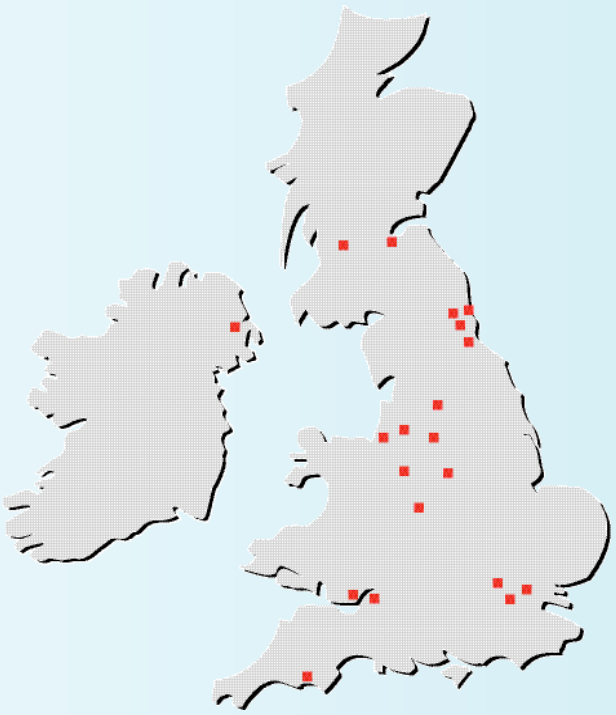

**LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS**

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

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CONTRIBUTORS TO THIS EDITION **NICOLA DANDRIDGE**
**SUSAN HARRIS**
**JOHN O'NEILL**
**VICTORIA PHILLIPS**
**JUDITH RHULE**
**ANITA VADGAMA**

EDITOR **ALISON CLARKE**

DESIGN & PRODUCTION **REXCLUSIVE**
PRINT **www.talismanprint.co.uk**
ILLUSTRATIONS **BRIAN GALLAGHER**
PHOTOGRAPHS **www.reportdigital.co.uk**
FRONT COVER PHOTOGRAPH **IAN BRITTON (FREEFOTO.COM)/ REXCLUSIVE**


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

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028 9089 0400

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0117 3042400

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01782 406 200

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



"LAW SUIT"
BY
BRIAN GALLAGHER

bdgallagher@eircom.net
www.bdgart.com

(No.8) 

THOMPSONS SOLICITORS

# Labour&European Law Review

ISSUE 93 OCTOBER 2004

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# REGISTER TO GO

**Following a consultation on employment tribunal procedures, the Government has decided to stop publishing the public register of tribunal applications.**

Instead, it will just publish tribunal judgements. This means that if a case is settled before a judgement is reached, there will no longer be any details of it on the register.

Most people who contributed to the consultation agreed that this was a good idea. In particular, some unions were concerned that the register has been used in the past for 'blacklisting' purposes. And that it was being used by claims companies who wrote directly to applicants, causing confusion where they were represented by trade unions. On the whole, unions were among those supporting the changes.

The new approach means that there will still be a public record of judgements reached in tribunals, but no more detailed claims and responses.

To view the Government response to the public consultation, go to: *www.dti.gov.uk/er/individual/etregs_gov_resp.pdf*

# MENTAL HEALTH

**The Government has agreed to amend the Disability Discrimination Act by giving more employment protection to people with mental health problems.**

In particular, it has agreed to remove the requirement in the DDA for a mental illness to be 'clinically well recognised' before it can qualify as a disability.

The Government has also said that the new legislation will be extended to give increased protection to people with progressive conditions such as HIV, MS and cancer by ensuring that the DDA applies from the date of diagnosis. If agreed by parliament, it will impose a new positive duty on public bodies to promote equal opportunities for disabled people, similar to the existing duty for race equality.

The changes came about in response to recommendations put forward by a joint parliamentary scrutiny committee of the Disability Discrimination Bill (to which Thompsons gave evidence). To see the Government's response to the report of the joint committee, go to: *www.disability.gov.uk/legislation/ddb/response.asp*

# OF EQUAL VALUE

**New regulations coming into force on 1 October 2004 will make significant changes to the way that tribunals manage equal value cases.**

These amend the Employment Tribunal Rules of Procedure and confer new case management powers on tribunals. Other regulations, amending the Equal Pay Act, will come into force on the same day.

