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ACAS CP GUIDE

The conciliation service ACAS has published a short guide for employers on civil partnerships.

The guide sets out employers' duties to provide to employees who are civil partners, and to their civil partners, the same benefits they give to married employees and their spouses. These could include survivor pensions, flexible working, statutory paternity pay, paternity and adoption leave, health insurance or time off before or after marriage/registration.

There are no legal requirements to offer such benefits to couples of either the same or opposite sex who have not entered into a marriage or civil partnership. However, where benefits are made available to unmarried opposite sex couples, they must be extended to same sex couples who have not registered a civil partnership.

Go to: *www.acas.org.uk/index.aspx?articleid=997* for more information.

NEW COMPENSATION LIMITS

A number of new compensation limits came into force on 1 February 2006. These include:

	Previously	Now
Limits on guarantee daily payments	£18.40	£18.90
Limit on a week's pay	£280	£290
Maximum amount of a week's pay for calculating basic or additional award ofcompensation for unfair dismissal or redundancy payment	£280	£290
Maximum basic award for unfair dismissal (30 weeks' pay)	£8,400	£8,700
Minimum basic award for dismissal on trade union, health and safety, occupational pension scheme trustee, employee representative and on working time grounds only	£3,800	£4,000
Maximum compensatory award for unfair dismissal	£56,800*	£58,400*
Minimum award for employees excluded or expelled from a trade union	£6,100	£6,300

*There is no limit where the employee is dismissed unfairly or selected for redundancy for reasons connected with health and safety matters or public interest disclosure ("whistleblowing"), or the dismissal is contrary to discrimination law.

EQUALITY 200 YEARS OFF

In its annual survey of women's representation, the Equal Opportunities Commission (EOC) suggests that it will take 20 years before there are equal numbers of men and women in the top civil service; 40 years for directors of FTSE 100 companies; 40 years for the senior judiciary; and up to 200 years for Parliament.

Thirty years after the Sex Discrimination Act (SDA) came into force, "Sex and Power: Who Runs Britain? 2006", showed that women represent only 11 per cent of directors at FTSE 100 companies, 20 per cent of MPs and 16 per cent of council leaders.

The survey also shows that women make up just nine per cent of the senior judiciary, 10 per cent of senior police officers, and 13 per cent of editors of national newspapers.

While women are reaching critical mass in some areas, such as heads of professional bodies (33 per cent) and national arts organisations (33 per cent), in most fields there has been little change since the EOC first published the survey two years ago.

The EOC is calling for:

- all political parties to take action to improve women's representation before the sunset clause in the law makes positive action impossible
- more high-quality, high-paid, flexible and part-time work at all levels
- a legal requirement for employers in the private sector to promote sex equality and eliminate sex discrimination, similar to a new duty on public sector employers expected in 2007.

NEW BENEFIT RATES

The Government has announced new rates of statutory benefits, all of which apply from April 2006. These include statutory maternity, paternity and adoption pay, as well as a new level for statutory sick pay.

From April 2006:

- the standard rate of statutory maternity, paternity and adoption pay rises from £106 to £108.85 per week
- the standard rate of statutory sick pay goes up from £68.20 to £70.05 per week
- the earnings threshold for these payments increases from £82 to £84 per week.

Grievance dispute

In line with regulation 14 of the Dispute Resolution Regulations, the employment appeal tribunal (EAT) has ruled that a statutory questionnaire cannot be counted as a statement of grievance.

In Holc-Gale -v- Makers UK Ltd, Ms Holc-Gale served her employer with an equal pay questionnaire before bringing her claim. She did not lodge a grievance beforehand.

Instead, she argued that the statutory questionnaire should be considered in two, separate parts. The first part, in which the claimant sets out the information about the case, should be regarded as the grievance statement. It is only the second part, in which the claimant asks her questions, which should not.

The employment appeal tribunal disagreed. It said that the policy behind regulation 14 was to exclude the anti-discrimination questionnaire procedure from the statutory definition of grievance. The EAT also rejected her argument that the requirement to lodge a statutory grievance before making a claim was a breach of the Equal Pay Directive.

Male to female pensions

In the UK, men currently receive their state pension at 65; women at age 60. But how does that affect transsexuals?

