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RACE EQUALITY

The Commission for Racial Equality has published its race equality scheme for 2005 to 2008, setting out the Commission's aims and the practical ways in which it plans to meet its duties under the Race Relations Act 1976.

The scheme sets out eight objectives in all. To download a copy, go to: *www.cre.gov.uk/about/scheme.html*

Also new on its website is an employment case law database, containing summaries of significant cases that have shaped race discrimination law in employment. The database has been divided into seven categories, including direct and indirect discrimination, victimisation, remedies and procedure.

For the database, go to: *www.cre.gov.uk/about/scheme.html*

CBI LOSES CONFIDENCE

According to a new report from the CBI, business is losing confidence in the employment tribunal system following the introduction of new dispute resolution rules last year.

The report claims that companies are very concerned about the complexity of the new procedures – even though the number of tribunal cases has fallen since last October.

The bosses' organisation does not give any statistical analysis to back up its claims. But perhaps that's not surprising, given that all the evidence points to the fact that the new procedures work against the best interests of workers and to the benefit of employers.

Read more at: *www.thompsons.law.co.uk/ntext/rel.php?id=127*

HAZARDS AT WORK

Essential reading for safety representatives and anyone interested in health and safety, the TUC publication, *Hazards at Work* is now available.

The book deals with all the major hazards that people are likely to face at work, and also shows reps how to make their workplace safer. A practical guide, it is filled with checklists and advice on where to go for help as well as providing lots of examples of good practice.

To get a copy, go to *www.tuc.org.uk/publications*

CONSULTING ON EQUALITY

According to Meg Munn, deputy Minister for Women and Equality, the public sector must lead by example when it comes to gender equality.

So the Government has issued a consultation document *Advancing Equality for Men and Women*, setting out proposals to introduce a public sector duty to promote gender equality, otherwise known as the "gender duty".

These proposals will require public authorities to eliminate discrimination and promote equality of opportunity between men and women. Drawn up in consultation with Government departments, the wider public sector and external stakeholders, the proposals oblige public authorities to:

- Draw up and publish an equality scheme to identify gender equality goals and show the steps that the authority will take to implement them.
- Develop and publish an equal pay policy statement, which must include measures to ensure fair promotion and development opportunities and tackle occupational segregation.
- Assess the impact of new legislation, policies, employment and service delivery changes on men and women. These assessments must also be published.

The deadline for comments is 12 January 2006.

Go to: *www.womenandequalityunit.gov.uk/legislation/index.htm* to download a copy of the document.

TRADE UNION EQUALITY

In its second biennial equality audit, the TUC says that people employed in workplaces where there is a trade union are likely to have a better work/life balance, and face less discrimination, than people in non-unionised workplaces.

The equality audit 2005 shows union successes in negotiating agreements that give employees more flexibility in the number of hours they work, and improved maternity and paternity pay and leave. Unions are also working with employers to toughen up workplace procedures tackling racism, sexism, ageism and homophobia.

For a copy, go to: *www.tuc.org.uk/extras/auditfinal.pdf*

Compulsory forms

Under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, the employment tribunal office stopped accepting claims that are submitted on anything other than the stipulated ET1 and ET3 forms from 1 October.

The reason, apparently, is because of a new case management system which will not recognise anything other than the prescribed forms.

So throw away your old forms and get copies of the new ones from the employment tribunal website at: *www.employmenttribunals.gov.uk/publications.asp*

Employment tribunal DVD

ACAS has helped launch a new DVD, in association with Channel Television and law firm Capital Law, to guide employers and individuals through the employment tribunal process .

The *Essential Guide to Employment Tribunals* offers viewers advice on whether they should be going to tribunal at all – and, if they do, provides comprehensive guidance on how to prepare and what to expect once they get there.

It also contains interviews with experts and a dramatised case study to show viewers what actually happens at a tribunal. It also tries to answer some of the most commonly asked questions.