We will look at the implications of these changes in a future edition of LELR.

For details of changes to the Employment Tribunal Rules of Procedure, go to: *www.womenandequalityunit.gov.uk/publications/equal_value_regs_sch6_draft.dot*

For details of the amendments of the Equal Pay Act, go to: *www.womenandequalityunit.gov.uk/publications/epa_amend_regs_aug04.doc*

# EQUAL TREATMENT

**The European Commission has published a proposal which it says will improve, simplify and modernise the existing EC equal treatment legislation.**

Under the process known as 'co-decision' the commission has issued a draft directive that is currently being discussed by the commission and the European parliament.

Among other things, it aims to consolidate all the existing directives on equal pay and equal treatment and reflect existing case law on issues such as equal pay. It will also try to speed up the implementation of equal treatment generally.

# DISPUTE RESOLUTION

**The Government's new regulations on dispute resolution came into operation at the beginning of October.**

As a result, all employers (irrespective of their size) now have to have minimum statutory procedures in place for dealing with dismissal, disciplinary action and grievances in the workplace.

The Government has drawn up information and guidance about how the changes will impact on employees which can be accessed at: *www.dti.gov.uk/er/employee_guidance.htm*

Thompsons has also prepared a free supplement (enclosed with this edition of LELR) which you may find helpful in picking your way round the new regulations.

# Older but no wiser

**The Court of Appeal has just decided – in** Rutherford & Anor -V- Secretary of State for Trade and Industry **– that it is not discriminatory to deny workers over 65 the right to claim unfair dismissal and redundancy. It justified this by saying that when you look at statistics for the working population as a whole, there is no indirectly discriminatory effect.**

The claim was brought by two men who were both over 65 when they were dismissed. They said that the upper qualifying age limit contravened EU law as it affected more men than women. The employment tribunal agreed, saying that the pool for comparison should be people between 55 and 74, for whom retirement has 'real meaning'.

The Court of Appeal has said that was the wrong pool. Instead the tribunal should have looked at the statistics for the entire national workforce because it was national legislation that was under scrutiny.

We'll look at this case in more detail in the November edition of LELR.

# The spice of life

**It's not that often that you read about a case of indirect race discrimination that is related to pay. But the Court of Appeal has just decided in** Spicer -V- Government of Spain **that a British teacher was discriminated against at a Spanish state school in London.**

Although Mr Spicer had a higher basic rate of pay than the Spanish civil servants, he was paid less overall because the Spanish teachers got a generous relocation allowance.

The court agreed with the tribunal that the pool for comparison should be all the teachers at the school, because the circumstances of both groups were the same – i.e. they were all teachers. However, it disagreed with the tribunal's conclusion that Mr Spicer had not suffered a disadvantage because his basic pay was higher.

His appeal was therefore allowed and the case remitted to the tribunal to assess compensation.

# Block out parental leave

**Under the maternity and parental leave regulations, parental leave can only be taken in blocks of one week.**

In South Central Trains Ltd -V- Rodway, a train guard conductor asked to take parental leave of one day but his employer refused because his job could not be covered. He was subsequently disciplined for being on unauthorised leave.

The employment tribunal said that by disciplining him, his employer had subjected him to a 'detriment' or disadvantage under the regulations.

The employment appeal tribunal has overturned that decision and confirmed that, if an employee wants the protection of the parental leave regulations, he or she can only take the leave in blocks of one week.

# Disclosure of medical records

**The following question arose in the case of** Hanlon -V- Kirklees Metropolitan Council**: was it reasonable to order Mr Hanlon to disclose his medical records?**

Mr Hanlon was in dispute with Kirklees, following a change in his shift pattern at work. The council asked to see his medical records, but Mr Hanlon refused, as was his right under the Access to Medical Reports Act 1988.

The tribunal then ordered Mr Hanlon to give his consent which he refused. Mr Hanlon then appealed against that order, on the basis that it was an invasion of his privacy under Article 8 of the European Convention on Human Rights (ECHR).