The Advocate General (who advises the European Court of Justice in making their decision) has said that it was contrary for a member state to refuse a retirement pension to a male to female transsexual before the age of 65, if that person would have been entitled to a pension at age 60 under national law.

Sarah Margaret Richards, a male to female transsexual who had gender reassignment surgery in May 2001, applied in February 2002 for a pension to be paid from her 60th birthday, which was in 2002.

The Department for Work and Pensions refused on the grounds that it was more than four months before her 65th birthday, as it still considered her to be a man.

The ECJ has still to give its verdict, and although it does not always follow the opinion of the Advocate General, it usually does so.

Equally valued

Just when the courts seemed to have accepted that pay differences in equal pay cases should all be viewed with suspicion (*Sharp -v- Caledonia Group Services, LELR 107*), the Court of Appeal has ruled the opposite.

It has decided in Armstrong and ors -v- Newcastle Upon Tyne NHS Hospital Trust that employers do not have to provide justification for a pay disparity unless the reason for it – the genuine material factor – is itself tainted by sex discrimination.

This is in complete contrast to the decision of the employment appeal tribunal (EAT) in *Sharp*, which said that employers have to objectively justify all material factor defences. Although the Court of Appeal decision does not refer to *Sharp*, it takes precedence over any decision by the EAT.

This decision will be covered in more detail in the next LELR.

A rub down

A woman prison officer was directly discriminated against when she was required to do rub down searches of male prisoners in a men's prison, an employment appeal tribunal (EAT) has ruled.

The officer, Mrs Carol Anne Saunders, took a claim of sex discrimination against the Home Office after she was transferred to a women's prison, having refused to do the searches of male prisoners because she found them degrading and distasteful.

Although male prison officers are not allowed to do rub down searches of women, women prison officers in male prisons are required by the rules to carry them out on men.

The EAT has confirmed in Home Office -v- Saunders that the correct comparator for a female officer carrying out a search on a male prisoner was a male officer carrying out a search on a female prisoner.

Mrs Saunders had therefore been directly discriminated against when she was required to carry out a rub-down search of a male prisoner when a male colleague was specifically prohibited from carrying out a rub-down search of a female prisoner. To hold otherwise, said the EAT, would be to *"defeat the purpose of the legislation, which is to eliminate discrimination against women on the ground of their sex in all the areas with which it deals"*.

STILL NO JUSTICE FOR NUJ

Under the Employment Relations Act 1999, trade unions can apply to the Central Arbitration Committee (CAC) for recognition if they cannot reach a voluntary agreement with the employer.

In NUJ -v- Central Arbitration Committee and MGN Limited (2006, IRLR 53), the Court of Appeal said that the CAC was right to rule an NUJ application inadmissible, despite the fact that it had the support of a majority of the members of the bargaining unit.

The NUJ instructed Thompsons to act on its behalf.

WHAT WERE THE BASIC FACTS?

By June 2003, more than half the journalists in the sports division of Mirror Group Newspapers (MGN) were members of the NUJ, so the union approached management for recognition.

Some time after this, however, the British Association of Journalists (BAJ), which had, at most, one member in the division, also made an approach, and the employers signed a recognition agreement with them in July 2003.

The employers subsequently consulted the union on two occasions, but did not engage in any pay bargaining, nor was the mechanism for this set up.

In September 2003, the NUJ applied to the CAC for recognition, but as MGN had already come to an agreement with the BAJ, the arbitration committee said the NUJ's application was inadmissible.

WHAT DID THE HIGH COURT DECIDE?

And the High Court agreed (see *LELR 96* for details). It said that the committee could not proceed with an application for recognition if another collective agreement was "already in force."

In this case, the High Court said that the agreement between MGN and the BAJ was clearly designed to be a recognition agreement and satisfied the requirements of the legislation. And because it was binding from the moment it was signed, it was therefore in force when the CAC considered the NUJ's application.

It also said that, although everyone has the right to freedom of association, that right could not be breached even if most of the workforce was 'shut out' from the collective bargaining process because the employer had recognised another union.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal said that the High Court was right, and that the NUJ's application was inadmissible because another collective agreement was in force.

It dismissed the union's argument that a collective agreement could not be in force if it had not been used to determine the terms and conditions of workers in the bargaining unit.

