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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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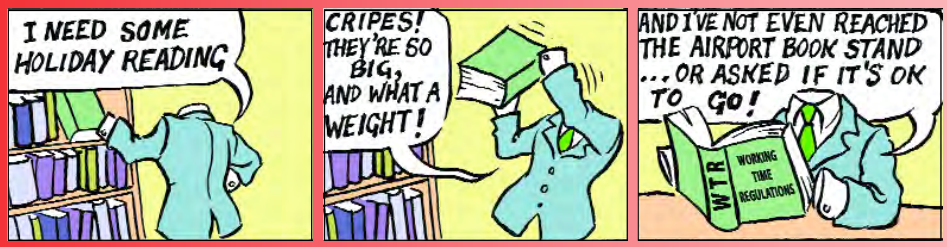

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THOMPSONS SOLICITORS

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TOP OF THE LAWYERS

When asked to name the top ten lawyers whose work should be familiar to all students, the Professor of Law at the Open University included William Henry Thompson, the founder of Thompsons, in his list.

Prof. Gary Slapper said in an article in The Times, that W H Thompson's achievements deserve to be ranked along-side such greats as Cicero, Sir Thomas More and Nelson Mandela.

Thompson, who qualified in 1908, was imprisoned as a conscientious objector and became the country's leading expert on working people's compensation.

A supporter of the suffragettes and co-founder of the National Council for Civil Liberties (now Liberty), he established the firm of Thompsons in 1921. Today it is the largest personal injury and employment rights firm in the UK.

STRESS MANAGEMENT

A significant area of work for the Health and Safety Executive is stress at work. Its research shows that:

- about half a million people in the UK experience work-related stress at a level they believe is making them ill
- up to five million people in the UK feel 'very' or 'extremely' stressed by their work
- work-related stress costs society about £3.7 billion every year (at 1995/6 prices).

It recognises that pressure in itself is not necessarily bad and many people thrive on it - it is when pressure becomes excessive that people experience ill health.

As a result, the HSE has developed a series of standards of good management practice and produced a consultation document, asking for views from interested parties by 27 August. The standards that they look at include the demands that a job makes on a worker; the control people have over the job they do; the support they receive; and how organisational change is managed.

If you want to contribute to the consultation, log on to *www.hse.gov.uk/consult/condocs/stressms.htm.*

WORKING TO TIME

Following a consultation on the working time directive which closed at the end of March 2004 (see LELR 89), the European Commission has now published a discussion paper on proposed changes to the directive.

Aimed at the social partners (the representatives of both workers and employers), the Commission has identified a number of areas for negotiation. These include:

- The future of the individual opt-out, which allows workers to opt out of the 48-hour maximum average, working week. The UK government wants to keep it, but the Commission has suggested that it may be phased out. The other alternative would be to tighten the conditions for applying it.
- The definition of working time, which has been deemed by the European Court of Justice to include 'on-call' time, even if workers are asleep for much of that time. The Commission is asking the partners to decide how to treat 'inactive' on-call time - the UK government has already suggested excluding 'inactive' time from the definition of working time.
- A review of reference periods over which the 48-hour average working week is calculated. It is currently 17 weeks, but can be extended by agreement, a trend that is already discernible.
- A consideration of work-life balance and whether the directive is the tool to address it. The Commission recognises that this issue goes beyond working time, but thinks that the directive could be used to give a clearer steer.

The social partners have nine months to negotiate a collective agreement. If they cannot reach a consensus, the Commission can adopt measures set out in the consultation paper to revise the directive.

DISABLED CODES

The Disability Rights Commission has published two new Codes of Practice on Part 2 of the DDA (The Code of Practice on Employment and Occupation and the Code of Practice for Trade Organisations and Qualifications Bodies).