The employment appeal tribunal has just confirmed the tribunal's decision, saying that his right to refuse disclosure 'is not an absolute right of privacy' but is subject to a need to protect the rights of others, particularly in litigation.

# TIME FLIES FOR TRAINEE SOLICITOR

**There are fairly strict time limits for lodging a claim with an employment tribunal, although in certain circumstances they can be extended if it's 'just and equitable to do so'. In** Chohan -V- Derby Law Centre (2004, IRLR 685)**, the tribunal didn't think it was but the employment appeal tribunal (EAT) has just disagreed.**

The case was backed by Thompsons.

## WHAT WERE THE FACTS?

Ms Chohan was a trainee solicitor at the law centre, giving advice on employment law. She was, however, dismissed from her job, after which she claimed sex discrimination and unfair dismissal.

Her complaints were resolved following the intervention of the arbitration service, ACAS, and she signed a compromise agreement to that effect on 18 April 2002.

However, on 23 April 2002, she got a letter from the Law Society saying that it had been informed by the law centre that her training contract had been terminated. She finally received a copy of the letter that the centre had written (dated 22 March) on 30 April.

She then claimed that the letter from the law centre, containing details of how her employment had come to an end, amounted to an act of victimisation. For its part, the centre argued that it was under a professional duty to report her dismissal, that the terms of the letter were a fair representation of the facts and that the compromise agreement prevented her from pursuing a victimisation claim.

## WHAT DID THE TRIBUNAL DECIDE?

The tribunal said that the compromise agreement did no such thing. Unfortunately for Ms Chohan, however, it also decided that her claim was out of time. As it had not been presented until 9 July 2002, she was 18 days over the three months' limit which started on 22 March.

In her defence, Ms Chohan said she had been wrongly advised by her solicitor who had told her that time would start to run from the date she got the letter, and not the date on which it was written.

She asked the tribunal to exercise its discretion to extend the time limit so that her claim could go ahead, on the basis that she had been waiting to find out what the Office of the Supervision of Solicitors had to say about the termination of her training contract, and whether it intended to investigate the matter further.

The tribunal refused. It reasoned that her solicitor was a senior employment lawyer and that she herself was legally trained and that therefore it would not be 'just and equitable' to extend the time limit.

## WHAT DID THE PARTIES ARGUE ON APPEAL?

Ms Chohan appealed on the basis that she should not be penalised for her solicitor's bad advice, and that the law centre would not suffer any prejudice by allowing her claim to go ahead (except that it would be involved in the proceedings).

The law centre, on the other hand, argued that the tribunal had applied the law correctly and that its decision could not be described as perverse.

## WHAT DID THE EAT DECIDE?

The employment appeal tribunal (EAT) decided that it was just and equitable to extend the time limit. The tribunal had been wrong to ignore Ms Chohan's point that she was waiting for a decision from the Law Society. Although most applicants don't succeed in their claim for an extension of time if they wait for an internal procedure to be exhausted, the EAT felt that 'in the regulated regime of solicitors' contracts, the situation may well be different.'

It also felt that poor legal advice should not automatically defeat her argument. Even though she was a trainee solicitor in employment matters, she was still entitled to entrust the running of her case to another experienced solicitor and rely on the advice that she was given.

The case was remitted to a tribunal to hear her victimisation claim.

# Nottingham County Council -V- Meikle

# SICK OF DISABILITY

**Following an important decision by the Court of Appeal in** Nottingham County Council -V- Meikle (2004, IRLR 703)**, trade unions will now be able to argue that extending a sick pay scheme may be a reasonable adjustment under the disability legislation. The Court of Appeal also confirmed that applicants can claim constructive dismissal under the Disability Discrimination Act (DDA).**

## WHAT WERE THE BASIC FACTS?

Ms Meikle had been working as a teacher for the council since the early 1980s, initially part-time and then full-time. In 1993 she started to suffer from a deteriorating eye condition, which resulted in the loss of all her sight in one eye and some sight in the other.

She asked the school to make a number of adjustments, such as enlarging the print on the daily timetable, and for more 'non-contact' periods so that she could prepare work for her classes in daylight, rather than after dark. Nothing was done to help her.