All that the CAC needed to look for "was an earnest desire to work within the agreement; not evidence that any of its specific provisions had in fact been carried out."

"In force" simply meant that, once signed, the agreement was binding on the parties to it.

The NUJ then argued that the refusal of MGN to negotiate with them constituted a breach of article 11 of the Human Rights Act – the right to join a trade union. The Court also dismissed this argument, saying that *"the right to be recognised for the purposes of collective bargaining does not fall within the rights guaranteed by Article 11."*

Nor, said the court, had the state discriminated against the union under Article 14 of the Human Rights Act by failing to take positive steps to stop the recognition legislation being abused by an employer.

COMMENT

The case highlights the loophole available to employers to reach sham agreements with unrepresentative "unions" in order to block the representative union's application for recognition. Despite the evidence that the BAJ had no more than one member in the bargaining unit and there had never been any negotiations with it, the NUJ was still not recognised.

WHO'S WHO?

Although most employees will know the identity of their employer, things can get complicated in the event of a merger and/or a TUPE transfer, as in the case of Crest Packaging Ltd and ors -v- Bell and ors.

The employment appeal tribunal (EAT) has said that tribunals must look for documentary evidence before deciding the employer's identity, and not make assumptions about the employer's intentions.

Amicus instructed Thompsons to represent its members.

WHAT WERE THE BASIC FACTS?

Following the collapse of the Crest group of companies in 2003, almost 300 employees brought claims for outstanding wages and for unfair and wrongful dismissal.

However, before any of the claims could be heard, the tribunal had to decide whether the parent company, or one of two subsidiaries, was their employer. Six employees were chosen as representatives of the 267 claimants, with everyone agreeing to abide by the outcome.

The tribunal chairman (sitting alone) decided that all the test claimants were employed by Crest Packaging Limited, the parent company of the group, and not either of the two subsidiaries. All three companies challenged that decision.

WHAT WAS THE RELEVANT HISTORY?

In May 1985, Crest Flexible Packaging Ltd bought two subsidiary companies from Bowater, which it then transferred on to Crest Cartons Ltd shortly afterwards. The parent company of that group became Crest Packaging Ltd.

The first three test claimants, Messrs Parry, Bell and Ingram had originally been employed by Bowater, but were transferred under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) to Crest Flexible. Mr Ingram was then transferred on to Crest Cartons.

Messrs Breaker, Packham and Stevens, who had all joined the Crest group after May 1985, were issued with statements of terms and conditions which only referred to Crest Packaging. The tribunal chairman decided that the parent company must therefore have considered itself to be their employer.

On that basis, he concluded that it would be irrational for pre-1985 employees to have a different employer from post-1985 ones; that Crest Packaging clearly controlled their terms and conditions of employment; and that it made no distinction between pre- and post-1985 employees.

WHAT DID THE EAT DECIDE?

Messrs Parry, Bell and Ingram: The EAT said that the chairman seemed to think that all he needed to do was assess whether Crest Packaging intended to be their employer. Instead of concentrating on what Crest Packaging intended, he needed to look for evidence to back up his conclusion that these three employees had ceased to be employed by Crest Flexible or Crest Cartons, and been re-engaged at some point on new contracts of employment with Crest Packaging.

As he had not done that, the chairman had misdirected himself as to the relevant law and had come to a factual conclusion that was "perversely misguided".

Messrs Breaker, Stevens and Packham: In these cases, the EAT said that the chairman did not apply any of the correct legal principles. It criticised his conclusion that the three were employees of Crest Packaging "primarily" because it had issued them with their statement of terms and conditions. They said that he *"focused merely on what one party to the supposed employment contract intended or expected, and ignored all evidence pointing to whether or not there was any evidence to show whether the employees intended to, and did, contract with Packaging."*

In particular, it said that the chairman paid no "express regard" to the documentary material indicating that one of the subsidiaries was the real employer. Nor did he provide an explanation for all the material produced by Crest Flexible and Crest Cartons, indicating that in fact they were the employers.

The EAT allowed the appeal and remitted the issue of the identity of the employer of each of the six test claimants to a different tribunal for re-hearing.

a brief overview of

WE CAN

A contract of employment is an agreement entered into by two parties, giving rise to obligations that are recognised or enforced by the law.