These have been laid before Parliament and can be found on *www.drc-gb.org.*

Roll up Roll up

In LELR 89 (May 2004) we reported that an employment appeal tribunal had decided to refer the issue of rolled-up holiday pay to the European Court of Justice. In the meantime, the Court of Appeal has decided in the composite cases of Clarke -V- Staddon **and** Caulfield -V- Marshalls Clay Products **that the procedure is compatible with the EU Working Time Directive.**

The judges looked at the policy behind the directive and asked whether 'rolling-up' holiday pay would undermine it. They thought not and went on to hold that the Working Time Regulations, which implement the directive in the UK, also allow for rolled-up holiday pay.

However, because of a number of inconsistent court decisions on the issue, the Court decided that this case should also be referred to the European Court of Justice. It is likely that it will be joined with *Robinson-Steele -V- RF Retail Services Ltd*.

No parental payout

The European Court of Justice has decided - in the case of Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten -V- Wirtschaftskammer Österreich **- that periods of parental leave do not have to be taken into account when calculating a termination payment.**

The Gewerkschaftsbund, an Austrian trade union and the claimant in the case, made an application for a declaration that the first period of parental leave taken by a worker must be included when calculating length of service in a job, just as it is for military or civilian service.

It said that the difference in treatment between workers on parental leave (the majority of whom are women) and those on military service (a majority of whom are men) would otherwise constitute indirect discrimination prohibited by Article 141 of the EC Treaty.

But the ECJ disagreed on the basis that the two situations are not comparable. It said that parental leave is leave taken voluntarily by a worker in order to bring up a child. National service, on the other hand, represents a civic obligation laid down by law and is not governed by the individual interests of the worker.

In each case, the suspension of the contract of employment is based on particular reasons - in one, the interests of the worker and family and, in the other, the collective interests of the nation. As those reasons are of a different nature, the workers who benefit are not in comparable situations.

Accordingly, the court decided that Article 141 of the EC Treaty and Article 1 of the Equal Treatment Directive 'do not preclude the calculation of a termination payment from taking into account, as length of service, the duration of periods of military service or the civilian equivalent performed mainly by men but not of parental leave taken most often by women'.

It is worth noting that in the UK, service does accrue during periods of parental leave under our amended Maternity and Parental Leave Regulations.

THERE IS NO AUGUST ISSUE OF THE LELR. THE NEXT ISSUE WILL BE SEPTEMBER 2004

Dispute resolution

The Department of Trade and Industry has produced detailed guidance notes for the statutory workplace disciplinary and grievance procedures, due to come into force on 1 October 2004.

They provide an explanation of the procedures and what they cover; the situations in which they apply; the exemptions; and the impact on tribunal applications. (See LELR 86 for a brief summary of the regulations, which will be featured in detail in a later edition).

Although the guidance has no legal force and is aimed specifically at employment lawyers and human resource specialists, it is also likely to be of interest to trade union officials and lay representatives. It can be accessed at *www.dti.gov.uk/er/comprehensive_guidance.pdf*.

FIXED TIME

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

In one of the first cases to be heard under the regulations - Webley -V- the Department for Work & Pensions - the employment appeal tribunal (EAT) said that the tribunal had asked the wrong question and ordered a full hearing by a different tribunal. The case was backed by Thompsons.

WHAT DID SHE CLAIM?

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.

WHAT DID THE PARTIES ARGUE?

The applicant 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 two grounds. Firstly, on the basis of the 51-week rule; and secondly, 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.

WHAT WERE THE ISSUES TO BE CONSIDERED?

The chair of the tribunal decided that the question to be answered was *'whether the non renewal of a fixed-term contract is capable of involving less favourable treatment within the regulations'*.

The EAT judge decided that the real questions to be decided were these:

- as an employee with a fixed-term contract, was it a term of the contract that Ms Webley was subject to the 51-week rule?
- if so, was that term applied to a permanent employee?
- if not, was the applicant less favourably treated than her permanent comparator?
- alternatively, was she subjected to a detriment by the application of the 51-week rule to her and not to a comparable permanent employee?
- if she was subjected to less favourable treatment, was that treatment because she was a fixed-term employee and could it be justified on objective grounds?

