THOMPSONS SOLICITORS

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WORKERS' HEALTH

The Information Commissioner has just published part 4 of the Employment Practices Data Protection Code.

This part of the code recommends how employers can meet the requirements of the Data Protection Act when obtaining and handling information about workers' health.

As a whole, the code deals with the impact of data protection law on the employment relationship. It covers issues such as obtaining information about workers, the retention of records, access to records and disclosure of them.

You can access the code at: *www.informationcommissioner.gov.uk* and follow the link under 'What's New'.

SICK NOTE BRITAIN

The TUC has produced a report countering the myth that UK workers – particularly in the public sector – are always going off sick.

Instead it shows that British workers are less likely to take time off than any European country other than Denmark, and that public sector workers take less sick time than those in the private sector.

It says that a bigger problem is the high number of workers (75 per cent) who confess to having struggled into work when they were ill.

The report also takes a pop at commentators who suggest that many people who are off work with stress are not really that ill. It notes that the Health and Safety Executive estimates that work-related stress costs employers £353 million and society £3.7 billion, and the symptoms suffered by stressed out employees are serious and include mental health and chronic physical health problems.

You can access a copy of the report at *www.tuc.org.uk*.

I & C REGULATIONS OUT

The Information and Consultation Regulations, due to come into force in April, have now been approved by parliament.

The Department of Trade and Industry has also issued guidance setting out how to make best use of the new laws that give employees the right to be consulted and informed about matters that affect them at work.

Go to *www.dti.gov.uk/er/consultation/proposal.htm* for a link to the new regulations, the guidance and other relevant documents.

DISABILITY BILL

The Disability Discrimination Bill is currently going through parliament. Among other things, it introduces a new duty on public bodies to promote equality of opportunity for disabled people.

It also extends rights under the existing Disability Discrimination Act (DDA) by ensuring that people with HIV, MS and cancer are covered from the point at which the condition is diagnosed. And it removes the requirement from the DDA's definition of disability that mental illnesses must be 'clinically well-recognised.'

The Department of Work and Pensions has now launched a consultation paper which sets out the government's proposals for using the regulation-making powers contained in the Bill in a number of further areas.

In particular, it is asking for views on the power that allows the Secretary of State to exclude certain types of cancer from the extended definition of disability.

The government is asking for responses to the paper by 18 March. You can access the document by going to: *www.dwp.gov.uk/consultations/consult/2004/ddb/private_clubs_premises.pdf*

PAY AND PENSIONS

The TUC has issued guidelines for companies about disclosing information on the pay and pensions of directors and other employees.

In particular, the TUC Shareholder Voting and Engagement Guidelines say that any difference in pension arrangements between the boardroom and the rest of staff should be made public.

The guidelines set out policy on a range of corporate governance issues. These have been developed as part of the TUC's work to develop a strong shareholder voice for the representatives of employee-owned capital in pension funds and other investment vehicles.

You will find copies of the guidelines at: *www.tuc.org.uk/pensions/index.cfm?mins=349&minors=349*

TUC EQUALITY BOOK

The TUC has launched a new book about sex discrimination. The TUC Guide to Equality Law, by Nichola Dandridge, head of equal rights at Thompsons, and LELR editor Alison Clarke, is available from TUC publications (020 7467 1294) price £6 to unions.

Fighting fire with the law

Following the Court of Appeal's decision in Mathews and ors -v- Kent and Medway Towns Fire Authority & ors **(LELR 92), the Fire Brigades Union has been granted leave to appeal to the House of Lords. The union has instructed Thompsons to represent their members.**

The case concerns thousands of part-time (or retained) fire fighters who claim that they are being treated less favourably than full timers in a number of ways:

- by being denied access to statutory pension arrangements
- by being denied increased pay for additional responsibilities
- in the way their sick pay arrangements were calculated

Employment relations

A number of provisions of the Employment Relations Act 2004 came into effect on 31 December.

Sections 15 and **18** extend the Secretary of State's powers to amend procedures relating to the recognition and derecognition of trade unions for collective bargaining purposes. They also enable the Secretary of State to deal with a situation where a trade union amalgamates or transfers its engagements or the employer involved ceases to be the employer

Section 33 entitles a trade union to exclude or expel an individual wholly or mainly for taking part in activities of a political party. It also removes the minimum award to a member expelled solely for membership, if the union can prove that membership was not the main reason.