Until one of the parties accepts the offer of a job, there is no contract between them. Once they accept, however, they become bound by the terms of the offer. It is important to note that a contract does not have to be in writing (although it helps to establish what terms had been agreed) for it to be legally binding.

In this article ***Emma del Torto***, a solicitor from Thompsons Employment Rights Unit in Cardiff, looks at the employment contract and answers some frequently asked questions.

EMPLOYEE OR WORKER?

There are three different types of employment relationship – an employee, a worker (for instance, someone who works on a casual basis) or someone who is self employed.

Although there is no legal test for establishing whether someone is an employee or a worker, the person is likely to be an employee if the employer:

- provides the work
- controls when and how the work is done
- provides tools, equipment and even a uniform.

If, however, someone else can substitute for the worker, if they determine their own hours, hire their own helpers and pay their tax and national insurance on a self-employed basis, then they are probably not an employee.

All this matters because employees enjoy far more rights than workers or people who are self-employed – for instance, the right to claim unfair dismissal (if they've worked for a year) as well as various maternity and paternity rights and the right to request to work flexibly.

WHAT ARE EXPRESS CONTRACT TERMS?

Express contract terms are terms explicitly set out in the employment contract, and as a result, both parties know (hopefully) what they have agreed to.

These terms deal with specific working arrangements including pay, hours, holidays, place of work, provisions for sick pay, pensions and other benefits.

WHAT ARE IMPLIED CONTRACT TERMS?

These are terms that the employer and the employee are assumed to have agreed. Terms regarded as so obvious that they need not specifically be included – for example the employer's duty to provide a safe working environment and the duty of mutual trust and confidence.

The implied term of trust and respect has proved to be more powerful, in certain circumstances, than an express term of the contract. In *United Bank Ltd -v- Akhtar (1989, IRLR 507)*, Mr Akhtar claimed constructive dismissal when he was told to move from Leeds to Birmingham to work.

Despite the fact that there was a mobility clause in his

WORK IT OUT

contract, the employment appeal tribunal (EAT) found it unreasonable for the employer to expect the employee to move within the six-day time frame. In other words, it said that the implied term of trust and respect overrode the express term of the contract.

WHAT ARE INCORPORATED TERMS?

These are terms that are incorporated from other sources, for example from collective agreements or works rules.

These can be expressly incorporated (for example when the individual contract states that certain terms are regulated by a collective agreement); or impliedly incorporated (for example when custom and practice is so well-established that the terms of collective agreements are incorporated into individual contracts).

WHAT ARE STATUTORY TERMS?

These are terms that are implied or imposed by statute. Examples of statutory terms are the right to a minimum wage and the right to statutory minimum annual leave.

WHAT IS THE WRITTEN STATEMENT?

There is no legal requirement for an employer to provide a contract of employment, nor for it to be in writing. Under section 1 of the Employment Rights Act 1996, however, the employer must provide the employee with a written statement within two months of starting work.

This must include information such as the names of the employer and employee, date the employment started, pay, hours, holidays, notice, any sickness pay scheme, any pension scheme, place of work, job title or description of duties, details of any disciplinary and grievance procedure.

As part of the new statutory dispute resolution procedures, a tribunal can award an extra two or four weeks' pay to an employee, if their employer does not give them a written statement or notification of a change of a term or condition of employment.

Any changes to the contract terms must be notified to the employee in writing within one month of the change taking effect. Notification is not the same as a legal variation of a contract (see *LELR 93*).

WHEN CAN AN EMPLOYER VARY THE CONTRACT?

An employment contract is a legally binding agreement between two parties. A term of a contract cannot, therefore, be varied unilaterally without giving rise to a breach of contract.

So can an employer withdraw a discretionary benefit from staff, such as the provision of permanent health insurance? The simple answer is yes. It is only if it is explicitly a term of the contract (say, for senior management), that they cannot.

In *Wandsworth London Borough Council -v- D'Silva (1998, IRLR 193)* the employer altered a code of practice in relation to sickness. The Court of Appeal found that the code was not part of the contract but was simply meant to lay down good practice for managers. The language of the provisions in question was found not to provide "... an appropriate foundation on which to base contractual rights...".

If an employer tries to vary the contract terms but cannot get agreement from their employees, they can always terminate the contract and offer new contracts with the new terms and conditions.