WHAT WAS THE ANSWER?

The EAT judge said the employment tribunal's decision to dismiss Ms Webley's claim was wrong. He argued that *'it simply cannot be said that the non-renewal of a fixed-term contract is incapable of involving less favourable treatment, otherwise an applicant whose employment ends on non-renewal of her fixed-term contract would invariably be precluded from bringing a claim under the regulations'*.

In coming to his decision, the EAT judge relied on the case of *Whiffen -V- Milham Ford Girls School (2001, IRLR 468)* in which Mrs Whiffen complained that she had not been considered for redundancy under the employer's selection procedure because she was a fixed-term employee. Although the regulations were not in force at the time, the judge said that the case showed that non-renewal of her fixed-term contract was capable of involving less favourable treatment in those circumstances.

He therefore allowed the appeal, set aside the chair's decision and directed that the case be heard before another employment tribunal, *'at which all the issues identified above may be properly considered, based on the evidence and arguments to be advanced by the parties'*.

The DWP has since appealed this decision to the Court of Appeal and the case is due to be heard at the end of November.

R -V- Secretary of State for Trade & Industry

EQUALITY RULES OK

In December last year, the Government introduced the Employment Equality (Sexual Orientation) Regulations 2003 outlawing discrimination on the basis of sexual orientation.

A number of unions, backed by Thompsons, challenged the new regulations. In R (on the application of Amicus-MSF section and others) -V- Secretary of State for Trade and Industry (2004, IRLR 430), they argued that some of the exemptions were incompatible with the obligations under the EC Equal Treatment Framework Directive 2000, and conflicted with provisions of the European Convention on Human Rights.

Although the High Court rejected that challenge (see LELR 90), some of its comments have bolstered the trade union view of the limitations of the exceptions. In particular, it emphasised that the scope of the 'organised religion' exception is very restricted.

WHAT REGULATIONS WERE CHALLENGED?

The exceptions challenged were:

- **Reg 7(2)** - being of a particular sexual orientation is a genuine and determining occupational requirement; it is proportionate to apply that requirement; and the employer is reasonably satisfied that the person does not meet it
- **Reg 7(3)** - the employment is for the purposes of an organised religion and the employer applies a requirement related to sexual orientation to comply with the doctrines of that religion or would allow them to avoid coming into conflict with the strongly held convictions of a significant number of the religion's followers.
- **Reg 25** - benefits that depend on being married

WHAT DID THE COURT SAY ABOUT REGULATION 7(2)?

Trade unions were concerned that this exemption, which is not directly reflected in the underpinning directive, might lead to stereotypical assumptions by employers about a person's orientation from, say, their appearance.

The judge, however, found that the rationale for the exemption was sensible. He said that an employer is not bound to accept, at face value, the answer that someone gives when asked whether they meet the requirement to be of a particular sexual orientation. The requirement of reasonableness ensures that decisions cannot lawfully be based on stereotypes.

WHAT DID THE COURT SAY ABOUT REGULATION 7(3)?

The government more or less conceded that regulation 7(3) should have a very narrow application, only applying to those in pastoral roles within religious organisations. In its view, ministers and priests would be covered by the regulation, but not teachers in faith schools.

The judge accepted this approach. He said that the exemption has to be construed very narrowly, and drew a distinction between employment for the purposes of a religious organisation, and employment based on religious belief. A teacher in a faith school would not be regarded as employed 'for the purposes of an organised religion', and so would not be covered by the exemption.

In terms of ministers in a church, the test would not be the assessment of an individual employer, but an objective assessment by reference to the actual doctrines of the religion. As the judge notes, 'that is very narrow in scope'.

The judgement will be influential when tribunals come to interpret the application of the exemption in any particular case. For example, teachers in a faith school, aid workers for a voluntary organisation, staff in a religious bookshop or even church cleaners can rely on the regulations if they are discriminated against on the grounds of sexual orientation.