The DVD costs £34.95 and can be ordered by calling 08702 42 90 90 or through the Acas website *www.acas.org.uk*

European harassment

A new law that came into force at the beginning of October should make it easier for women to prevent inappropriate behaviour and remarks of a lewd and sexual nature at work, according to the TUC.

As a result of changes required by the Equal Treatment Directive, women who are sexually harassed at work do not need to show that a man would have been treated differently.

Now women only need to prove that they were treated in a way relating to their sex which violated their dignity, or was intimidating, hostile, degrading, humiliating or offensive.

A temporary Europe

The EU has decided, as a way of reducing some of its red tape, that the proposed EC Directive on working conditions for temporary workers is to be shelved.

The directive would have given temporary agency workers a right to the same general conditions as permanent, in-house staff from day one and the same salary after six weeks. However, some Governments (including the UK) wanted a one-year qualifying period.

This latest announcement means that the directive is even less likely to become law as it stands, and may well have to be rewritten before it is eventually reconsidered.

New legislation

The second instalment of employment legislation for this year came into effect on 1 October. This includes:

- The remaining provisions of the Employment Relations Act 2004, which simplify the information that unions have to give employers before balloting for industrial action. They also make changes to the use of unfair practices in relation to recognition and derecognition ballots..
- Employment Equality (Sex Discrimination) Regulations 2005. These amend the definition of indirect discrimination in the Sex Discrimination Act and introduce a new definition of harassment.
- Public Interest Disclosures (Prescribed Person) (Amendment) Order 2005, which amends the categories of prescribed person to whom a protected disclosure may be made.
- National Minimum Wage Regulations 1999 (Amendment) Regulations 2005. These introduce the annual increase in the level of the national minimum wage (see LELR 103).

Be civil to your partner

From 5 December 2005, same-sex couples can have their relationships legally recognised. From then on, anyone who registers a civil partnership will have the same rights as a married couple in relation to tax, social security, inheritance, pensions, workplace benefits and so forth.

The Women and Equality Unit has now produced a series of guidance booklets to help couples to register their partnership.

To access the guidance, go to: *www.womenandequalityunit.gov.uk/civilpartnership/guidance.htm*

CONSTRUCTIVE ARCHITECT

It is not easy to win a claim of constructive dismissal, but the employment appeal tribunal (EAT) has just said in Land Securities Trillium Ltd -v- Thornley (2005, IRLR 765) **that the employer could not rely on a flexible clause in her contract to completely change her job description.**

Ms Thornley's union, BECTU, instructed Thompsons to act on her behalf.

WHAT WERE THE BASIC FACTS?

Ms Thornley had worked as an architect for the BBC for 11 years when her department was transferred to Land Securities Trillium in November 2001 under the Transfer of Undertakings Regulations.

Although she had some management responsibilities following a promotion in 1992, her main duties at the BBC were as an architect working on "full service" projects. In other words, complex design projects for which she was responsible from start to finish.

Picture: John Harris/reportdigital

Subsequent to the transfer, her new employer outlined proposals to reduce the number of in-house architects and to increase the number of external consultants, particularly on large projects. Ms Thornley complained in October 2002 that she felt her position had become redundant, because she would be reduced to overseeing the external consultants.

Her employers then produced a new job specification, changing her job title to "senior architect" and setting out the main duties and responsibilities. Ms Thornley felt that her job had been downgraded to that of a manager and that she was being deskilled as an architect.

At the end of November, she was told that she had not been selected for redundancy. She lodged a grievance, but her employer decided that the changes to her job did not amount to a redundancy situation. She resigned on 13 January 2003, claiming unfair dismissal.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal agreed with Ms Thornley. It found that she resigned because the new job description fundamentally breached the main term of her contract, which was to lead on large and complex projects in which she would have a hands-on role from start to finish.

It also said that the flexibility clause (requiring her to perform any duties that might be "reasonably required" of her) in her contract did not mean that her employers could change the content of her work to such an extent that she was effectively deskilled as an architect.

It said that the reason for her dismissal was therefore redundancy, the new post was not a suitable alternative job, and that her dismissal was unfair.

WHAT DID THE EAT DECIDE?

