he was claiming over £50,000); but if he was an employee he was entitled to only one week's notice.

It concluded that there was some contract between Mr Flett and EAB, but, whatever it was, it was neither a contract of apprenticeship nor a contract of employment. And it dismissed his claim.

WHAT DID THE EAT SAY?

In order to ascertain the status of Mr Flett's arrangement, the EAT had a good look at the differences between modern apprenticeships and the old common law contracts of apprenticeship.

Under the traditional arrangement, the agreement was between two parties – the apprentice and the employer. The apprenticeship was for a fixed term; the employer agreed to employ the apprentice for that length of time; and the employer had an obligation to educate and train the apprentice.

As such, if the employer terminated the agreement early, he or she had to pay damages to the employee, not only for their loss of earnings, but also, potentially, "for the diminution of their future prospects".

Modern apprenticeships, on the other hand, involve a tripartite arrangement: first, between the trainee and the employer; secondly between the trainee and the training agent; and thirdly between the training agent and/or the central qualifying body and the employer.

This is completely different from the two-way traditional apprenticeship agreement between the employer and the apprentice. The EAT said that the tripartite agreement governing Mr Flett's situation did not fit into this description and was not, therefore, a common law contract of apprenticeship.

But did he have a contract of employment? The EAT said that he did, and not just because Mr Flett was already employed by EAB before the training arrangements started.

It said that "*every incident indicating employment seems, notwithstanding the paucity of evidence, to have been present and to have continued during the training period; and the relevant documents redound with employer, employee and terms and conditions of employment.*

"There is little doubt that the appellant was working as an employee, and receiving wages as such."

Mr Flett was therefore awarded one week's wages – the sum of £112.12.

> *'every incident indicating employment seems to have been present... There is little doubt that the appellant was working as an employee, and receiving wages as such'*

Blowing the whistle

The Public Interest Disclosure Act 1998 protects employees who are dismissed after blowing the whistle on their employers, as long as the disclosures are made in good faith, and not out of spite.

In Lucas -v- Chichester Diocesan Housing Association Ltd (IDS Brief 779), the employment appeal tribunal (EAT) has overturned the tribunal decision and said that Ms Lucas' main motivation was to raise concerns about possible financial impropriety.

WHAT WERE THE BASIC FACTS?

Ms Lucas was hired to work for 18 months on a project being funded by Brighton and Hove Corporation but managed by the Housing Association to raise awareness of information technology locally.

The Housing Association sub-contracted the work to another consultant, Jill Mercer who, in turn, appointed Ms Lucas as an ICT co-ordinator, ostensibly on a self-employed basis. Ms Mercer was also responsible for another project funded by the Corporation – World Web Wise

On 19 June 2003 Ms Lucas raised concerns with a director of the Housing Association (Mr Daniels) that Ms Mercer was using money from one project to help support the other. Mr Daniels brought her concerns to the attention of Ms Mercer, after which Ms Lucas' hours (and her pay) were reduced on 30 June.

She raised her concerns again on 3 July, but this time with the deputy project director of the Corporation. Two weeks later she was dismissed by Ms Mercer.

Ms Lucas, who had less than 12 months' service, claimed automatic unfair dismissal for making a protected disclosure. The tribunal decided that. although her allegations were well founded, the statements were made to spite Ms Mercer because of the reduction in her hours (rather than in the public interest), and were not therefore made in good faith.

She also claimed wrongful dismissal because she had not been paid for the whole of the fixed-term contract. The tribunal upheld her claim of wrongful dismissal, but only awarded her one month's pay in lieu of notice.

WHAT WAS THE BASIS OF THE APPEAL?

Ms Lucas appealed against that decision, saying that the chronology of events showed that the disclosure had nothing to do with the reduction in her hours. She also argued that, as she had been engaged on an 18-month fixed-term contract, terminated after six months, that she was entitled to 12 months' damages.

For its part, the Housing Association said the decision was not perverse and that Ms Lucas could not meet the high threshold required for a protected disclosure. As for the contract, it said that was not for a fixed term, as Ms Lucas claimed, but operated on a rolling month to month basis, terminable on a month's notice.

WHAT DID THE EAT DECIDE?

The EAT said that the correct approach was to follow the provisions laid down by the Court of Appeal in *Street -v- Derbyshire Unemployed Workers Centre* (*LELR* 92). Basically it said that tribunals have to use their common sense to decide whether the main reason for making the disclosure is to right a wrong, or if the person has an ulterior motive (such as spite).

In this case, the EAT did not think Ms Lucas was motivated by personal antagonism to Ms Mercer. It pointed to the fact that, although her hours had been cut on 30 June, she made the first disclosure 11 days before that. It noted that the Housing Association had not mentioned anything about Ms Lucas being motivated by spite in its Notice Of Appearance (its written reply to Ms Lucas' tribunal claim), nor when they cross examined her at the hearing.

As for her contract, the EAT said that it was not for a fixed term and could be terminated on a month's notice. It was reasonable for the tribunal to fix the period of notice at one month and to award damages on that basis.

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 **Joanne Beill**, **Iain Birrell**, **Caroline Clarke**, **Nicola Dandridge**, **Joe O'Hara**, **Victoria Phillips**

EDITOR **ALISON CLARKE**

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

"LAW SUIT"
BY
BRIAN GALLAGHER

brian@bdgart.com
www.bdgart.com

19926/0605/1097