WHAT DID THE COURT SAY ABOUT REGULATION 25?

Regulation 25 states that the provisions of the regulations do not affect benefits dependent on marital status. The trade unions argued that this provision would discriminate against gays and lesbians.

Although the judge found in the government's favour on this point, he said that he did not find the issue easy to resolve.

a brief overview of

WE'RE ALL GOING ON A

Until 1998, workers in this country had no statutory right to paid holiday. Since the introduction of the Working Time Regulations (WTR), they have been entitled to a minimum of four weeks every year. Joe O'Hara, a solicitor from Thompsons' Employment Rights Unit in London, summarises the law and answers some commonly asked questions.

THE LAW

Although workers are entitled to four weeks' holiday under the regulations, there is a question mark as to what constitutes a week. According to guidance from the government, a week's holiday equates to the same amount of time as the working week.

That means that someone working five days a week is entitled to 20 days' leave, someone working two days a week gets eight days' annual leave, and a worker on annualised hours gets 1/13th of those hours. Some workers may, of course, get more than this under the terms of their contract.

Workers cannot carry over WTR holidays from one leave year to the next, nor can employers give pay in lieu except on termination of employment.

In the absence of an agreement to the contrary, an employer can count public holidays towards the four weeks. For workers entitled to more than four weeks, the WTR rules apply only to those (first) four weeks.

FREQUENTLY ASKED QUESTIONS

■ *How does holiday entitlement accrue?*

In the first year of a job (but only in the first year), entitlement accrues by 1/12th (rounded up to the next half or whole day) at the start of each month. Someone working three days a week accrues one day's leave at the start of each month; someone working six days a week will have accrued six days' holiday by the start of the third month. The sting in the tail is that during the first year, workers can only take holiday accrued by the month they want to take it.

Employers do not have to apply these restrictive rules and many collective agreements (as well as individual contracts) contain more favourable arrangements.

■ *What happens during maternity leave and sickness absence?*

The European Court of Justice recently held that WTR rights continue to accrue during maternity leave. The same principle applies to sickness absence.

■ *What notice has to be given?*

The WTR allow workers (except for the first year) to take some or all of their entitlement at any time during the year. However (unless there is an agreement to the contrary), workers have to give verbal or written notice of twice the length of the planned holiday. In the same way, an employer who wants to close the workplace for 10 days over Christmas or during the summer should give 20 days' warning.

The employer can block the employee's request by giving counter-notice equal to the length of the planned holiday. For instance, if a worker gives six weeks' notice of an intention to take three weeks' leave, the employer, without giving reasons, can give the worker three weeks' notice (expiring before the holiday is due to start) that he or she cannot take it.

This means that employers, at almost the last moment, can stop workers going away. Not surprisingly, some collective agreements (and individual

SUMMER HOLIDAY

contracts) require the counter-notice to be given in good time after the employer receives the worker's own notice. Many also require the employer to have reasonable grounds for refusing a holiday request.

If as a result of an employer's counter notice, the worker's holiday year expires without having taken the full four weeks, the employer will be in breach of the regulations.

Workers who want to take holiday while off work due to illness or because they are on maternity leave (or any other leave for that matter) still have to give the proper notice to their employer.

■ *How much should workers be paid?*

The regulations say that workers should be paid 'a week's pay' (which is net, not gross). That means that:

- those with fixed, contractual hours and pay get their basic pay (but not overtime unless it is guaranteed)
- piece workers and workers on commission, whose hours are constant but whose pay varies with the amount of work done, get their average hourly rate multiplied by normal working hours
- shift workers whose hours and pay vary in a set pattern get their average hourly rate multiplied by their average working hours
- workers who do not have normal working hours (i.e. a set number of contractual hours every week or month set out in their contract of employment) get their average pay (including overtime, whether guaranteed or not) over the preceding 12 weeks, excluding weeks in which they got no pay at all

Employers can 'set off' a worker's WTR holiday pay against his or her contractual pay - in other words, workers cannot get both. But if the contract provides for holiday pay in excess of 'a week's pay', then workers are entitled to the higher amount.