The EAT said that the tribunal was right to decide that the employers were in fundamental breach of Ms Thornley's contract. They had imposed a new job description which had significantly changed her role. Her duties as a "hands-on" architect were substantially reduced to a mainly managerial one.

The tribunal was also entitled, when trying to decide her contractual duties, to look not only at how her duties were described in her original job description but also how they operated in practice.

It pointed out that job descriptions are not *"prescriptive documents. They frequently fail to represent, or represent either accurately or fully, the actual duties in fact undertaken by an employee in his or her post; and the duties are often described in vague terms so that, when interpreting them, a tribunal is required to put some flesh on the bones, as it were, in order to understand what exactly the employee's duties comprised."*

The tribunal was entitled to find that Ms Thornley's employers had not just changed the emphasis of her role, but rather the content of her duties. These changes did not fall within the scope of the flexibility clause in Ms Thornley's contract.

REPENT AT LEISURE

To establish that an employer has breached a fundamental term of the contract, the employee has to show that it is, in fact, already a contract term and not just a statement of intent.

In Judge -v- Crown Leisure Ltd (2005, IRLR 823), the Court of Appeal has said that the terms of a contractual promise must be "certain" and not "vague" to be capable of being enforced.

WHAT WERE THE BASIC FACTS?

Crown Leisure employed four special operations managers, one of whom was paid considerably more than the other three, following a transfer from a related company in June 2001. The company had made clear to all four managers that it would equalise their salaries in "due course".

Mr Fannon, the special operations director, wrote to Mr Judge in May 2002, apologising for the fact that their salaries had still not been equalised, but assuring him that was still his intention.

The two men then met a year later in June 2003, and Mr Fannon explained that, with the increase and the substantial bonuses that Mr Judge had just received, this was about as far as he could go in establishing parity with the other manager.

Mr Judge then resigned from his job, alleging that the company had failed to honour a contractual promise to equalise his salary with the higher paid manager. He also alleged that Mr Fannon had explicitly promised at an office party in December 2001 to put him on the higher salary scale within two years. Mr Fannon said no such conversation had ever taken place.

WHAT DID THE TRIBUNALS DECIDE?

The tribunal said that *"for there to be a legally binding and enforceable contractual commitment, there must be certainty as to the contractual commitment entered into, or alternatively facts from which certainty can be established. Otherwise, a 'promise' amounts to nothing more than a statement of intention."*

On that basis, it decided that the letter of May 2002 was nothing more than a "statement of intention". As far as the conversation at the Christmas party was concerned, it did not accept the evidence of either of the parties.

Instead, it said that Mr Fannon probably did give Mr Judge some "words of comfort", but it did not believe that he had entered into any legally binding contractual commitment with him in such an environment.

The company was not, therefore, in fundamental breach and Mr Judge had not been constructively dismissed. The employment appeal tribunal agreed with that decision.

WHAT DID THE COURT OF APPEAL DECIDE?

The court agreed with the tribunal, saying that the words uttered at the party did not amount to a contractual promise. They were too vague and uncertain. They were, in effect, just a reiteration of the previous statement that Mr Fannon had made of a general intention to bring about parity of salary or remuneration "in due course".

The tribunal rejected Mr Judge's allegation that Mr Fannon had promised to bring about parity within two years. Had he done so, the court said that *"a promise to achieve parity within two years might well be sufficiently certain to be capable of enforcement."*

Picture: Paul Box/reportdigital

The court also said that Mr Judge had misunderstood the tribunal's decision when he argued that it had applied the wrong legal test for establishing whether there was an intention to create "legal relations".

In the court's view, that question had never arisen. These two men were already employer and employee, so there was an existing legal relationship between them. *"If words had been uttered that were capable of amounting to a contractual promise, it could not sensibly have been suggested that there was no intention to create legal relations. The real point was that the ET found that the words uttered did not amount to a contractual promise."*

a brief overview of

FIXING THE TERMS

In October 2002, the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 came into force. They said, among other things, that in July 2006 lots of fixed term employees would become eligible for permanent employment under their existing fixed term contracts.