In *Scott -v- Richardson (EAT April 2005 0074/04)*, the claimant was dismissed for refusing to accept a variation to their contract. The EAT said that the test was whether the employer reasonably believed that the changes to the contract were advantageous and it was not necessary for the employer to prove such advantages. This case highlights the low threshold that the employer must meet for the 'some other substantial reason' test for dismissal.

CONCLUSION

In theory, both parties freely enter into a contract of employment that is negotiated by two equal parties. In reality many workers have little choice but to accept the terms on offer, although some highly skilled workers are able to negotiate good terms.

Overall, the development of individual rights through employment contracts is one that is still heavily reliant on the negotiation of terms and conditions, both collectively and individually.

THE PANEL BEATERS

It is directly discriminatory under the Race Relations Act 1976 to treat someone less favourably than another person on racial grounds. This is known as direct discrimination.

In Bvunzai -v- Glasgow City Council, the Court of Session (the Scottish equivalent of the Court of Appeal) has said that tribunals must consider not just the conduct of the employer, but also whether they can provide an explanation for their behaviour when considering allegations of direct discrimination.

Mr Bvunzai's union, Unison, instructed Thompsons to act on his behalf.

WHY DID MR BVUNZAI COMPLAIN?

Mr Bvunzai had worked for Glasgow City Council since 1977. In August 2000 he applied for a senior social work management job, for which five people were interviewed. He was the only black candidate. The person appointed was a white woman, Ms McGuire.

Mr Bvunzai claimed direct discrimination on the basis that:

- The panel members ignored the council's code of practice on recruitment and selection which said that an interview assessment form should be completed after each interview. Instead, it was filled in at the end of the whole interview process. Mr Bvunzai had been interviewed first; Ms McGuire last.
- One of the panel members had not received any training in the code of practice.
- Ms McGuire was given a higher score than Mr Bvunzai for "speech, manner" and was described as "articulate", with no allowance made for the fact that Mr Bvunzai was born in Zimbabwe and learned English as a second language.
- Ms McGuire was given a higher score for "evidence of career development" although Mr Bvunzai was far more experienced.
- Neither candidate was given a score for "experience" although Mr Bvunzai had far more experience at senior management level than Ms McGuire.
- The panel had not followed the code of practice for nominating a second referee. Instead of asking each candidate to suggest one, it asked their external line managers for a reference. Ms McGuire's external line manager was Mr Grant (a member of the interview panel).

WHAT DID THE TRIBUNALS DECIDE?

The tribunal decided that the interview panel's assessment of Mr Bvunzai was influenced by racial factors, as the members could not credibly explain why his score was so much lower than Ms McGuire's. This was compounded by breaches of the council's own code of practice.

The employment appeal tribunal disagreed, however, saying that the tribunal's decision was "perverse". Mr Bvunzai appealed to the Court of Session.

WHAT DID THE COURT OF SESSION DECIDE?

Relying on *Nagarajan -v- London Regional Transport (1999, ICR 877)*, the court said that, without any direct evidence of racial bias, the tribunal could only infer how the panel had come to its decision "from the surrounding circumstances".

In this case *"the circumstances were ... such that it was open to the employment tribunal to find that the appellant's non-selection was influenced by racial factors, even if the conduct did not point overtly to the decision having been made on racial grounds ... It was thus not the respondent's conduct alone which rendered that finding open to the tribunal, but that conduct combined with the respondent's inability to explain it."*

It said that the test for "perversity" was a high one that, ultimately, was "a matter for the tribunal's conscientious judgment." The EAT had therefore erred in law in interfering with their decision.

The Court of Session allowed the appeal and remitted the case to the original employment tribunal to reassess the compensation.

CABINET DUTIES

Under the Disability Discrimination Act 1995, employers have a duty to make reasonable adjustments if the "provisions, criteria or practices" or the "physical features" of the workplace put a worker at a substantial disadvantage in comparison with a non-disabled person.

In Smith -v- Churchills Stairlift plc, the Court of Appeal has said that the test as to whether the adjustment was reasonable is an objective one for the tribunal to decide.

WHAT WERE THE BASIC FACTS?

Mr Smith applied for and was offered a job selling radiator cabinets. He had explained at his interview that he had difficulty walking and carrying heavy objects, but the company said it could supply an automatic car.