One contentious matter (which has been referred to the European Court of Justice) revolves around the question of 'rolled-up' pay. In a recent case (see LELR 82) the employment appeal tribunal held that:

- a contract providing for a basic wage or rate topped up by a specific sum or percentage for holiday pay, even if not paid at holiday time, complies with the regulations (courts in Scotland disagree)
- a contract that is silent or tries to exclude holiday pay or states that a rate of pay includes holiday pay without indicating or specifying how much that is does not comply with the regulations

In a recent case - *Canada Life Ltd -V- Gray and anor* (see LELR 89) - the employment appeal tribunal decided that two ex-workers were entitled to holiday pay, even though they had worked for many years without taking any.

And in *Inland Revenue -V- Ainsworth*, the EAT decided that workers on long term sick leave are entitled to four weeks' paid holiday under the regulations, even if their contractual entitlement has been exhausted.

■ *What happens on termination of employment?*

Employers can only pay in lieu of holidays when someone is leaving. In that event, workers are entitled to a pro rata amount from the start of the leave year (or of employment, if a new worker) to the last day of employment, minus holiday actually taken.

If a worker takes more than his or her pro rata entitlement and then resigns or is dismissed, the employer needs an agreement to recoup or offset the 'excess' pay. If there's no agreement (whether express or implied) then there's no entitlement to a repayment.

DRUNK AND DISPUTED

The behaviour of people hearing a case (whether in the workplace or in a tribunal) can be crucial to the outcome. In this case - Stansbury -V- Datapulse plc and anor (2004, IRLR 466) **- Mr Stansbury successfully argued at the Court of Appeal that he had been denied a fair hearing because one of the panel members fell asleep.**

WHAT HAPPENED AT THE HEARING?

Mr Stansbury brought a claim of unfair dismissal after being made redundant by his employer. The case was heard in May and July 2001 by a tribunal panel consisting of the chairman, Mr Ross, and two lay members, Mr Carruthers and Mr Eynon. They decided that the dismissal was fair. Mrs Jennifer Kavanagh represented Mr Stansbury.

WHY DID MR STANSBURY APPEAL?

Mr Stansbury (acting on his own) sought a review of the tribunal's decision, claiming that a panel member fell asleep during the hearing and that his breath smelt of alcohol. The chairman of the tribunal dismissed the request for a review, saying that he should have made his objection known at the hearing.

Mr Stansbury then appealed in September 2001 against the tribunal's decision, claiming (among other things) that one of the panel members was drunk. The employment appeal tribunal (EAT) asked for comments on his allegation from all the tribunal members and the two barristers.

The general consensus was that although Mr Eynon may have smelt slightly of alcohol, he did not actually fall asleep. Rather he closed his eyes to concentrate.

Even Mr Stansbury's barrister said something similar in a statement in April 2002. Her view was that the lay member's behaviour was not an issue until Mr Stansbury received the tribunal's decision.

WHAT DID THE EAT DECIDE?

However, the EAT was also shown an unsigned opinion by Mrs Kavanagh in September 2001 to Mr Stansbury's insurers which said that one of the panel members was clearly drunk and not following the proceedings.

As a result, although the EAT rejected Mr Stansbury's main appeal, it allowed him to go ahead on the procedural ground that he had been denied a fair hearing within Article 6 of the European Convention on Human Rights.

Unfortunately for Mr Stansbury, he did not succeed. The EAT was satisfied that the tribunal's reasoning was careful and that even if Mr Eynon was drunk and did fall asleep, it did not make the hearing unfair.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court agreed with the EAT that although Mr Stansbury did not make his objections known to the tribunal (which would have been preferable), that did not mean he could not raise them on appeal.