In this article, ***Emma del Torto***, a solicitor from Thompsons' Employment Rights Unit in Cardiff, summarises the basic rights of fixed term employees under the regulations, and looks at some of the practical steps they can take to become permanent employees.

WHAT IS THE BACKGROUND TO THE REGULATIONS?

Like a lot of employment law, the origin of the 2002 regulations can be traced back to a European directive, in this case the European Framework Agreement on Fixed Term Work.

The underlying principle was to improve the quality of fixed term work and to prevent employers from abusing successive fixed term contracts.

And it has had an effect. Since October 2002 (the date when the regulations came into force), the number of people on fixed term contracts has fallen by eight per cent. In the preceding period (1994 to 2001), the number of fixed term contracts increased by seven per cent, according to the Labour Force Survey.

WHAT DO THE REGULATIONS SAY?

Basically, the regulations state that fixed term employees cannot be treated less favourably than comparable permanent employees, just because they are on fixed term contracts (unless the treatment can be objectively justified).

In particular, they have the right not to be treated less favourably as far as the terms of their contract are concerned, and must not to be subjected to a "detriment" (or disadvantage) by their employer.

To make a claim, fixed term employees have to compare themselves with someone in their workplace who is a permanent employee. Then they have to prove that they are being treated less favourably than that person – this could include being offered less training, not being made aware of permanent vacancies, restricting their eligibility to pension and other benefits, and so on.

HOW CAN FIXED TERM WORKERS BECOME PERMANENT EMPLOYEES?

Under regulation eight, an employee on a fixed term contract can become a permanent employee if:

- the employee is already employed under a fixed term contract which has previously been renewed
- the employee has been continuously employed under fixed term contracts for four years or more (discounting the time before 10 July 2002)
- the employer cannot objectively justify renewing (or extending) the last contract.

WHAT IS OBJECTIVE JUSTIFICATION?

Employers can continue to renew fixed term contracts for more than four years provided that they can objectively justify their decision. The DTI guide to the regulations states that the less favourable treatment can be objectively justified if:

- it is to achieve a legitimate objective, for example a genuine business objective
- it is necessary to achieve that objective
- it is an appropriate way to achieve that objective.

These are wide definitions and, in the event of a dispute, tribunals just have to look at the facts and merits of each case. Neither the regulations nor the DTI guide provide a clear definition of what would constitute a genuine need for a fixed term.

However, this might include specialist short-term work; seasonal or project work; a temporary absence to cover maternity leave or sickness absence; work that is externally funded by a single source for a fixed period of time.

WHAT SHOULD EMPLOYEES DO AFTER 10 JULY 2006?

Employees who have been employed on successive fixed term contracts for four years or more after 10 July 2006 have the right to request a written statement from their employer

FOUR YEARS ON

confirming that they are now permanent (regulation nine).

The employer, within 21 days of receiving the request, has to provide either a written statement confirming the permanent status or give reasons why they are refusing the request.

The employer will have to state "objective grounds for the employee under a fixed term" in order to justify not making the employee permanent. This statement is admissible in a court or tribunal.

If the employee is not satisfied with their employer's written reasons, they can then make an application to a tribunal. However, they must make the request prior to the tribunal application and must still be employed by that employer.

It is important to submit the written request and application to the tribunal before the fixed term contract period comes to an end. And remember that from 1 October 2005 all applications to a tribunal must be made on form ET1 (available from the ETS website *www.ets.gov.uk*, job centres or the tribunal offices). No other version is acceptable.

The burden of proof lies with the employer to show that there is a genuine reason why the contract has to be fixed term.

HAS THERE BEEN ANY CASE LAW?

There has been very little case law to test the rights of fixed term employees since the regulations came into force. However, in September 2005 the South London employment tribunal ruled in favour of four education advisors who brought a claim against their employer, the Department for Education and Skills (DfES).

The tribunal ruled that the four fixed term workers should be awarded redundancy packages if they are made redundant prior to the renewal of their fixed term packages in March 2006.