Although it was unsure at this stage what samples the sales staff would have to carry, the company offered him a place on a training course. It then decided that they would have to carry a full-sized cabinet (weighing 25 kilos), reasoning that if people could see them they would be more likely to buy them.

Working on the basis that Mr Smith would not be able to carry one, the company withdrew the offer of the training course. He suggested a trial period of selling without using the cabinet, but the company refused. Mr Smith made a claim of disability discrimination.

WHAT DID THE TRIBUNALS DECIDE?

The employment tribunal decided that Mr Smith was treated less favourably for a reason related to his disability when the company withdrew the place on the course. It said that carrying the cabinet was not an essential part of the job – it was simply an "arrangement" attached to the job.

It then decided, however, that he had not been placed at a substantial disadvantage by this requirement on the basis that, due to its weight and size, a majority of the population would have difficulty carrying the cabinet any distance and lifting it into a car.

Although the duty to make reasonable adjustments did not arise, the tribunal said that, if it had, the company would not have fulfilled the duty, because it had not offered a trial period of selling, using a different sales aid to the full-sized cabinet.

The company's withdrawal of the offer was justified, however, because Mr Smith was clearly unable to carry the cabinet and there were good commercial reasons for the sales staff to have them on show for potential customers.

The EAT, however, said the tribunal's decision was inconsistent and perverse. On the one hand, it had accepted the company's reasons for needing the cabinets in terms of the justification defence, but rejected it when considering the requirement to carry out reasonable adjustments.

WHAT DID THE COURT OF APPEAL DECIDE?

Arrangements – Following the decision in *Archibald -v- Fife Council (LELR 92)*, the tribunal was right to decide that the requirement to carry a full-sized radiator cabinet was a relevant "arrangement", but so was withdrawing the offer on the training course if Mr Smith could not carry a cabinet. The duty to make a reasonable adjustment would then have been triggered if either of these arrangements put him at a substantial disadvantage.

Trigger for duty to adjust – The Court of Appeal said that tribunals must look at the reason that triggers the duty to adjust. In this case, it said that the reason Mr Smith could not lift the cabinet was because of his back, so the comparison was not with the rest of the population but the other candidates who had successfully made it onto the training course.

Test for reasonableness and justification – The test as to whether the adjustment was reasonable is an objective one for the tribunal to decide (as opposed to whether the employer responded in a way that was reasonable). The justification test for less favourable treatment, on the other hand, is a subjective one.

The court upheld Mr Smith's appeal and remitted the matter to the tribunal to work out his compensation.

A risky business

Under health and safety regulations, employers have to take action to avoid any risks to a pregnant worker that they identify in their risk assessment. For instance, by altering her hours of work or working conditions.

In New Southern Railway Ltd -v- Quinn, the employment appeal tribunal (EAT) has made clear that the word "avoid" means reduce as far as possible, not eliminate completely.

WHAT WERE THE BASIC FACTS?

After working for New Southern Railway for nearly three years, Ms Quinn was appointed on 15 September 2003 to the post of duty station manager at Brighton for a three-month trial period on a salary of £19,500. Her manager told her in mid November that he wanted her to be made permanent.

However, she then went on sick leave from 18 November to 5 December, during which time she found out that she was pregnant. On her return, it was agreed that she should work on permanent middle shifts until the worst of her morning sickness was over, after which a risk assessment would be carried out. This was done on 11 December by Mr Oke, the company's safety strategy manager.

He thought she could continue in the temporary post, but her manager and the company's senior area personnel manager (who had never heard of a pregnancy-related suspension or transfer) thought the risks were too high. She returned to her old job as a PA in January 2004 on a salary of £16,085.

Ms Quinn complained, among other things, that she had suffered a detriment by reason of her pregnancy because of a reduction in her salary, the failure to offer her alternative employment on terms that were no less favourable, contrary to section 67 of the Employment Rights Act and that she had received less favourable treatment by reason of her sex.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal took the view that she had not been suspended from her post as duty manager for health and safety reasons. It said that the decision to demote her to her old job had nothing to do with the risk assessment (which her managers did not understand), and everything to do with their "patronising and paternalistic attitudes" to her.

The tribunal concluded that this was a straightforward case of discrimination on the grounds of sex.