Inevitably, Ms Meikle started to suffer from eye strain and had to take time off work. Her doctor said she was also suffering from stress. In July 1999, she lodged a claim for disability discrimination.

On 10 September the school suspended her because of her absence, and she was put on half-pay from 17 December. This was in accordance with the local authority's policy that an absence from work of more than 100 days resulted in a reduction of sickness benefit.

Subsequent negotiations to enable her to return came to nothing and she resigned on 30 May. She brought a further tribunal complaint that she had been discriminated against on grounds of disability, and that she had been unfairly and wrongfully, constructively dismissed.

## WHAT DID THE TRIBUNALS DECIDE?

The employment tribunal found that Ms Meikle had been discriminated against in a number of respects under the DDA, and had been placed at a substantial disadvantage as a result. However, it said she had not been constructively or wrongfully dismissed, and rejected her complaint that the local authority had unlawfully discriminated against her by placing her on half pay.

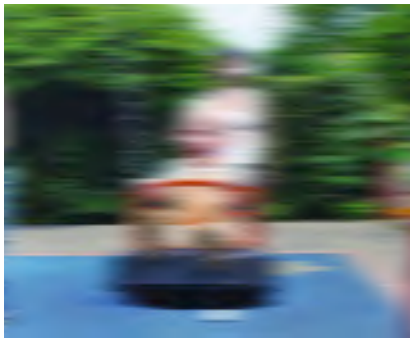
The employment appeal tribunal (EAT), however, said that the tribunal was wrong to say she had not been constructively dismissed. Instead, it held that the local authority had been in fundamental breach of contract because it had failed to carry out reasonable adjustments, and that she had resigned in response to that breach.

It also said it was wrong to hold that a constructive dismissal does not fall within the scope of the word "dismissal" in the Disability Discrimination Act, and was therefore not in itself a discriminatory act.

## WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal agreed with the EAT. It concluded:

- That Ms Meikle resigned in response to her employer's fundamental breach of contract – that is, she was constructively dismissed
- That the constructive dismissal was itself a discriminatory act under the DDA
- That unlike payments to an employee's pension or insurance scheme, the payment of sick pay was an arrangement which could be subject to the employer's duty to carry out reasonable adjustments. This follows the previous decision of the EAT case of *Hood -V- London Clubs Management*, which was backed by the GMB
- That reducing Ms Meikle's sick pay by half amounted to less favourable treatment that could not be justified by the employer. This was for the simple reason that had the employer made reasonable adjustments to her working patterns, she would not have had to take so much sick leave and would not therefore have been put on half pay.



a brief overview of

# CHANGING TERMS

**Whether they know it or not, all employees work under a contract of employment. Ideally this should be a written document and should give as many details as possible of the terms and conditions that apply. In unionised workplaces contract terms are usually regulated by collective agreements.**

**John O'Neill**, a solicitor from Thompsons' Employment Rights Unit in Belfast, looks at the general principles relating to variation of contract and answers some commonly asked questions.

## THE LAW

Although there is no legal requirement on employers to provide a written contract, they do have to provide a written statement of particulars of employment.

This should outline the main terms and conditions including:

- the names of the employer and employee
- the date employment began
- the job title and duties of the job
- the place of work
- the rate and frequency of pay, hours, holidays, sickness pay and pension scheme/s
- notice details
- reference to any incorporated collective agreements
- details of any disciplinary and grievance procedures

Both parties are bound by the contract and generally neither can vary it without the agreement of the other person.

## FREQUENTLY ASKED QUESTIONS

### *Can the employer change the contract unilaterally?*

If an employer tries to impose a variation of contract, they will potentially be in breach of contract. To decide whether they are, two initial questions have to be asked:

- Is the term being varied a term of the contract?
- If so, does the employer have the right to unilaterally vary it?

### *What is a non-contractual term?*

A non-contractual term is one that does not legally bind the two parties to the contract.

For instance, it may be very clear that certain allowances are at the discretion of the employer and as such would be deemed non-contractual. As a result, If the employer unilaterally removes them, this would not be in breach of contract.

It is not always easy to know, however, whether or not the written contract and any other evidence show an intention to be legally bound. Tribunals and courts are often reluctant to rule that a term is non-contractual. To cover themselves, some employers incorporate a specific statement in the contract stating that entitlement to the benefit is non-contractual.