Section 34 says that certain applications which were previously made to the Employment Appeal Tribunal will be made to an employment tribunal. These relate to unjustified disciplinary action or expulsion by a trade union.

Section 54 provides a new power for the Secretary of State to widen the means of voting available in ballots and elections conducted under the Trade Union and Labour Relations (Consolidation) Act 1992.

Fixing terms

According to regulations introduced in 2002, fixed-term workers cannot be treated less favourably than permanent workers, unless the employer can justify the difference.

The Court of Appeal has just decided in Webley -v- the Department for Work and Pensions (LELR 91), that a failure to renew a fixed-term contract did not constitute less favourable treatment. The case was supported by PCS who instructed Thompsons.

Ms Webley started work as an administrative officer at the Leyton Job Centre on a short term, temporary contract on 4 February 2002, which expired on 3 May 2002. She was then given a succession of fixed-term contracts, the last of which expired on 17 January 2003, just short of the one-year qualifying period for unfair dismissal.

Someone else then had to be employed to do her work because fixed-term, casual employees (who are not appointed under full, fair and open competition rules) cannot be employed for more than 51 weeks. This is known as the 51-week rule.

The claimant complained that permanent employees would not have their contract terminated at 51 weeks, and that this constituted a 'detriment' contrary to the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

The DWP justified the dismissal on the basis of the 51-week rule. It also said that there is no obligation under the regulations to convert a fixed-term contract into a permanent contract and so there can be no detriment when it expires.

And the Court of Appeal agreed, saying that *'the termination of such a contract by the simple effluxion of time cannot, of itself, constitute less favourable treatment by comparison with a permanent employee. It is of the essence of a fixed-term contract that it comes to an end at the expiry of the fixed-term.'*

This decision means that employers who decide not to renew the contracts of their fixed-term employees will not be acting contrary to the regulations, although they may face claims for indirect race or sex discrimination or unfair dismissal. This is an important limitation on the scope of the protection given by the regulations. The union is considering an appeal to the House of Lords.

TIME OUT

In cases of unfair dismissal, claimants have to lodge their tribunal claim within three months (less one day) of the effective date of termination of their contract.

As the claimant in the case of Palfrey -v- Transco (2004, IRLR 916) found out, that means that the first thing you have to do is identify the effective date of termination.

Photo: Stefano Cagnoni (Report Digital)

WHAT WERE THE BASIC FACTS?

Mr Palfrey was made redundant by Transco, and was told in a letter dated 24 February 2003 that his notice period would start on 25 February. As he was entitled to 12 weeks' contractual notice, his last day at work was19 May.

However, the letter also said that he could be paid in lieu of notice, if that was more suitable for him. Mr Palfrey agreed and his employer confirmed in a further letter dated 17 March that his last day of work would therefore be 31 March.

Mr Palfrey then made a claim of unfair dismissal more than three months after 31 March, but less than three months from19 May.

The question for the tribunal was whether Mr Palfry's effective date of termination was the one set out in Transco's original letter (19 May) or its subsequent letter (31 March). It looked at the majority decision of the Court of Appeal in *TBA Industrial Products Ltd -v- Morland (1982, IRLR 331)*, which said that if employers want to alter the effective date of termination, they should serve a new notice which was 'causative of the termination' and which complied with the date suggested by the employee.

The tribunal said that although the relevant statute (section 97(1)(a) of the Employment Rights Act) makes no mention of causation, it was bound by the precedent established by the Court of Appeal.

It concluded that the notice given by Transco on 17 March resulted in (or 'caused') Mr Palfry's employment to come to an end. His contract therefore finished on 31 March and his claim was out of time.

WHAT DID THE EAT DECIDE?

The employment appeal tribunal (EAT) agreed. It said first of all that employers and employees often want to vary an initial notice of termination – this was by no means an unusual situation.

It made sense, therefore, for the parties to be able to engage in discussion and vary the notice. Otherwise, if the termination of employment itself was deemed to have resulted from an agreement between the parties, the employee could not make a claim for unfair dismissal, since there would have been no dismissal.