WHAT DID THE PARTIES ARGUE ON APPEAL?

The company argued that the tribunal had misunderstood the phrase "avoid the risk" in the health and safety regulations, which, it said, meant "get rid of" rather than "reduce."

It said this was an absolute obligation under European law, so that if there was any risk of harm (no matter how small), the employer had to avoid it. In this case, that meant demoting Ms Quinn back into her post of PA.

Ms Quinn, on the other hand, said that the company should have produced evidence that the risks to her safety and that of her unborn child could not be avoided in any other way. For instance by altering her shift pattern or hours of work, as Mr Oke had suggested. If that was not possible, she should have been transferred to suitable alternative work on the same terms, or suspended on full pay.

> *'It said this was a fundamental flaw in the company's case because the same risks applied just as much to her post as PA as to the post of duty manager from which she had been suspended'*

WHAT DID THE EAT DECIDE?

The EAT agreed with Ms Quinn. It said the company had not considered whether the risk could be avoided by altering her working conditions or hours.

It said this was a fundamental flaw in the company's case because the same risks applied just as much to her post as a PA as to the post of duty manager from which she had been suspended.

It also disagreed with the company as to the meaning of the word "avoid", saying that it "cannot mean eliminate in entirety but means reduced to its lowest acceptable level."

It therefore dismissed the company's appeal.

God only knows

Historically the courts have said that ministers of religion cannot be employees, and that they therefore fall outside the scope of a lot of employment legislation.

In a ground-breaking decision, however, the House of Lords has said in Percy -v- Church of Scotland Board of National Mission that the claimant was an employee under the definition of the Sex Discrimination Act of 1975.

WHAT WERE THE BASIC FACTS?

Ms Percy, who was single, successfully applied for the post of minister in a Scottish parish in 1994. The committee overseeing the appointment sent her details of the "duties" she would have to carry out, as well as the "terms and conditions" (such as length of tenure and salary) that related to the post.

Three years later, however, she was suspended after she was alleged to have had an affair with a married parishioner.

The church board wrote to her a number of times before she resigned referring to her "employment" and suspension on full pay. She then claimed unfair dismissal and unlawful sex discrimination, on the basis that the church had, in the past, treated male ministers differently.

The tribunal dismissed her claims, saying that her complaints were "spiritual matters" that fell within the jurisdiction of the courts of the Church of Scotland. It said that her "contract" was not a contract of employment as defined in the unfair dismissal legislation or the Sex Discrimination Act 1975 (SDA).

She appealed against the decision that she had not been discriminated against, but the employment appeal tribunal and the Court of Session (the Scottish equivalent of the Court of Appeal) rejected her claim, saying that she did not have a contract of employment or "service".

DID SHE HAVE A CONTRACT?

Ms Percy continued with the discrimination claim because the SDA (unlike unfair dismissal legislation) prohibits discrimination in relation to employment under "a contract personally to execute any work or labour" (a contract for services), as well as a contract of service. She argued that she had entered into a contract personally with the Board to execute work and labour in the parish.

And a majority of the House of Lords agreed with her. They said that the documentation between the two parties showed that Ms Percy had

entered into a contract with the Board to provide services to the church on a set of agreed terms and conditions.

It clearly set out a number of aims and duties she was to fulfil in return for her salary and other benefits. In order to perform them she had "to execute work and labour." The dominant purpose of the contract was to secure her appointment to the office so that she could perform those duties personally.

WAS SHE ALSO AN OFFICE HOLDER?

Yes, according to the House of Lords. But they then went on to say that the fact that her status as an associate minister could also be described as an ecclesiastical office was irrelevant. Her rights and duties were defined by her contract, not by the "office" to which she was appointed.

Although clergy are servants of God, in the sense that God's word governs all that they practise, preach and teach, their Lordships said that does not mean that they cannot be "workers" or in the "employment" of the church.

DID THE COURTS HAVE JURISDICTION?

Again, a majority of the House of Lords said they did. Although it recognised that the Church claimed exclusive jurisdiction in all matters of doctrine, worship, government and discipline, it said that the provision of a remedy for unlawful discrimination was a civil, not a spiritual matter.

Ms Percy was therefore entitled to have her claim heard by an employment tribunal.

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