But the real question was whether the hearing was fair. The Court of Appeal emphasised that it was the duty of the tribunal to be alert during the whole of the hearing, and to appear to be so. It disagreed with the reasoning of the EAT that the hearing was fair because the decision was unanimous and reserved.

In its judgment, a *'hearing by a tribunal which includes a member who has been drinking alcohol to the extent that he appeared to fall asleep and not to be concentrating on the case does not give the appearance of the fair hearing to which every party is entitled*'. The Court said that public confidence in the administration of justice would be damaged if it took the view that such behaviour did not matter.

The appeal was therefore allowed, the decision of the tribunal set aside and the case remitted for a rehearing before a differently constituted tribunal.

COMMENT

Although the Court of Appeal was prepared to hear this case (despite the fact that the wing member's conduct was not challenged at the hearing), applicants and their representatives should make their objections known straight away.

UNREASONABLE COSTS

Unlike other courts, it is very unusual for employment tribunals to order the losing party to pay the other side's costs. But that's exactly what the tribunal did in McPherson -V- BNP Paribas**, when it ordered Mr McPherson to pay almost £91,000. The Court of Appeal has just upheld this decision, but reduced the amount that he had to pay.**

WHAT WAS MR MCPHERSON'S COMPLAINT?

Mr McPherson claimed unfair dismissal and breach of contract, but withdrew his claims several weeks before the date of the full hearing. He claimed he had been constructively dismissed from his £100,000 (plus bonus and other benefits) job on 29 September 2000.

WHAT WAS THE KEY ISSUE?

The crucial question was whether, in all the circumstances of the case, the claimant had conducted the proceedings unreasonably. It was not whether the withdrawal of the claim was in itself unreasonable.

Mr McPherson's complaint, which was presented on 17 October 2000, was listed for hearing at the end of September 2001. On 21 August, his solicitor wrote to the solicitors for BNP Paribas to notify them that he was being treated for a potentially serious heart complaint and might need surgery, but that they did not intend to apply for an adjournment at this stage.

A month later, however, Mr McPherson applied to postpone the hearing and submitted two letters from his consultant cardiologist. The other side opposed the adjournment and said that if it were postponed, it would make an application for costs on the grounds of unreasonable conduct.

The company's solicitors argued that his condition was not life threatening and did not require an operation. In addition, they said, the bank had already incurred considerable costs. However, the adjournment was granted and the hearing was re-listed for the end of May 2002.

WAS HIS CONDUCT UNREASONABLE?

At the directions hearing on 31 January 2002 Mr McPherson was ordered to disclose information about his new job. He failed to comply with that order as well as another directions order, and subsequently failed to supply information on his medical condition, requested in a number of letters from the solicitors for BNP Paribas. The company then made an application for costs.

On 9 May, Mr McPherson's solicitors wrote to the tribunal giving notice of his intention to withdraw his claim. The hearing of the costs application went ahead on 27 May.

Mr McPherson did not attend, but argued in a statement that he was not well enough to appear and produced a letter from his doctor dated 23 May 2002, which referred back to a consultation in December 2001 at which he had discussed, unknown to the tribunal or BNP Paribas, the option of withdrawing from the case.

WHAT DID THE COURTS DECIDE?

The tribunal ordered Mr McPherson to pay all BNP Paribas's costs of the proceedings (including the costs hearing). He appealed unsuccessfully to the EAT and subsequently to the Court of Appeal.

The latter said that it would be wrong if tribunals always took the approach that withdrawal constituted unreasonable conduct. Notice of withdrawal might in some cases be 'the dawn of sanity' and tribunals should therefore not discourage applicants.

Equally, however, tribunals should not follow a practice on costs that might encourage speculative claims, allowing applicants to pursue cases to the very end in the hope of receiving an offer, but then being able to drop the case without any sanction.