To avoid the assumption that an original notice could not be varied, the Court of Appeal had decided in *TBA* that it had to be positively withdrawn. The EAT said that although Transco had not withdrawn their original notice and then served a new one, its letter of 17 March had effectively provided 'fresh notice.'

In any event, the EAT said that the decision of the Court of Appeal in *TBA* should not be followed because it had not taken account of a number of other important decisions.

The EAT concluded therefore that when there is an agreed variation of the notice of dismissal, the notice expires on the new date, as does the contract of employment. (The same would seem to apply to an agreed variation of a notice of resignation.) This means that the tribunal time limit starts to run from the date on which the revised notice expires.

COUNTING THE COSTS

If someone acts unreasonably in the way that they bring or conduct proceedings in an employment tribunal, they run the risk of having a costs order made against them.

In Iron and Steel Trades Confederation -v- ASW Ltd (IRLR 2004, 926), the employment appeal tribunal (EAT) has clarified that a costs order will not be made against a party just because their case was unlikely to succeed.

WHAT WAS THE HISTORY TO THE CASE?

The Iron and Steel Trades Confederation (ISTC) made an application for a protective award on behalf of 170 of its members who had been made redundant by ASW Ltd. The application was delayed by the fact that the company went into liquidation.

Because the claim was presented four months out of time, the tribunal dismissed the application on the basis that it had still been reasonably practical for the union to have lodged it within the time limit. The union appealed against that decision.

In accordance with new practice directions, the union's appeal was sifted before it was heard by the EAT. It survived that stage, but was dismissed by the EAT at the full hearing, which said that the union's case had no chance of success. An application for costs was then made.

WHAT WERE THE ARGUMENTS AT THE EAT?

The union relied on an unreported decision – *Coots -v- John Lewis plc, 2001* – which said that the EAT does not usually award costs if the appeal survives a preliminary stage.

This particular appeal tribunal said that because the new practice directions required all cases to be sifted, there was now inevitably some kind of preliminary process to go through. It dismissed the suggestion, therefore, that costs would only be awarded in exceptional circumstances once a case had been sifted.

The fact that this case survived a sift would, therefore, only be a factor in the court's consideration. The other factor to be considered was whether the proceedings had been brought or conducted unreasonably.

WHAT DID THE EAT DECIDE?

The EAT decided that although the union had little or no hope of success in bringing its claim, it had not conducted the proceedings unreasonably. Under the present rules (which may change as a result of new proposals), there is no provision to award costs if proceedings are 'misconceived' - in other words, if they have no reasonable prospect of success.

The EAT also dismissed the union's argument that the employer should have indicated that it would seek costs against them.

It emphasised that it did not *'encourage, indeed we would not welcome, a situation in which threats of costs are fired across the bows as a matter of course between the parties.*

'There are many cases in which this will be seen almost to amount to emotional or financial blackmail, and certainly in any sort of race or sex discrimination cases it could be said, and has been, I think, in some cases said, that a threat of costs could amount to victimisation.'

Photo: RexClusive

The EAT concluded, therefore, that claimants who bring cases which do not have much chance of success will be at risk *'as to costs, and should not feel comforted by the existence of a sift order, or even a preliminary hearing order, entitling them to go ahead.'* It warned such appellants *'to consider their position very carefully'* before lodging their appeal.

Despite the appeal tribunal's views on the strength of the case brought by ISTC, it decided that it had not acted unreasonably in bringing or conducting the proceedings and made no order for costs against it.

a brief overview of

HOLLOW VICTORY

All too often, an award of compensation by an employment tribunal can end up as a hollow victory for workers. The reason is simple. Awards are not being paid because employment tribunals in England and Wales have no powers to enforce them.

According to a recent report by the Citizens Advice Bureaux (LELR 94), there were 13,000 successful tribunal claims in 2003-4, most involving unfair dismissal, unpaid wages and redundancy pay. The vast majority resulted in a financial award by the tribunal.

The bureaux also reported a steady stream of cases of non-payment of those awards by employers. Some were unpaid as a result of insolvency, but far too many were the result of sheer intransigency on the part of the employer who perhaps thought it would go away.

In this article, ***Emma del Torto***, a solicitor from Thompsons' Employment Rights Unit in Cardiff, looks at what claimants can do if their employer refuses to cough up, or becomes insolvent.