In *Albion Automotive -V- Walker & Ors 2002*, the Court of Appeal upheld a tribunal's finding that an established custom of enhanced redundancy payments was sufficient to indicate an intention by the employer to be contractually bound to such payments.

### *Can the employer incorporate a term to unilaterally vary the contract?*

A term of a contract may be changed if the contract specifically says so. However the courts will not always enforce such a term.

In the case of *Wandsworth London Borough Council -V- D'Silva 1998*, the court said that employers need to use clear language in a contract to be able to unilaterally vary it. This case also suggested that the courts may not uphold such a term where the result would be harsh and unreasonable.

In *United Bank Ltd -V- Akhtar* 1989, the court upheld a claim of constructive dismissal despite the existence of an express mobility clause in Mr Akhtar's contract. This was because he was being asked to move city in six days with no consideration for his personal circumstances.

### *What about changes that are not authorised by the contract?*

Where a variation is not authorised by the contract, the employer can still bring it about in one of the following ways:

- express agreement between the parties
- implied agreement through the conduct of employee
- union agreement which is binding on the employee
- termination of the existing contract and re-employment under a new contract

# AND CONDITIONS

### ■ *What is meant by express agreement?*

It just means that there was a clear agreement between the employer and employee, which was voluntary.

If the employee can show that he or she was put under 'duress', they cannot be said to have agreed voluntarily. However, it is not duress if an employer threatens to dismiss the employee if they do not sign.

### ■ *What is meant by implied agreement?*

This will usually arise if the employer purports to unilaterally vary the contract by imposing new terms and conditions and the employee is seen to accept this by their behaviour e.g. by working under the new terms for a long period without protest.

However, the courts are generally reluctant to find that employees have consented to a variation of contract in the absence of an express agreement.

This is particularly so in cases where the changes do not happen with immediate effect (e.g. changes to sick pay).

### ■ *What about collective agreements?*

As long as a collective agreement is incorporated into individual contracts, employees will be bound by any change negotiated as a result. Employees need not be a union member or even be aware of the collective agreement to be bound by it.

**INCORPORATED TERMS**

Incorporation of terms may be: express i.e. the individual contract expressly states that terms are governed by a collective agreement.

Incorporation may also be implied where there is a well-established custom that terms of collective agreements are incorporated into individual contracts.

When terms of a collective agreement are incorporated into individual contracts, they are legally enforceable.

### ■ *Can the employer terminate the contract?*

If an employer wants to change a term and cannot get agreement for it, they will sometimes terminate the existing contract and offer a new one with the variation.

If the employee is dismissed for refusing to accept the new contract, this will not always be unfair. It will depend on all the circumstances.

If the employer can show a good business reason for the changes, they are likely to be able to establish that the dismissal was for 'some other substantial reason' and was therefore potentially fair.

However, a tribunal will also consider whether the employer behaved reasonably in bringing in the new contract – eg by consulting with the employees and unions. A dismissal is more likely to be unfair if the employer just imposes the change without consultation.

### ■ *What can the employee do?*

If the employer imposes a new term or dismisses the employee for refusing to accept the change, an employee may respond in the following ways:

- stay and work 'under protest' and bring a claim for unlawful deductions or breach of contract
- in the case of a fundamental breach of contract, resign and claim constructive dismissal
- if the employer has introduced a new contract which fundamentally changes the job, the employee can continue to work under the new contract and claim unfair dismissal in relation to the old one (*Hogg -V- Dover College 1990*)
- refuse to work the new terms if, for instance, they involve different duties or hours – this may result in dismissal which may or may not be unfair depending on the circumstances.

### ■ *What can trade unions do?*

Unions need to be careful about telling members to refuse to work the new terms. This may be deemed industrial action and, without a ballot, they run the risk that it may be unlawful.

If an employer dismisses more than 20 employees to impose new contracts, they have to consult with the recognised trade union. If they don't, the union can claim for protective awards of up to thirteen weeks' pay.