In this case, the court was satisfied that there was ample evidence to justify the tribunal's overall conclusion that Mr McPherson had acted unreasonably. As the unreasonable conduct started with the application for an adjournment in September 2001 on medical grounds, he was only liable to pay the costs incurred after that date.

Notice of compensation

It is a well-established legal principle that workers cannot be compensated twice for any loss that they incur. This has been confirmed in Hardy -V- Polk (Leeds) Ltd (2004, IRLR 420)**, in which the employment appeal tribunal (EAT) said that Ms Hardy was not entitled to be compensated for the full seven weeks of her notice period, as she was only out of work for four of them.**

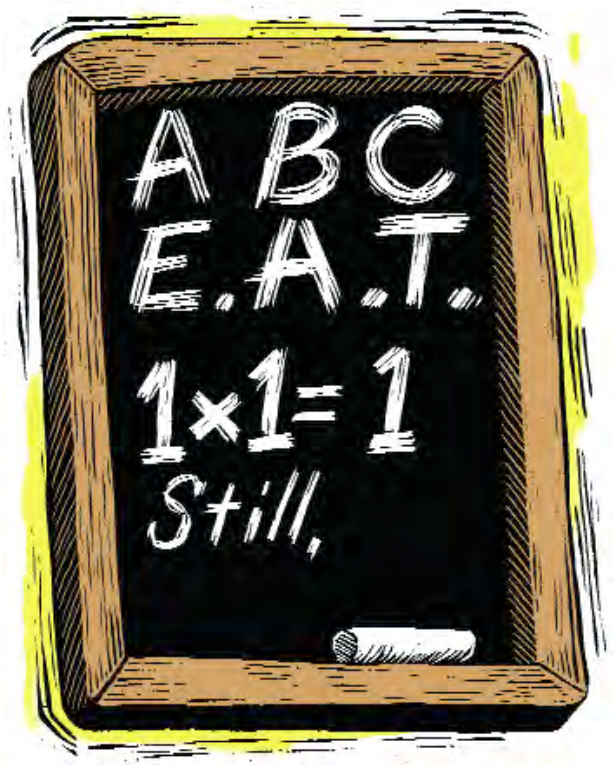
As the decision was made before the decision of the Court of Appeal in *Dunnachie -V- Kingston* (see LELR 87 for a summary), it also said that she was not entitled to compensation for injury to feelings.

WHAT HAPPENED TO MS HARDY?

Ms Hardy had been working for Polk Ltd for about seven years when she resigned on 29 May 2002, to start a better-paid job with a direct competitor. The company asked her to sign a confidentiality agreement, but she refused and they dismissed her on 5 June 2002.

She then started with her new employer on 8 July, a few weeks earlier than she would have done, had she had to work out her full eight-week notice period. That left a four-week period when neither Polk Ltd nor her new employer was paying her.

She asked the tribunal to award her, among other things, seven weeks' notice pay and £10,000 for injury to feelings. The company admitted liability and the tribunal awarded her four weeks' net loss in respect of salary, but no compensation for injury to feelings.



WHAT WERE HER GROUNDS OF APPEAL?

Ms Hardy appealed against the failure to compensate her for injury to feelings, and the award of four weeks' rather than seven weeks' net loss.

The EAT, however, rejected both her claims - the first on the basis of the (now outdated) decision of the EAT in Dunnachie, that it had no jurisdiction to make such an award and could not see the point in re-hearing the arguments that had already been rehearsed and rejected in that case.

The second was on the basis that she did not have the right to be compensated twice. Ms Hardy had argued that, had her employer paid her for eight weeks in lieu of notice at the outset, and had she then gone off and worked for the competitor, she would have been entitled to keep both the payment in lieu of notice and the money from the alternative employer.

The EAT refused to entertain this hypothesis, arguing that although she had been treated badly, she had been adequately compensated with payments of both basic and compensatory awards. It also pointed out that she was only out of employment for four weeks, and earned more for three of them than she would have done if she had continued to work for her old employer.