WHAT SHOULD CLAIMANTS DO FIRST?

The best bet for enforcing a tribunal judgment is to lodge a claim in the county court. This requires filling in the relevant application form (N322A available from *www.courtservice.gov.uk*).

The application must be made in the court in the area where the employer (known as the respondent) either lives or carries on his or her business. There are about 230 county courts in England and Wales, each covering a specific geographic jurisdiction.

When 'filing' (or lodging) the application form, a copy of the tribunal judgment must be attached to it. The form is only one page and is fairly easy to complete. The claimant just needs to provide all their details, plus everything it asks about the respondent. The claimant also has to pay a fee, which is currently £30.

Once the form has been processed by an officer of the court, it then issues an order to the employer to pay the award, plus interest and the court fee within 14 days. Costs incurred for solicitors' fees up to a maximum of £75.50 for awards exceeding £2,000 can be claimed back.

WHAT ABOUT GETTING A COUNTY COURT JUDGMENT?

Once the claim has been filed, the court will enter the employer's name on the register of county court judgments. This may make a small employer pay up, as this is the register that banks, building societies and credit companies search when considering applications for financial loans and credit.

However, it may not have much impact on limited companies and there is, therefore, no guarantee that a claimant will receive any money as a result of an employer's name going on the register.

HOW DOES THE COURT ENFORCE ITS JUDGMENT?

There are a number of ways to enforce a county court judgment, depending on individual circumstances.

The alternatives include:

- issuing a warrant of execution – in other words, sending in the bailiffs to seize some of the employer's assets which they can sell off to pay the debt
- issuing a third party debt order – getting money from a third party who either owes the employer money or holds it on his or her behalf such as a bank
- issuing a charging order – this secures payment of the money owing against land or other property owned by the employer, and it prevents the employer from selling it without paying the claimant first. A sale can be forced, but advice from a solicitor should be sought first.

It is important to consider the size and solvency of the respondent when choosing the method of enforcement. It is often a good idea to do a Companies House check to assess whether the company's finances are in order and whether annual accounts have been filed and are up to date.

WHAT HAPPENS IF THE EMPLOYER IS INSOLVENT?

If the employer has ceased trading, the claimant can apply to the courts to have a receiver or liquidator appointed and declare them insolvent. If the employer was a sole trader,

FOR CLAIMANTS

then a statutory demand can be served. Twenty one days after serving it, the claimant can apply for a bankruptcy order against the employer.

However, these options only apply if the clainant is owed more than £750.

Assuming there are any assets left, these will then be sold to pay off the employer's debts. However, the claimant may not get all their money back as these have to be paid off in a certain, very strict order. If there are no assets left, the claimant can apply to the DTI's National Insurance Fund.

WHAT ABOIUT REDUNDANCY?

If the employer becomes insolvent and the employee is owed a redundancy payment, application can be made to the Department of Trade and Industry. It has produced a very helpful guide (Redundancy and Insolvency – A Guide to Employees) and all the necessary forms can be accessed from the same source (*www.insolvency.gov.uk*).

A claim as a result of a tribunal decision should include a copy of it along with the relevant form (RP1).

There is, however, a limit on what can be claimed under this scheme, with the result that only part of an outstanding debt may be met. If the respondent still owes money, the claimant should contact the insolvency practitioner dealing with the case and alert them to this fact.

WHAT ABOUT CASES CONCILIATED BY ACAS?

These cannot be registered in the county court, so the claimant will have to go to the High Court and allege breach of contract. The trouble is that this can be contested by the employer, which means that he or she can re-open the very issue decided by the tribunal. This inevitably involves more time and expense.

WHAT IS THE CONCLUSION?

Clearly the enforcement system is unsatisfactory. The government has, however, done little to date to resolve the situation although it did produce a white paper last year indicating an intention to reform current 'processes'.

Unfortunately, as the Citizens Advice Bureaux pointed out in their report, the government's proposal to elevate the status of tribunals (so that an award would have the same status as an order of any civil court) does not go far enough. Instead, it recommends that unpaid awards should be enforced directly by the state. This idea looks a long way ahead of its time.

OWN UP, OWN UP

Under the Companies Act, directors are required to observe a number of different duties and obligations. But just how far do these extend?