# BUILDING UP REGULATIONS

**The Working Time Regulations give workers the right to four weeks' annual holiday. But who exactly is a worker? In the case of** Redrow Homes (Yorkshire) Ltd -V- Wright; Redrow Homes (NW) Ltd -V- Roberts & Ors (2004, IRLR 720)**, the Court of Appeal has said that contract bricklayers are included in the definition.**

## WHAT WERE THE BASIC FACTS?

Mr Wright worked for Redrow as a bricklayer for six months on two of its sites in West Yorkshire, along with another bricklayer, Mr Milner. The company provided the men with the bricks, pre-mixed mortar, a fork-lift truck and driver, scaffolding and normally one labourer per site. Mr Wright and Mr Milner provided their own hand tools.

They were given a set of drawings and were subject to a building programme. Apart from an obligation to conform to the building programme and to the daily outside limits of time, they could regulate their hours and work to suit themselves.

Each week, they submitted a claim for payment indicating how the payment should be divided between them. These were made every week into each of their bank accounts. Similar facts applied to Mr Roberts and his fellow applicants, except that the site was in the north west of England.

The applicants accepted the offer of work on the basis of an official document that set out a number of conditions. Condition 6 said the men were required to *'provide sufficient labour to maintain the progress laid down from time to time by the company, and [to] supply such labour with all necessary tools and equipment.'*

It further required that *'on each site where the work is in progress the contractor must maintain a competent foreman or chargehand who has complete control of all labour engaged on any work.'*

## WERE THEY WORKERS?

Under the regulations, a worker means someone who has entered into or works under either:

- a contract of employment, or
- any other contract under which the individual undertakes to do or perform personally any work or services for another party to the contract who is not a client or customer of any profession or business undertaking carried on by the individual

The case hinged on whether the bricklayers had undertaken to do the work specified in the contract personally. The men maintained that they worked under a contract whereby each of them undertook to do the work personally for Redrow. Which they all did.

Redrow argued that there was no contractual obligation on any of the men to do the work 'personally'. It pointed to condition 6 which was an express term of the contract which stated quite clearly that the work could be done by other people. The requirements on the contractor stipulated in condition 6 were inconsistent with a personal obligation.

## WHAT DID THE COURT OF APPEAL CONCLUDE?

The appeal court decided that both the employment and the appeal tribunals were right to find that the bricklayers were workers within the meaning of the regulations.

It said that there was an obligation on the applicants to do the work personally and that was the intention of the parties when the contracts were made.

Because the contracts were drafted on the basis of 'one size fits all', some clauses clearly did not apply to all workers at all times.

In these contracts, it said that condition 6 (allowing others to do the work) was not intended to be included.

The court pointed to the way that Redrow paid the men, saying that this 'pointed strongly in the direction of contracts with individual bricklayers to do the work personally.'

It said it was clear that there was an obligation on the applicants to do the work personally.

The company contracted with the applicants personally, they were paid individually and the items of work specified were not beyond the capacity of the applicants to do themselves.

# ABROAD WITH THE MOD

**English employment tribunals can only hear claims by employees who work in Great Britain. So what protection is there for people who work abroad? The employment appeal tribunal (EAT) has just decided in two of three conjoined cases –** Saggar -V- Ministry of Defence; Lucas -V- Ministry of Defence; Ministry of Defence -V- Gandiya (IDS, 763) **– that they have to work more than a minimal amount of time in GB to be eligible.**

## WHAT IS THE RELEVANT LEGISLATION?

Both the Sex Discrimination Act 1975 and the Race Relations Act 1976 state that it is unlawful for an employer to discriminate against an employee who works 'at an establishment in Great Britain', even if the employee works some of the time outside Great Britain. It is only if they work 'wholly outside' it that they lose the protection.

However, prior to 16 December 1999 the legislation was more restrictive and said that an employee was to be regarded as being employed at an establishment in Great Britain, unless he or she worked 'wholly or mainly outside' GB.

## WHAT WERE THE BASIC FACTS?

**Saggar**: After sixteen years at an MOD base in the UK, Lt Col Saggar had been permanently stationed in Cyprus from 1998 and was still there when he made his claim of race discrimination. The tribunal decided that he worked wholly outside GB.