In comparing their contract terms to those of permanent employees, the tribunal said that the fixed term workers were disadvantaged when it came to redundancy, as they did not benefit from the Civil Service Compensation Scheme.

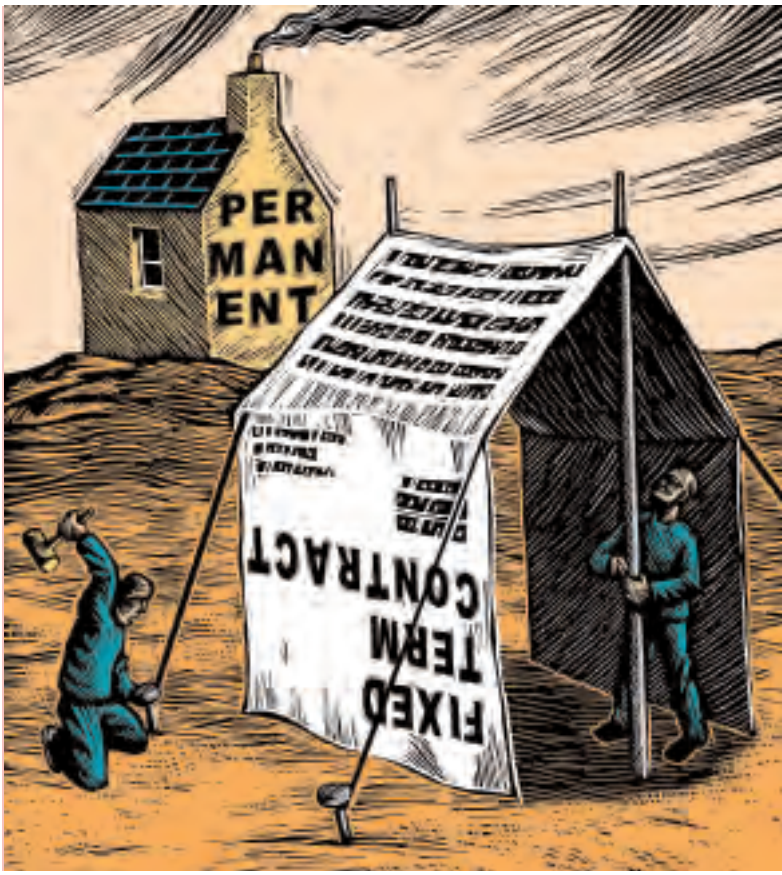
CONCLUSION

It is generally accepted that fixed term contracts promote a flexible labour market and can be beneficial to both employer and employee. For example, there may be employees who enjoy the flexibility of not working on a permanent basis and have other obligations. Similarly employers have seasonal and project based work that is better staffed by using fixed term employees.

The regulations are in place to prevent the abuse of fixed term contracts, where the reality is that the employee should have all the benefits and security of a permanent contract.

It is likely that there will be an increase of tribunal claims taking advantage of the protection of these regulations from July 2006.

Employers will then have to re-examine the indiscriminate use of fixed term contracts that has clearly disadvantaged employees in the past.



SICKENING FOR JUSTICE

Under European legislation, women have the right to be paid the same as men doing the same work or work of equal value. Women also have the right not to be discriminated against "particularly as regards pregnancy and maternity".

In North Western Health Board -v- McKenna (C-191/03), the European Court of Justice (ECJ) has, however, decided that a sick-pay scheme that treats pregnancy-related illness in the same way as any other illness is not discriminatory.

WHAT WERE THE FACTS IN THE CASE?

In January 2000, Ms McKenna discovered that she was pregnant. She subsequently went off on sick leave for almost the whole of her pregnancy because of a medical condition linked to it.

Under the Republic of Ireland board's sick-pay scheme, employees were entitled to full pay for six months, followed by half pay for six months within any four-year period.

It did not distinguish between pregnancy-related illnesses and any other form of illness.

Ms McKenna exhausted her entitlement to full pay in July 2000 and went onto half pay until the beginning of September, when she started her maternity leave.