In Item Software Ltd -v- Fassihi (IRLR 2004, 928), the Court of Appeal has just decided that a director (who was also an employee) had a duty to disclose his own misconduct as part of the director's duty of loyalty.

WHAT HAPPENED IN THIS CASE?

Mr Fassihi was the sales and marketing director of Item Software. He was also an employee with a contract that paid him monthly in arrears.

A major part of Item's business was the distribution of software products for Isograph Ltd. In November 1998, Item decided to negotiate more favourable terms with the company but, when these failed, Isograph gave notice to terminate the contract, expiring in May 2000.

During the course of the negotiations, Mr Fassihi (who had set up his own company) secretly approached Isograph and entered into a distribution agreement with them. When Item discovered what he was doing, it dismissed him summarily on 26 June 2000.

Item then claimed that Mr Fassihi was in breach of duty for failing to disclose his approach to Isograph. Mr Fassihi counterclaimed for wrongful dismissal and for arrears of salary for the 26 days prior to his dismissal.

The High Court judge decided that Mr Fassihi was in breach of his duty as a director and an employee for failing to disclose his own misconduct and that Item was entitled to recover damages from him. He rejected Mr Fassihi's counter claim for wrongful dismissal and arrears of salary.

WHAT DID THE COURT DECIDE ON 'DISCLOSURE'?

The Court of Appeal said that, as a director, Mr Fassihi was a fiduciary of the company which meant that he had to observe certain mandatory duties and obligations. These included a liability to account for secret profits and to act in the best interests of the company.

But, as a director, was he under a duty to disclose his own misconduct? The court decided that just because the duty of loyalty had not been applied before as a way of imposing an obligation on a director to disclose his own misconduct, that was '*not a good objection to the application of the fiduciary principle.*'

The court concluded, therefore, that Mr Fassihi could not fulfil his duty of loyalty to the company as a director without telling Item about his plan to acquire the Isograph contract for himself.

WHAT DID THE COURT DECIDE ON 'APPORTIONMENT'?

The Court of Appeal decided, however, that the High Court judge was wrong to hold that Mr Fassihi was not entitled to arrears of salary for the 26 days prior to his dismissal. It said that the 1870 Apportionment Act allows for a proportional part of someone's salary to be claimed.

It said that the fact that Mr Fassihi's June salary was not due until the end of the month (when he was no longer employed by Item) was not a good objection. The Act allows

Photo: Jess Hurd (Report Digital)

for payment of a portion of salary when the whole lot would have become due and it should be paid on that date – in this case at the end of the month.

The judge had been wrong to decide that he was bound by the decision of the Court of Appeal in *Boston Deep Sea Fishing and Ice Co Ltd -v- Ansell*. This concerned an employee whose salary was paid at the end of designated periods but whose contract was terminated before the end of one of them. As a result, he was not entitled to recover a proportionate amount of his salary.

However, for whatever reason, counsel had not relied on the Apportionment Act in the *Boston* case and it could not be relied on now as authority for how the Act should be applied.

HUMAN RIGHTS AND WRONGS

The Human Rights Act 1998, which incorporates the European Convention on Human Rights into UK law, gives public sector employees the right to bring a claim against their employer for a breach of the Convention.

In McGowan -v- Scottish Water (IDS 771), the employment appeal tribunal (EAT) upheld the tribunal's decision that the employee's human rights had not been breached by the company when it used covert surveillance of his home to establish whether he had been falsifying his timesheets.

WHAT WAS THE HISTORY TO THE CASE?

Mr McGowan worked at a remote water treatment plant and lived nearby. Scottish Water suspected that he was falsifying his timesheets and claiming for work he hadn't done. They engaged a firm of private investigators to watch his house from the opposite side of the public road, and made a video of his comings and goings to compare with his timesheets.

He was subsequently dismissed, following which he brought proceedings for unfair dismissal on the ground that his human rights under article 8 (1) of the Convention had been breached by his employer's surveillance. That is, the right to respect for his private and family life, home and correspondence.

WHY DID THE TRIBUNAL DECIDE AGAINST HIM?

The tribunal rejected his claim, and said that Scottish Water could justify what it had done under article 8 (2) in that it was 'in accordance with the law and necessary ... in the interests of ... public safety.'