**Lucas**: Ms Lucas was stationed in Northern Ireland and complained of alleged acts of sex discrimination from February to September 2000. She was stationed in the province for the whole time, and only left to take annual leave and to attend a number of training courses in England. All her intelligence work was done in Northern Ireland. Again, the tribunal found that she worked wholly outside GB.

**Gandiya**: The Rev Gandiya was an army chaplain stationed in Germany from 1998. He complained of acts of discrimination between March 1999 and August 2000. He spent all his time outside GB except for attending a retreat, a funeral and a wedding in GB in 2000. The tribunal decided that these visits were part of his work.

## WHAT DID THE EAT DECIDE?

The EAT said it had to answer three basic questions:

1. What point in time should the tribunal use to decide if the applicant works wholly outside GB?
2. What constitutes work?
3. Is there a minimum consideration in relation to the word 'wholly'?

**Time**: The EAT dismissed Mr Saggar's appeal because it said that it would have to look at the whole of his employment from 1982 onwards for his claim to succeed, and that would be absurd. The tribunal said that the law cannot protect someone alleging discrimination while working abroad, if that person is either someone who used to work in Great Britain but has not done so for many years, or someone who was employed under an original contract that contemplated that he or she would or might be employed in Great Britain but in fact never was.

**Work**: The EAT said that tribunals should ask themselves three questions to decide whether an activity constitutes work:

- Is the applicant required to do the work under their contract?
- What is the content of the work?
- How regular is the work and how long does it last for?

The EAT decided that by attending training courses in England during her time in Northern Ireland, Ms Lucas was not doing her work wholly outside GB.

Her appeal was therefore allowed. With regard to Rev Gandiya, it said that his officiation at the funeral fell within his duties, and that by visiting this country to perform them he was working in Great Britain for that day.

**De Minimis**: However, the MOD's appeal against Rev Gandiya was ultimately successful because the EAT went on to say that it would be absurd to establish jurisdiction on the basis of a one day visit, when the rest of his employment was 'otherwise wholly abroad'.

# Sexual offence

**Although** Scott -V- Commissioners of Inland Revenue (2004, IRLR 713) **is not primarily a case about sexual harassment, the Court of Appeal has nonetheless made some valuable observations about how employers should deal with it.**

## WHAT HAPPENED IN THIS CASE?

Mr Scott was dismissed in August 2001 at the age of 56 on grounds of ill health, having worked for the Inland Revenue for over 40 years. He had become depressed after a claim of sexual harassment was made against him by a colleague, Miss Fitch, which the Inland Revenue decided in her favour.

The tribunal found that he had been unfairly and wrongfully dismissed, had been discriminated against on grounds of both sex and disability, and had been victimised.

It made an award of compensation totalling £98,378 (based on the fact that he would have had to retire at age 60), but did not award Mr Scott any part of his costs. It also made separate awards for injury to feelings for unlawful discrimination and aggravated damages

The tribunal was scathing about the way the Inland Revenue handled the accusation of sexual harassment, saying that: '*we cannot for a moment believe that any reasonable person viewing matters objectively could or would view the allegations as serious.*'

## WHAT DID THE EAT DECIDE?

The EAT dismissed his appeal against his award of compensation and the failure to award costs.

And the registrar of the EAT refused to let him change his notice of appeal to reflect the fact that the Inland Revenue had extended its retirement policy from age 60 to 65 while his appeal was pending, and which impacted on his calculations for compensation.

## WHAT DID THE COURT OF APPEAL CONCLUDE?

The Court of Appeal said that:

- The employment tribunal did not err in making separate awards for injury to feelings and aggravated damages
- The award for injury to feelings of £15,000 was about right
- The award for psychiatric damage of £15,000 needed to go back to the employment tribunal to be reappraised, on the basis that the tribunal's prognosis for Mr Scott's health had been too optimistic
- Aggravated damages are intended to deal with cases where the injury was inflicted by conduct that was 'high-handed, malicious, insulting or oppressive'
- The decision not to award costs needed to be reconsidered to compensate him for the original unjust accusation

The court also gave him permission to appeal against the registrar's refusal to allow the application to be re-amended

## WHAT DID IT SAY ABOUT SEXUAL HARASSMENT?

Just as importantly, it made some significant comments about the tone and approach that the tribunal adopted to the complaint of sexual harassment made by Miss Fitch.