She was on leave until 11 December 2000, but when she was unable to return to work at the end of her leave, she went back onto half pay.

She argued that she had been discriminated against contrary to the Equal Treatment Directive (ETD); and that she had been treated less favourably in terms of pay contrary to Article 141 and the Equal Pay Directive (EPD).

WHAT WERE THE QUESTIONS FOR THE ECJ?

The Irish labour court asked the ECJ:

- Does a sick pay scheme that does not differentiate between pregnancy-related and other illnesses come within the scope of the ETD or Article 141 and the EPD?
- If it comes within the ETD, is it contrary to the directive for an employer to offset a period of absence as a result of a pregnancy-related illness against the person's overall entitlement under the sick-pay scheme?
- If it comes within Article 141 and the EPD, is it contrary to those laws for an employer to reduce a woman's pay when the absence is due to a pregnancy-related illness, in circumstances where a man on sick leave would also have his pay reduced?

WHAT DID THE ECJ DECIDE?

The court decided, first, that the case came within the scope of Article 141 and the EPD. The court then pointed out that there is no general principle under community law that says that women should continue to receive full pay during maternity leave.

The only proviso is that the pay should not be so low as to undermine the community law objective of protecting pregnant women before they give birth.

So, according to the court, if you can have a rule allowing for a reduction in pay during maternity leave that does not constitute sex discrimination, then equally you can have a rule that allows for a reduction in pay during the pregnancy because of a pregnancy-related illness.

A reduction in pay will not, therefore, constitute sex discrimination as long as the woman is treated the same way as a man who is absent on sick leave, and as long as the pay is enough to protect a pregnant worker.

Picture: Justin Tallis/reportdigital.co.uk

Finally, the court said that it is not discriminatory to have a rule in a sick pay scheme whereby absences are offset against a maximum number of paid sick days over a specified period, whether or not the illness is pregnancy-related.

However, it then said that during periods of absence after the maternity leave, the pay must not be any lower than the minimum amount to which she was entitled during the pregnancy.

EXPOSED TO DISCRIMINATION

Under the Disability Discrimination Act (DDA), there are a number of excluded conditions such as a tendency to physical or sexual abuse of other people, exhibitionism or a tendency to set fires.

In Edmund Nuttall Ltd -v- Butterfield (2005, IRLR 751), the employment appeal tribunal (EAT) has said that, if the reason for the less favourable treatment is because of an excluded condition, then the fact that the person has a disability under the Act (even if it is linked to the excluded condition), is irrelevant.

WHAT WERE THE BASIC FACTS?

In November 2003, following a business trip, Mr Nuttall committed two offences of indecent exposure and one offence of dangerous driving.

He was sentenced in February 2004 to a three-year Community Rehabilitation Order (CRO) and was ordered to see a psychiatrist. He was also disqualified from driving for two years.

After sentencing, Mr Butterfield told his employer about the driving disqualification, but did not mention the indecent exposure nor the CRO. His employer agreed he could return to work as long as someone else drove him about.

However, Mr Butterfield was subsequently dismissed when his employer found out about the other offences, saying they had lost all trust in him. He then made a claim of unfair dismissal and disability discrimination, based on his psychiatrist's assessment that he was suffering from a severe depressive illness.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal said that Mr Butterfield committed the offences because he was suffering from depression. As the offences were the reason for his dismissal, the tribunal found that he was less favourably treated for a reason relating to his disability.

The tribunal also upheld his claim of unfair dismissal, on the basis that his employer had prejudged the matter before the disciplinary hearing took place. And as his employer had not thought about whether he was likely to re-offend, dismissal was outside the range of reasonable responses open to them.

WHAT DID THE EAT DECIDE?

Regulation four of the DDA specifies that "a tendency to ... sexual abuse of other persons" and "exhibitionism" are among the "conditions" that are "not to be treated as amounting to impairments" under the Act.

Referring to the decision in *Murray -v- Newham Citizens' Advice Bureau*, the EAT said that it was not helpful to refer to the exclusions as "free-standing conditions", as opposed to conditions that are the direct consequence of some physical or mental impairment. It pointed out that a claimant may have both a legitimate impairment and an excluded condition.

