Published by Thompsons Solicitors

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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 52 November 2000

# Sexuality discrimination: unlawful

## MacDonald v Ministry of Defence (Unreported EAT/121/00)

**WE HAVE just reported the Employment Appeal Tribunal judgment that the Sex Discrimination Act does not cover issues of sexuality (Pearce v The Governing Body of Mayfield Secondary School LELR 50).**

Now the Scottish Employment Appeal Tribunal has reached the opposite conclusion. It is unlawful to discriminate and harass a gay employee – contrary to the Sex Discrimination Act 1975. The Court reasoned that the word sex in the legislation encompassed sexuality and therefore protected lesbians and gays. If there was a need for a comparator, then the comparison was with one of the opposite sexuality and gender.

In Mr MacDonald's case the EAT was fully aware of the chequered legal history of sexuality discrimination. They noted the Court of Appeal case of **Smith v Gardner Merchant** (1998 IRLR 510, LELR 26) which rejected the idea of including sexuality discrimination within the definition of gender discrimination. The Court only accepted that there could be sex discrimination claim if a "homosexual" of one sex compared themselves with a "homosexual" of the opposite sex. The **Pearce** case followed the reasoning in **Smith v Gardner Merchant** in rejecting Ms Pearce's claim.

The EAT in MacDonald got around **Smith v Gardner Merchant** by relying on European developments which occurred after **Smith v Gardner Merchant** was decided. including the ruling of the European Court of Human Rights that the discharge of lesbian and gay personnel from the armed forces was unlawful (**Lustig-Prean** ([1999] IRLR 734, LELR 40). They also made reference to an unreported case **Salguerio** which said that the word "sex" in Article 14 of the European Convention on Human Rights prohibits sexuality discrimination. Lastly but not least the Court was most insistent on the need to apply European law in their interpretation of UK law both on principle or under the Human Rights Act 1988.

As there was statutory ambiguity in the word "sex" the EAT held that they should interpret it to include sexuality. They could both apply European law and depart from the Court of Appeal in **Smith v Gardner Merchant.**

Confusingly that does not necessarily mean that the law has changed, just that both arguments are now supported by legal authority. Employers will rely on **Smith v Gardner Merchant** and Applicants on the Human Rights Act and the **MacDonald** case. So where there are instances of sexuality discrimination including dismissal, claims can now be argued in the Tribunal with some chance of success.

The European Framework Directive, passed by the Council of Ministers on the October 17 will make sexuality discrimination unlawful. The wide prohibition of the directive will include indirect discrimination as well as direct. The Government only has three years to implement the law as far as lesbian and gay employees are concerned, so by then at the latest, the matter will be beyond doubt.

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# National Minimum Wage becomes less minimal

**National Minimum Wage Regulations 1999 (Amendment) Regulations 2000**
**Smith v Thomas (Employment Tribunal, 1100367/2000, unreported)**

**THE NATIONAL Minimum Wage regulations came into force on 1 October and raised the rate of the national minimum wage from £3.60 to £3.70 per hour.**

The regulations also introduce a number of other changes:

- workers on National Traineeships and their equivalents in Scotland and Northern Ireland are now treated as having contracts of apprenticeship for the purpose of the national minimum wage;
- post-graduate students who do work experience for up to one year as a requirement of their course will not have to be paid the national minimum wage for that work, provided that the course is at a UK higher education institution;
- time when a worker is permitted to sleep can only be excluded from the calculation of the national minimum wage if the worker is provided with suitable facilities for sleeeping.

The regulations also introduce technical amendments relating to travel time between assignments, being "on call" at home and the submission of time sheets.

Meanwhile an Employment tribunal has ruled on the definition of a "rest break" under the **National Minimum Wage** regulations. In **Smith v G and M Thomas**, a tribunal had to consider whether a nightcarer's breaks during an 11 hour shift counted for the national minimum wage. Regulation 15(7) provides that the period of a "rest break" does not count towards time worked. Could the Applicant count the full 11 hours towards her time worked? Although the tribunal refused to believe that she never "nodded off" during her shift, there was no proper provision for her to have a rest break during her shift.

The tribunal saw no problem in transporting the definition of a "rest break" contained in the Working Time Regulations into the National Minimun Wage Regulations as a minimum standard. The rest break must have a clear start and end point, be uninterrupted and be for at least twenty minutes. Applying the reverse burden of proof built into the national minimum wage regulations, the respondents were unable to convince the Tribunal that Ms Smith enjoyed the benefit of rest breaks. The entire 11 hours therefore counted towards her time worked and she was not being paid the national minimum wage.