Instead, it agreed with Scottish Water when it argued that, had it not carried out the surveillance covertly, there was '*a risk of a water incident which could affect public safety and the health of those served by the treatment works*.' It was necessary, therefore, to protect the company's assets.

Mr McGowan had cited only one incident which had any impact on his private and family life in that his wife was seen on a video made by the investigators which was used during the disciplinary procedure. The tribunal rejected this allegation, saying that his wife could have been seen at any time by any one using the public road.

SHOULD MR MCGOWAN NOT HAVE BEEN WARNED?

The tribunal said that although it would usually expect an employee to be warned that they may be subjected to covert surveillance, failing to do so was not a breach of human rights.

It decided that if Mr McGowan had been told about the possibility of covert surveillance being carried out, he could easily have found out when he would be subjected to it and altered his activities accordingly.

WHAT DID THE EAT DECIDE?

The EAT said that, at first sight, covert surveillance of a person's home, unbeknown to him or her, 'raises at least a strong presumption that the right to have one's private life respected is being invaded'. It was however justified in this case because it was to prevent criminal activity and/or injury to the public.

It concentrated on the key question of proportionality (that is, the balance between the individual's and society's interests).

It said that the covert activity went to the heart of the investigation in that the aim was to check the accuracy (or otherwise) of Mr McGowan's timesheets.

Mr McGowan's alleged misconduct forced the company to investigate and this was not therefore a case where the surveillance was undertaken 'for external or whimsical reasons'. In the appeal tribunal's view, Scottish Water had a right to protect its assets and the public's safety and its actions were not therefore disproportionate.

COMMENT

Curiously, when considering the issues of justification and proportionality, the EAT thought it, 'a very important aspect of the case' that Scottish Water's suspicions had been proven correct. What is unclear from the judgement is how they would have applied this justification in a case where the employer's suspicions turned out to be wrong.

Roll up, roll up

The issue of rolled-up holiday pay has been the subject of a number of recent cases, but in *Marshalls Clay Products -v- Caulfield* **(LELR 82), the Court of Appeal decided that it was legal.** *Marshalls* **and a further case** *Robinson-Steel -v- RF Retails Services Ltd* **have, however, now been referred to the European Court of Justice (see LELR 91).**

So when the claimants in Smith -v- A J Morrisroes & Sons (along with a number of other conjoined appeals) raised more questions about holiday pay, the employment appeal tribunal (EAT) had to tread more carefully. It decided to deal only with the *Marshalls Clay* aspects of the appeals, and make no award in *Smith* until after the *Ainsworth* case concerning the timing and procedure for claims for holiday pay was heard this month (February 2005).

It also clarified the Court of Appeal's earlier guidance (see box below).

WHAT WAS MR SMITH'S COMPLAINT?

Mr Smith worked as a sub-contractor from August 1999 until April 2003. Under the terms of his original contract, he was paid £150 per day but with no entitlement to holiday pay. In late 2002 he was asked to sign a new contract, giving him 20 days' statutory holiday but at a daily rate of only £138 per day, with £12 held back as holiday pay.

'the contractual provision did not represent a true addition to the daily rate and did not therefore satisfy the Marshalls Clay criteria'

Mr Smith refused to sign the new contract, but his employer continued to deduct holiday pay until he left in April 2003. This deduction was clearly marked on his pay slips. The tribunal decided that this was not a unilateral change and was in accordance with the guidance set out in *Marshalls Clay*.

The EAT, however, did not agree and said that the new arrangements did not satisfy the *Marshalls Clay* exemption from the regulations. It therefore allowed his appeal.

WHAT WAS MR BYRNE'S COMPLAINT?

Mr Byrne started work in June 2002. He claimed he was verbally engaged on 19 June at a rate of £140 per day, but was given a contract the next day which said that his statutory holiday pay entitlement would be added to his hourly rate, giving a total daily rate of £140.

The tribunal found in his favour because it decided that the contractual provision did not represent a true addition to the daily rate and did not therefore satisfy the *Marshalls Clay* criteria. The EAT agreed.

WHAT WAS MR WIGGINS' COMPLAINT?

Mr Wiggins was an 'unattached teacher' working for the county council on the same terms as permanent teachers, apart from the fact that his pay was calculated on an hourly rate.