The critical question: what was the reason for the less favourable treatment? If it was the legitimate impairment, then that would amount to discrimination. If it was the excluded condition, then the claim would fail.

In this case, the EAT agreed that Mr Butterfield was disabled within the meaning of the DDA. His employer knew about his mental state, not least because he had been hospitalised on 22 November 2003 and had not come back to work.

Nevertheless, they had agreed, at the meeting in February 2004, that Mr Butterfield could continue to work for them. They only changed their minds when they heard about the indecent exposure, and were concerned that his behaviour could bring the company into disrepute.

The EAT found, therefore, that the sole reason for dismissal related to the exposure, an excluded condition under the DDA, and not to the legitimate impairment which was depression. Mr Butterfield's claim of disability discrimination could not succeed.

However, it upheld the decision of unfair dismissal, on the basis that Mr Butterfield's employer prejudged the outcome of the internal disciplinary proceedings and failed to think about whether he was likely to re-offend.

And it also overturned the tribunal's finding that Mr Butterfield did not contribute to his dismissal by his own conduct, as there was plenty of evidence that the offences were pre-planned.

Consult in time

It is well established under the Trade Union and Labour Relations (Consolidation) Act 1992 that employers have to consult "in good time" with their workforce before making redundancies.

In Leicestershire County Council -v- Unison, the employment appeal tribunal (EAT) has confirmed that, even if an employer partly complies with the requirement, they will not automatically be "credited" for it. Likewise, any consultation in advance of those decisions will not count. It is for the tribunal to decide which mitigating factors will justify a reduction.

WHAT WERE THE FACTS IN THE CASE?

Following a national agreement in 1997 to introduce a single structure for manual and administrative staff, Leicestershire County Council started evaluating 9,000 of its jobs in 1999. It held 16 meetings with the relevant trade unions between July 1999 and May 2002.

By June, most jobs had been evaluated and the council then turned its attention to those staff whose jobs had been downgraded, as well as those whose enhancements were affected.

It took the formal political decision on 12 December to dismiss both groups and offer them jobs on new terms and conditions within the new structure. However, it was clear that most of the work to carry out that decision had been undertaken at least a month before.

On 13 December, the council wrote to the union side telling them of the formal decision "to proceed with imposing job evaluation" but not saying how it was to be done. On 20 December, a "consultation notice", was sent to the Unison local branch secretary.

Unison claimed that the council had failed to consult with them about the redundancies "in good time" and applied for a protective award for both the "downgraded" group and the "enhancement" group.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal decided that the obligation to consult arose by mid-November at the latest. All that happened on 12 December was the announcement of a decision that had already been arrived at, given the "considerable level of activity already underway to implement the strategy".

As the formal announcement was not sent to the union until 20 December – at least a month after the decision was taken to dismiss – the council was in clear breach of its duty to consult 'in good time.'"

Following *Susie Radin Ltd -v- GMB & ors (LELR 90)*, the tribunal made a protective award of 90 days for the downgraded group, and 20 days for the enhancement group (on the basis that the trade union side had failed to respond to the council's invitation to consult).

WHAT DID THE EAT DECIDE?

The EAT said that it could not interfere with the tribunal's decision that "not just a proposal but a decision had been made in mid-November 2002."

Relying on the ECJ decision in *Junk -v- Kühnel (LELR 98)*, the EAT said that, given that the whole purpose of the legislation is to avoid dismissals, the obligation to consult must arise before an employer decides to terminate someone's contract.

Consultation should therefore *"begin before a decision is made as to the implementation of redundancy. By that, we mean prior to the giving of notice of redundancy and, of course, prior to the taking effect of such notice."*

The EAT upheld the award of 90 days' pay for the downgraded group, holding that the council's partial compliance with the requirement to provide information did not mean that there should be an automatic reduction.

In line with *Susie Radin Ltd -v- GMB & ors*, it said that it is for the tribunal to consider which mitigating circumstances would justify an appropriate reduction.