The EAT decided not to follow the decision in *Norton Tool Co Ltd -V- Tewson (1972, IRLR 86)*, but said instead that it was bound by the Court of Appeal decision of *Cerberus Software Ltd -V- Rowley (2001, IRLR 160)*. It said that, even if a contract of employment entitled the employer to make a payment in lieu of notice, it was still a claim for damages (as opposed to a debt owed by the employer) that the employee had a duty to mitigate.

The tribunal was therefore right to conclude that four weeks rather than seven weeks was the proper calculator. As Ms Hardy was not permitted to make a profit, it could not agree to allow her to recover from Polk Ltd as well as her new employer.

CAN SHE APPEAL AGAIN?

Although the EAT dismissed Ms Hardy's appeal for compensation for injury to feelings, it agreed to extend the time for an appeal until 14 days after the publication of the judgment of the Court of Appeal in Dunnachie.

Willing volunteers?

Until October this year, employers with fewer than 15 employees remain exempt from the provisions of Part ll of the Disability Discrimination Act. In the case of South East Sheffield Citizens Advice Bureau -V- Grayson (2004, IRLR 353)**, the employment appeal tribunal (EAT) decided that because the bureau's volunteers did not count as employees, it was exempt from the legislation.**

WHAT WAS THE BASIS OF MRS GRAYSON'S CLAIM?

Mrs Grayson was employed by the bureau from September 2001 to 26 March 2002 as a home visiting and outreach development worker. In June 2002 she claimed that the bureau had discriminated against her contrary to the Disability Discrimination Act.

The bureau disputed her claim, but said that the tribunal had no jurisdiction to hear it because it had less than 15 employees. Mrs Grayson accepted that there were only 11 paid employees, but she claimed that some of the bureau's voluntary advisers and its management committee directors should also be counted as employees.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal decided that the directors were not employed under an employment contract - they had no contract of service nor any contract personally to do any work for the bureau.

As for the advisers, however, the tribunal found that they were employed under a contract of service. It pointed out that there was no clause in the volunteer agreement that said there was no legal relationship between the bureau and the volunteers.

The bureau expected a minimum commitment of six hours per week from the volunteers. In exchange for their time, the bureau provided training, supervision, experience and cover in respect of any liability for negligent advice.

As long as the volunteers provided the advice, they continued to receive those benefits. If the advisers withdrew their services, then the bureau could stop the benefits. The tribunal said there was a contract of service between them.

WHAT DID THE CAB ARGUE ON APPEAL?

The bureau argued that the tribunal was wrong to have put so much emphasis on the fact that there was no express statement in the volunteer document to the effect that there was no intention to create legal relations between the parties. It pointed out that, while an express statement to that effect may be a relevant factor, the absence of such a statement was not.

Its submission was that, for any alleged contract to be legally binding, the parties should intend to be legally bound by it. As neither the bureau nor the volunteer signs the volunteer agreement, it could not be a document intended to create any legal contract between them.

WHAT DID THE EAT DECIDE?

The EAT said that to ascertain whether a volunteer worker is an employee, it needed to identify an arrangement under which, in exchange for some consideration (such as training), the volunteer is contractually obliged to render services or work personally for the employer.

The EAT did not think there was such an obligation. First of all, no one was required to sign the 'volunteer agreement'. It said nothing about the amount of holiday the volunteer can take, and did not offer payment for the services of the volunteers, just to reimburse their expenses.

Its purpose was simply to clarify the 'reasonable expectations' of each party (presumably so that the bureau could organise the provision of service by way of a rota). The EAT said such terminology was not the language of contractual obligation.

Although the bureau indemnified volunteers against negligence claims, that did not impose a contractual obligation on a volunteer to do any work for the bureau, nor for the bureau to provide work for the volunteer.

Volunteers could withdraw their services from the bureau at any time, with or without notice, and the bureau would have no contractual remedy against them. As a result, the EAT said that the advisers and other volunteers were not employees.