# Human Rights seminar

**AN IMPRESSIVE audience of trade unionists attended Thompsons Human Rights Act seminar on Monday 9 October. The seminar focussed on the issues which will assist unions and members and blended policy developments and practice with legal theory.**

**David Lock MP, minister from the Lord Chancellors Department gave the keynote address and underlined the cultural significance of the Act, in terms of the creation of readily identifiable positive rights, not a lawyers' gravy train. But he confirmed that there are no plans for the Government to sign up to the new Protocol 12, the comprehensive anti-discrimination protocol.**

# Police employers liable for bullying

**Waters v Commissioner of Police of the Metropolis [2000] IRLR 720.**

**EMPLOYERS MAY face negligence claims if they fail to deal adequately with sexual harassment, following the decision in the recent case of Waters v Commissioner of Police of the Metropolis.**

This case concerned a police woman who was raped by a fellow officer in police residential accommodation. She reported the assault to her superiors but after an internal enquiry no action was taken against the male officer.

She subsequently suffered further harassment and victimisation from her colleagues. This included being ostracised, left with no support in emergency situations, having unfair reports written about her; being excluded from duties she should have been carrying out and being advised to leave the police force.

She lodged a claim in the employment tribunal on the grounds that being excluded from duties amounted to victimisation in breach of s 4 (1) (d) of the Sex Discrimination Act 1975. In addition, she also pursued a civil action claiming that the Commissioner of Police had acted negligently in failing to deal with her complaint that she had been sexually assaulted by a male colleague, and had caused or permitted other police officers to harass and victimise her.

The Employment Tribunal, Employment Appeal Tribunal and the Court of Appeal dismissed her complaint of sex discrimination on the grounds that the alleged perpetrator was not acting in the course of his employment. In the civil action for negligence the Court of Appeal also dismissed the case and held that the Commissioner did not owe a duty of care to police officers under his control equivalent to that of an employer.

Ms Waters then appealed the negligence, but not the discrimination claim to the House of Lords. The Lords considered that while the courts have accepted that the police may not be sued for negligence in respect of their activities in the investigation and suppression of crime, that did not apply where there was an employment relationship.

In particular, a person employed under an ordinary contract of employment can have a valid cause of action against her employer both in negligence and breach of contract if the employer fails to protect her against victimisation and harassment which causes both physical and psychiatric injury.

**Sarah Spencer, director of the Institute of Public Policy and Research and a member of the Government's Human Rights Task Force, argued for the creation of a Human Rights Commission, as originally promised by the Government and insisted that the position of the EOC and the CRE would not be undermined by such a body.**

**Helen Mountfield, a barrister specialising in human rights law at Matrix chambers, then gave an insight into the opportunities for legal challenge and bargaining presented by the Act. She emphasised the importance of Article 8 – the right to respect for privacy and family life – to discrimination on grounds of sexuality, (now confirmed in the McDonald v Ministry of Defence case reported on page 1) and the enforcement of family friendly policies. Also discussed was whether the new workplace communication regulations comply with Article 8. Article 6 will impact on disciplinary proceedings and unfair dismissal cases and Article 14 and the first protocol will influence pensions law.**

**A digest of the speeches is available from the Thompsons' Employment Rights Unit at Congress House as is a short guide to the Human Rights Act for trades unionists.**

# Doctors on call

## Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana (European Court of Justice, 3 October 2000)

**THE EUROPEAN Court has now given its first judgment on the Working Time Directive. The case was brought by SIMAP, a union representing Spanish doctors, and concerned medical staff providing primary care in health centres in the Valencia region.**

The Court considered a number of important issues on the scope and application of the Directive which will have implications for workers throughout Europe, including the UK.

### The Directive and public sector workers

The employers argued that the medical staff were not covered by the Directive because of Article 2(2) of the Framework Directive on health and safety which states that it does not apply "where characteristics peculiar to certain public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it"

The Court stressed that both the Framework Directive and the Working Time Directive have the object of improving the health and safety of workers and must be broad in scope. The restriction in Article 2(2) must be interpreted narrowly and applies to certain public service activities intended to uphold public order and security which are essential for the proper functioning of society.

The activity of primary care teams is of a different nature and therefore is not excluded by Article 2(2): it falls within the Framework Directive and the Working Time Directive.

This aspect of the decision is helpful in limiting the number of public sector workers who will be excluded from health and safety and working time protection to those directly involved in public order and security.