Mr Wiggins argued that he was not told that holiday pay was provided for over and above his basic rate. Because this was not made clear in his contract or payslip, he said that the arrangements laid down by the county council did not comply with the *Marshalls Clay* guidelines.

However, both the tribunal and the EAT disagreed. Even though there was no express provision in his individual contract, Mr Wiggins knew that full-time teachers' terms and conditions were incorporated into his contract. There was also a document that allowed teachers to work out what they were paid for school holidays, and specifically the 20 days' basic statutory entitlement.

'MARSHALLS CLAY GUIDELINES' (REVISED)

There must be mutual agreement for genuine payment for holidays, representing a true addition to the contractual rate of pay for time worked.

The best way of evidencing this is for:

(a) the provision for rolled-up holiday pay to be clearly incorporated into the contract of employment

(b the percentage or amount allocated to holiday pay (or particulars sufficient to enable it to be calculated) to be identified in the contract, and preferably also in the payslip

(c) records to be kept of holidays taken (or of absences from work when holidays can be taken) and for reasonably practicable steps to be taken to ensure that workers take their holidays before the end of the relevant holiday year.

Discrete payment

When a court decides that someone has been wrongfully dismissed, it can calculate the size of any contractual bonus to which the employee would have been entitled as part of the damages settlement.

It is not so clear, however, what happens when the bonus is discretionary. In Horkulak -v- Cantor Fitzgerald International (CFI) (2004, IRLR 942), the Court of Appeal decided that the employer still has to exercise his or her discretion rationally and in good faith.

WHAT WERE THE BASIC FACTS?

In August 1999, Mr Horkulak was promoted to a senior post with CFI on a three-year contract, which entitled him to a basic salary, a loyalty bonus and an annual discretionary bonus. He reported to the chief executive, Mr Amaitis.

In June 2000 he resigned saying that his life had been made intolerable by the bullying and abusive behaviour of the CEO. He claimed wrongful and constructive dismissal.

The company admitted the abusive behaviour, but said it was largely down to serious shortcomings in Mr Horkulak's performance, made worse by his addiction to alcohol and cocaine.

The High Court judge rejected the company's defence, saying that Mr Horkulak's abuse of both alcohol and cocaine had not make him unfit to do his job. Instead he said that Mr Amaitis had deliberately undermined Mr Horkulak and thereby breached the implied term of trust and confidence in his contract.

The judge assessed damages on the basis of the amount he would have received up to 30 September 2002, had he not been dismissed. That included the two discretionary bonuses for 2001 and 2002, calculated at £630,000. The total award came to almost £900,000.

WHAT WAS THE MAIN GROUND FOR APPEAL?

CFI appealed against both the award and the level of damages, saying that as the company was not under an obligation to pay the bonus, and as damages for wrongful dismissal have to relate to a contractual entitlement, the judge was wrong to have awarded them.

It said that the wording in the contract was clear – by using the word 'may' with regard to the discretionary bonus, the company was under no obligation to even consider paying it.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal disagreed with the company. It said that the judge was right that had Mr Horkulak remained with CFI, it would have had to engage in a rational exercise of the discretion as to whether or not to pay him a bonus.

It went on to say that, in this case, it was clear from the wording of the clause that it was intended to motivate and reward employees, and should be read as a contractual benefit '*as opposed to a mere declaration of the employer's right to pay a bonus if he so wishes.*'

The next thing to decide was how much the award should be. This, said the court, required the judge to *'put himself in the shoes of those making the decision, and consider what decision, acting rationally, and not arbitrarily or perversely, they would have reached as to the amount to be paid*', had he remained in CFI's employment.

Again, it found against the company saying that in comparison with the sums paid to others of similar status, the figures arrived at by the judge were not out of line with Mr Horkulak's reasonable expectations, had the company been acting reasonably.

It did accept the company's argument, however, that the judge had failed to explain in sufficient detail how he had arrived at the precise figures and that Mr Horkulak had not done enough to mitigate his losses. It therefore reduced the award of damages by just over £100,000.

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
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CONTRIBUTORS TO THIS EDITION **Richard Arthur**
Iain Birrell
Joe O'Hara
Victoria Phillips
Judith Rhule
Emma del Torto
David Tyme
EDITOR **Alison Clarke**

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FRONT COVER **Brian Gallagher**

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

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