In particular, it said: '*Sexual harassment is a serious matter in the workplace and needs always to be addressed where there is a complaint about it, but it does not have to become the subject of a state trial every time it arises. Incidents trivial in themselves can acquire a measure of seriousness, or perceived seriousness, if they appear to be recurrent. That is one reason why they should not be considered in isolation.*'

It went on: '*What Miss Fitch had described in her complaint was a situation which is not uncommon in workplaces, and perceptions which, whether correct or mistaken, are usually real. We do not agree with the tribunal that it would have been appropriate for management simply to explain to Mr Scott that Miss Fitch's allegations "even if true were trivial" and to do no more than warn him as to remarks and conduct which could be taken out of context or cause upset to a sensitive young woman.*

*'The complaint was one which it would have been wrong for management to trivialise or to ignore, and we do not accept that management displayed an understanding of sexual harassment "that beggared common sense".*'

> *'The complaint was one which it would have been wrong for management to trivialise or to ignore'*
>
> **COURT OF APPEAL**

# Breaking glass

**It is often difficult for applicants in discrimination cases to point to evidence that backs up their claim. The case of** Rihal -V- London Borough of Ealing (IDS, 764; 2004, IRLR 642) **is no exception. However, the Court of Appeal has just said that the tribunal was right to look at the wider picture and to include evidence that a glass ceiling operated in relation to non white employees.**

This was a GMB case backed by Thompsons.

## WHAT WERE THE FACTS?

Mr Rihal, a Sikh born in India but resident for many years in the United Kingdom, worked for Ealing housing department in the central technical team as a surveyor.

By 1992 he was one of two senior surveyors, along with Mr Relf, who was white. They were equal in their qualifications and skills. They worked for the central technical team, headed up by Ms Herman, who was also in charge of the capital programmes subdivision. When the head of one of the other subdivisions retired in 1992, Mr Relf acted up.

He, in turn, retired in May 1996 but was not replaced. Instead, Mr Dicks, a white employee junior to Mr Rihal, was promoted and the two of them shared Mr Relf's responsibilities.

In September 1996, Ms Herman retired and was replaced as head of the central technical team by Mr Foxall, who was white. Her place as head of the capital programmes subdivision was taken on an acting-up basis by Mr Gaffikan, who was white and had fewer qualifications and less experience than Mr Rihal.

Following a major reorganisation of the department in 1998, Mr Rihal applied to assimilate to a number of posts but was unsuccessful. He lodged a grievance, but this was not dealt with for over 14 months.

## WHAT WERE MR RIHAL'S COMPLAINTS?

Mr Rihal made the following complaints to the tribunal:

- He was not appointed to act up when Mr Relf retired
- The duties allocated to him when Mr Relf retired were inappropriate
- He was not assimilated or appointed to any of the new posts
- The delay in dealing with his grievance was unacceptable

The tribunal decided in his favour, saying there was a glass ceiling in operation in the housing department. It pointed to '*... a "force" in existence throughout that prevented [his manager] and others from picturing a turban-wearing Sikh with a pronounced accent in the managerial roles.*' It decided that the 'force' in question was a racial ground.

The council appealed on all grounds, except against the finding that Mr Rihal was discriminated against when he was not appointed to act up when Mr Relf retired.

## WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal agreed on all counts. It said that the main issue to decide was whether the tribunal had been entitled to conclude that Mr Rihal's less favourable treatment was because of his race. The council complained that the tribunal had adopted too general an approach and had made inadequate findings of fact.

The court disagreed. It said that the tribunal had taken the proper approach to the comparative exercise required under the legislation – in other words, it had looked at all the evidence before it to decide whether he would have been treated differently had he been white.

In particular, it emphasised that the tribunal was entitled to look at the 'wider picture' in coming to its conclusions because Mr Rihal had made allegations of discrimination over a long period of time. The tribunal was right, therefore, not to treat the individual incidents in isolation from one another.

Instead, it criticised Ealing for trying to divide the period up as artificial, saying that if an employer institutes an arrangement that is racially discriminatory, that does not change just because the manager changes. The complaint was made against the organisation as a whole, not an individual manager.