However, it reduced the protection award to 10 days for the enhancement group, saying that the council's approach to them had been impressive after 12 December. It had not just tried to consult, but to negotiate with them, and should therefore be taken into account in mitigating the penalty.

> *'Consultation should begin before a decision is made as to the implementation of redundancy. By that we mean prior to giving notice of redundancy and prior to such notice taking effect'*

The stress of it all

Despite the success of a few high profile cases, negligence claims for stress at work remain notoriously difficult to prove.

And the case of Vahidi -v- Fairstead House School Trust is no exception. The Court of Appeal has said that, although the claimant's second breakdown was foreseeable, the school did everything it could to support her and was not, therefore, negligent.

WHAT WERE THE BASIC FACTS?

Mrs Vahidi had been a reception class teacher at the school for over 20 years when she was dismissed because of ill health in November 1998. Things started to go wrong in September 1997 following an Ofsted inspection, which showed some serious weaknesses in her teaching methods.

As a result Mrs Vahidi had to agree to work more closely with another teacher to make the necessary changes, although she was said to have "appeared to resent (the teacher's) attempts to assist."

She went to see her GP in October, complaining of agitated depression. She complained that she was in a blind panic, and felt she was getting no support from the school. She remained on sick leave until June 1998.

On her return at the beginning of the autumn term, the school arranged for her to have regular support meetings with other teachers, and provided her with a classroom assistant. However, at the end of October, Mrs Vahidi left the school at lunch time and did not return.

Mrs Vahidi claimed damages from the school, alleging that she had suffered two episodes of severe clinical depression because of their negligence.

WHAT DID THE HIGH COURT DECIDE?

The judge decided that the school was not to blame for the first breakdown because it had not been reasonably foreseeable. However, although her second breakdown had been, the school had done everything it could to support her. Mrs Vahidi's relapse had occurred because she could not cope with the changes that were required of her.

Relying on the case of *Hatton -v- Sutherland (2002, IRLR 263)*, the judge said that, although the head teacher was aware that Mrs Vahidi's health was deteriorating, the school was not in breach of duty by continuing to monitor her, as opposed to sending her home. The school was under the impression that she was still

Picture: John Harris/reportdigital

taking medication (although she was not) and that she was still fit for work.

Mrs Vahidi appealed against that decision, arguing that her employer had not given her enough support.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal agreed with the High Court. It said that to argue otherwise was a travesty of the facts.

It pointed out that, as soon as Mrs Vahidi indicated that she wanted to come back to work, the head teacher had arranged a meeting to discuss it. She was then allowed to return part time.

Once the autumn term began, the court said that "it is difficult to see what more the school could have done by way of support". As for the allegation that the school had not done enough to get further medical help, the court said this was an "equally hopeless" allegation.

Although some staff had noticed that Mrs Vahidi was becoming withdrawn again in early October, they had no option but to accept her own assurances about her state of health.

To do otherwise would have been intrusive, and would have implied that they did not believe her. Likewise, the allegation that the school should have sent her home would have been perceived as a hostile act.

The court said would-be litigants would be better off mediating in cases of stress where, as in this one, the legal principles are already well established. This would also have saved everyone a great deal of money.

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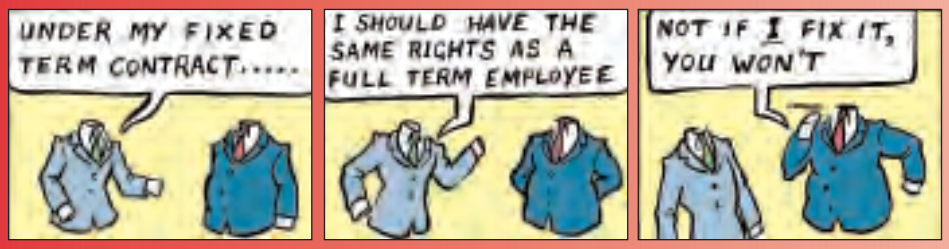

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