It may also be helpful when the ECJ considers the scope of the transport sector exclusion in the UK referred case of **Bowden v Tufnells Parcels Express Ltd** (see LELR issue 49) where Bowden and her colleagues are arguing that the exclusion does not extend to clerical workers in the transport sector.

### What is working time?

This is the aspect of the decision with the most obvious direct impact on public sector workers, and particularly health and care workers in the UK.

The Working Time Directive defines working time as any period during which the worker is

- working
- at the employer's disposal; and
- carrying out his/her activities or duties

The Advocate General in his Opinion to the Court had suggested that for a period to count as working time it was sufficient for it to satisfy any one of the requirements – it was not necessary to satisfy all three. The Court does not appear to take the same view.

This becomes apparent when the Court is considering whether time spent on call is working time. The Court considered two situations: the first where the doctor is on call and required to remain at the health centre throughout the period on call (commonly referred to as "standby") and the second where the doctor is on call by being contactable at all times without having to be at the health centre (this is what is more commonly referred to as "on call"). In both scenarios the ECJ considered whether all three conditions were fulfilled in order to determine whether the period counted as working time.

For periods on standby, the Court said that the first two conditions (working and at the employer's disposal) were obviously fulfilled. The Court also thought that the third condition (carrying out activities or duties) was fulfilled as doctors were obliged to be present and available at the workplace with a view

to providing their professional services and are therefore carrying out their duties. Periods on standby therefore count as working time.

The Court reached a different conclusion for periods on call. The Court concluded that even though medical staff on call are at the disposal of their employer (because they can be called in at any time), they may "manage their time with fewer constraints and pursue their own interests". In consequence, the Court decided that only those periods linked to the actual provision of primary care services (ie when actually called out or called upon) are to be regarded as working time.

This will be relevant to health workers and care workers in the UK and for other workers who have periods on call or on standby – for example maintenance workers. If the worker is required to attend at the employer's premises for the shift, in case required, that counts as working time. This would also be the case for staff who work in catering or retail, are required to be present throughout the day, but are only paid when serving customers (so-called zero hours contracts): the full period would be working time for the purpose of the provisions of the Directive.

The decision is not so helpful for those on call, but not at the employer's premises. The periods whilst on call, but not called will not be working time. However, as soon as a call is received and action or advice is required, that period whilst carrying out those duties counts as working time.

One may argue against this distinction on the basis of legal interpretation. However, it is a practical outcome which mirrors the approach taken in the Whitley Council agreement on working time in the National Health Service. The fact that periods on call are not themselves automatically working time does not allow employers to roster those periods without regard to the Directive. As soon as a worker on call is called out or called upon, the working time clock starts to tick, a rest period has been interrupted and there are consequences in terms of the requirement for compensatory rest.

## Night work, shift work and direct effect

The European Court considered that in this case the question of whether the doctors concerned were night workers was one for the national court, but it concluded that the doctors were shift workers because they were assigned to the same posts on a rotational basis, making it necessary for them to perform work at different hours over a given period of days or weeks.

The final point concerned direct effect of the Directive for public sector workers. The Court concluded that the provisions on the reference period for calculating the average working week were sufficiently unconditional and precise to have direct effect. This may suggest that when considering a different Article of the Directive (Article 7 on paid annual leave) the UK Court of Appeal in the **Gibson v East Riding** case was unduly restrictive in determining that the provision in question did not have direct effect.

## Other Developments

BECTU's challenge to the requirement to have 13 weeks continuous service in order to qualify for the right to paid annual leave under the UK working Time regulations will be heard in the ECJ on 7 December. It will be followed by the Advocate General's opinion and the judgment of the Court will follow after that

# Thompsons' Teesside office

THOMPSONS HAS opened a new office in Middlesbrough on Teesside. And the main office in the region, based in Newcastle upon Tyne, has relocated to new premises at The St. Nicholas Building, St. Nicholas Street in the centre of Newcastle.

Tony Lawton, managing partner in the North East said the move contrasted with that of commercial firm Eversheds, which recently closed its Teesside operation. He said, "our first priority is to working people, trade unions and their communities. By moving into Teesside we are ensuring that we are better able to serve them."

Robert Wood, the partner responsible for the Teesside office said, "this is an opportunity for us to provide a better and more accessible service for our clients in their fight for compensation for workplace injuries and occupational diseases."

The firm has recently seen a significant increase in the number of cases in the Teesside area for those suffering from asbestos related conditions – many of whom worked in the chemical plants and ship yards of Teesside.

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# Snooping on staff is still suspect

## The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 SI 2000/2699

**WORKERS SHOULD be able to carry out their duties in a dignified manner, with respect for their autonomy and without fear of constant monitoring. The implied contract duty of mutual trust and confidence between employer and employee arguably requires this approach. However, new regulations covering workplace surveillance appear to give employers the right to monitor and record e-mails, telephone calls and internet interactions at work, almost without restriction and with no duty to consult or negotiate with trade unions or worker representatives.**

This is an issue of particular concern given the advent and increasing use of forms of new communications technology and a labour market culture which has resulted in many people in the UK having to spend most of their waking hours at work. In these circumstances the boundaries between work and the rest of life are inevitably less distinct. Employers should be understanding about the need for a certain degree of privacy in order to help workers manage other aspects of their lives, which in turn impact on their work. In return, employers are likely to be rewarded with higher levels of worker productivity, morale and motivation.

This article outlines the new regulations, and their possible legality against the background of the Human Rights Act 1998 and relevant UK and European Union law.

The 'Interception of Communications' Regulations ('IC Regs') came into effect on 24 October 2000. They provide a statutory framework permitting employers to monitor and record certain types of communications in defined circumstances without the consent of the caller, sender or recipient.

The IC Regs are an exception to the general principle that it is unlawful for a person, without lawful authority, intentionally to intercept a communication in the course of its transmission by way of a public or private telecommunications system (Regulation of Investigatory Powers Act 2000 ('RIP Act') s.1). But intercepting communications is not unlawful if the interceptor reasonably believes that both parties to the communication consented to the interception.(s.3 RIP Act).

### Lawful interceptions under the IC Regs

The IC Regs provide authorisation in so many circumstances that it is difficult to see how employer interceptions could ever fall foul of the provisions.

If employers have made all reasonable efforts to inform every person who may use their system that interception may take place, Reg 3 authorises employers to monitor or keep a record of communications on their telecommunications systems without consent for a wide variety of purposes which are loosely drafted. They include categories such as to establish the existence of facts relevant to the business, to ensure the effective operation of the system and to investigate or detect the unauthorised use of telecommunications systems.

The interception must be effected solely for the purpose of monitoring or recording communications relevant to the employer's business. However, this test is also very widely defined, to include any communication relating to the business. For example, the mere fact of an employee using the company e-mail system

This month's guest author is Lucy Anderson, TUC Employment Rights Officer

(whether for 'business' or 'personal' use) would seem to amount to communication relating to the business, if only in view of the personnel management issues that arise.

In addition, monitoring (but not recording) may be carried out without consent to determine whether or not the communications are relevant to the business.

## Human rights implications

The right to privacy in Article 8 of the European Convention on Human Rights, as now applied through the Human Rights Act 1998 might be useful in challenging employer actions on workplace surveillance. Even where employees are informed about monitoring or have 'consented' this may still not be sufficient defence if there were in reality no opportunity to object or if the extent of the surveillance were out of all proportion to the reason for carrying it out (see Handyside v UK 1976 1 EHRR 737).

Where a policy on surveillance has been agreed through consultation and negotiation with a trade union, it is much less likely that any interception in accordance with that policy could be challenged, but the negotiation of a good policy could provide much needed protection for workers. There are obviously circumstances in which employers have a legitimate interest in intercepting communications which should not be objected to by the workforce, for example to check for viruses or where there is a suspicion that harassment has been occurring. Similarly, employers policies should include provisions to allow workers limited personal use of telephones, internet and e-mail, and guarantee no monitoring or recording unless the worker is unexpectedly unavailable for a long period or the employer has reasonable reason to believe that a worker has breached the policy or committed a criminal or serious disciplinary offence.

## Data protection

Recorded information obtained through interception of communications is likely also to be covered by the Data Protection Act 1998, and processing of the information must comply with the Act. The rules on processing 'sensitive personal data' (which might include the record of a telephone call from or to a medical adviser) are particularly strict.

The Data Protection Commissioner has issued a draft Code of Practice on the use of personal data in employer/employee relationships. The draft Code addresses personal information that may arise in a wide variety of situations, for example recruitment, employment records and employee monitoring.

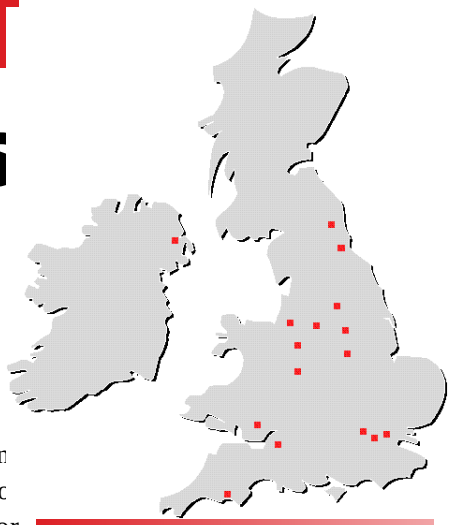
The section of the draft Code on employee monitoring provides a more favourable framework for workers and unions than that established by the IC Regs. One of the recommendations is that trade unions should be consulted on proposed monitoring of employees. The draft Code also stresses the importance of not monitoring unless there is a problem that calls for monitoring, and that the methods used should be proportionate and not unduly intrusive into an individual's privacy. Compliance with the Code will be taken into account in the Data Protection Commissioner's decisions on issuing enforcement notices against employers under the Data Protection Act.

There may also be issues as to whether the RIP Act and the IC Regs comply with the relevant European Union Directives on telecommunications and data protection – Directives 95/46/EC and 97/66/EC. In particular, it is not clear whether the routine monitoring or inspection by businesses for purposes unrelated to the exercise of official authority over possible criminal offences or professional regulatory regimes complies with European law. In addition, Article 5(1) requires the consent of users as a general principle to authorise interceptions. In the UK law 'reasonable belief' by employers is sufficient and may not comply with Article 5(1), which arguably requires a stricter test. It would mean, for example, that telephone calls from or to external sources could only be recorded if the external contact were warned in advance on each occasion and had explicitly given their consent.

## Conclusion

The RIP Act and the IC Regs do not strike an appropriate balance between the interests of employers and workers. The TUC is recommending a better legal framework encouraging employers and unions to negotiate agreements on this issue. Regulations should only apply where there is no such agreement, and there should be an enforceable legal right for unions to be informed and consulted. A new Code of Practice on privacy and autonomy at work with statutory force, and of wider application than the draft Code on data protection, would also provide certainty and consistency for workers, unions and employers, as well as courts and tribunals applying relevant legislation.

# The hidden penalties of leaving work



**Giraud UK Ltd v Smith [2000] IDS Brief 668**
**Knight v London Central Bus Co Ltd (unreported Employment Tribunal Case: 2300744/99)**

**CONTRACTS OF employment often include clauses enabling employers to recover money such as the costs of training, tools or uniform on the termination of employment or for the failure to give the full period of notice by an employee. The legality of this type of clause was most famously challenged in the area of refundable maternity pay. In the European Court of Justice it was argued unsuccessfully that it was a breach of equal pay law to require women to refund contractual maternity pay if they left employment within a certain period of their maternity leave (Boyle v EOC [1998] IRLR 717).**

But the legal enforceability of other types of repayment clauses can be more precarious as has been shown in these two recent cases. The issue most frequently arises when an employer withholds all or part of an employees final salary (and in some instances threatens to sue in Court for the balance) and the ex-employee brings Tribunal proceedings for breach of contract or claiming the money withheld is an unlawful deduction.

If the repayment clause operates as a penalty against the employee who is in breach of contract, then the employer cannot enforce it. Unless the sum in the clause is a genuine pre-estimate of likely loss from the breach by the employee, it will be a termed a penalty.

In two recent cases Employmen Tribunals have taken a robust view c these clauses offering some protection for workers. In **Giraud**, Mr Smith was a driver and under his contract he was required to give 4 weeks notice if he wanted to leave and that a failure to give the Company the period of notice would result in a deduction from final payment equal to the number of days short. Mr Smith left without giving any notice and the Company refused to pay him four weeks money.

The Tribunal found that the sum deducted bore no relation to the loss that the company might suffer as a result of his resignation without notice. New drivers could be easily found and the Tribunal concluded that the intention of the clause was to deter other employees from leaving without giving notice and was unenforceable. The EAT agreed.

Mrs Knight was employed as a bus conductor, her contract said that if she left work within one year she had to repay her employers £500 for her training and uniform. She was sacked after four months and had the £500 deducted from her final salary. The employer relied on the contract and said it could not be a penalty because it was not in respect of a breach of contract by Mrs Knight. But the Tribunal said that as Mrs Knight was not in a position to bargain on her terms when she joined the company and the £500 was not a genuine pre-estimate of cost. The employers had to repay the amounts deducted to Mrs Knight. The repayment provision was set aside by the Tribunal.

Just because repayment clauses of this type are in the contract, they may not be worth the paper they are written on.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