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## DISABILITY CHAMPIONS

**Are you a potential disability champion? If so, the Disability Champions @ Work project wants to hear from you. You just need to be a trade union representative with an interest in promoting disability issues at work.**

Set up in 2003, there are already 200 disability champions in workplaces around the country. Their basic role is to negotiate "reasonable adjustments", raise awareness of disability issues, conduct access audits of buildings, documents, policies etc and liaise with external organisations and other champions.

Champions attend a five-day accredited training course to give them the knowledge, skills and tools to do their role. This looks at:

- the Disability Discrimination Act
- understanding the concept of "reasonable adjustments"
- negotiating adjustments
- understanding Access to Work funding
- conducting an audit.

To become a champion, go to *www.unionlearn.org.uk/education/learn-811-f0.cfm*

## MORE ANNUAL LEAVE

**Plans to ensure that workers get paid leave for bank holidays, in addition to the statutory four weeks annual leave, have been set out in a Government consultation document.**

The Government proposes to phase in the additional leave starting with an increase from 20 to 24 days (pro rata for part time workers) from 1 October 2007.

It is also seeking views on whether the rest of the leave should be introduced in one stage (either from October 2008 or 2009) or in two phases (26 days from October 2008 and 28 days from October 2009).

The consultation document can be found at: *www.dti.gov.uk/employment/holidays/index.html*. It closes on 22 September 2006.

## EQUALITY 2025

**Following a report by the Prime Minister's Strategy Unit in 2005 (*Improving the Life Chances of Disabled People*), the Government has decided to set up an advisory body which will:**

- work with Government to help achieve equality for disabled people by 2025
- provide advice and information, based on the views and experiences of disabled people
- advise Government departments on how to engage effectively with disabled people
- help the Government to raise awareness of disabled people and their rights and challenge negative stereotypes in the media
- help ensure that public bodies meet their legal duties under the Disability Discrimination Act in relation to the Disability Equality Duty.

The new body, called Equality 2025, will be launched later this year. The Government will advertise for members of the body in both the general interest media and the disability press shortly.

## WHAT DOES YOUR BOSS EARN?

**Ever wondered what your boss earns? A TUC website now lets UK employees access information about staff pay and pensions, profits and losses, shareholder details and arrangements for staff representation.**

The "Your Company" search at *www.workSMART.org.uk* provides lots of detailed information, usually buried in annual reports, on 7,000 UK companies employing millions of staff.

Employees can use the site to compare their own pay with company directors. When they enter what they were earning five years ago the site tells them how much they would be paid if their earnings had increased at the same rate as executives.

Staff can also compare their own pay to others doing the same job at different firms. "Company Finder" also enables job seekers to check out a firm before interviews or accepting a post.

Go to: *www.workSMART.org.uk/company* to try it out.

## ACAS REPORTS

**In its annual report for 2005-6 published at the end of July, ACAS (the Advisory, Conciliation and Arbitration Service) reported that:**

- there were 109,712 applications to tribunals in 2005-6 compared to 81,833 the year before – up 25 per cent
- unfair dismissal continues to be the largest category of complaint with almost 36,000 applications (an increase of 1,000 on the year before)
- the top three topics to the ACAS helpline were: discipline/grievance, maternity/paternity and redundancy

For a copy, go to *www.acas.org.uk/media/pdf/7/0/Annual_report_2005_2006.pdf*

# Equality directive

**Seven directives on equality between men and women in employment have been "recast" by the European Parliament and the Council of the European Union. The new text also includes relevant decisions of the European Court of Justice.**

The seven consolidated directives are:

- No.75/117 on equal pay for men and women
- No.76/207 on equal treatment for men and women relating to access to employment
- No.2002/73, amending directive No.76/207, on equal treatment for men and women relating to employment, vocational training and promotion and working conditions
- No.86/378 on equal treatment for men and women in occupational social security schemes
- No.96/97, amending directive No.86/378, on the implementation of the principle of equal treatment for men and women in occupational social security schemes
- No.97/80 on the burden of proof in cases of discrimination based on sex
- No.98/52 on the extension of directive No.97/80 to the UK.

The new directive (2006/54) has to be implemented by member states by 15 August 2008.

# Work and families act

**According to the DTI, thousands of working parents stand to benefit from new rights to more maternity and paternity leave and pay now that the Work and Families Act has come into effect.**

Under the Act working parents will be entitled to:

- Nine months Statutory Maternity Pay, Statutory Adoption Pay and Maternity Allowance from April 2007 (to be increased to a year's paid leave by the end of the Parliament).
- A new right to an additional period of paternity leave for fathers, which will be introduced alongside the extension of Statutory Maternity Pay, Adoption Pay and Maternity Allowance to 12 months. This will enable them to benefit from leave and statutory pay if the mother returns to work after six months but before the end of her maternity leave period.
- The introduction of "Keeping in Touch" days so that a woman on maternity leave can go into work for a few days, without losing her right to maternity leave or a week's statutory pay.

# Fixing the term

**Anyone on a fixed term contract (or a series of them) for four years automatically became a permanent employee as of 10 July.**

This was because regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 was finally introduced (see LELR 105). The only exception to the rule is if the employer can objectively justify continuing the fixed term arrangement.

The implementation of the regulation means that employers must (within a month of the anniversary) give their employee a statement of changes to their terms and conditions. If they don't, the employee can make a claim to a tribunal and get an award of two or four weeks' pay.

# Too old at 65

**The National Council on Ageing (NCA) is challenging the Government over the legality of mandatory retirement ages. It has asked for a judicial review of the Employment Equality (Age) Regulations (2006) which come into force on 1 October.**

Under the regulations, employers can force employees to retire at or after 65 and can refuse to recruit anyone over the age of 65.

The NCA believes that by excluding people over 65 from protection the Government has failed to implement the directive correctly – in breach of their obligations under European law.

# Smoke free

**The Health Bill that is currently before Parliament includes legislative provisions to make virtually all enclosed public places and workplaces smoke free.**

If approved by Parliament, the Government plans to implement smoke free legislation in summer 2007.

The Department of Health has now published a consultation document - Smoke Free Premises and Vehicles – looking at proposed regulations to be made under powers in the Health Bill. The consultation period expires on 9th October 2006.

Go to *www.dh.gov.uk/Consultations/LiveConsultations/fs/en* to download the consultation document.

# WORKING TIME

**The definition of working time has proved crucial in the case of** MacCartney -v- Oversley House Management (2006, IRLR 514)**. Following an earlier European decision, the employment appeal tribunal (EAT) said that workers who have to be on site for 24 hours are "working" for the whole period, even if they are allowed to sleep during that time.**

Mrs MacCartney's union, the GMB, instructed Thompsons to act on her behalf.

## WHAT WERE THE BASIC FACTS?

Mrs MacCartney was the resident manager for a private housing development for the over 60s. Her annual salary (paid monthly) was £8,750, and she worked "four days per week of 24 hours on site cover". She also had the benefit of rent-free accommodation.

As she was on call for the full 24-hour period, Mrs MacCartney had to be on site or within a three-minute radius during that time. Although she was allowed to sleep, she still had to respond to emergencies. On average, the duty manager was called out every other day at some time between 6pm and 8am.

Mrs MacCartney complained that, as a result, she was not able to take the daily rest periods and rest breaks to which she was entitled under the Working Time Regulations, and that she was being paid less than the national minimum wage (NMW).

## WHAT DID THE TRIBUNAL DECIDE?

The tribunal found against Mrs MacCartney on all counts. First of all, it said that as she was not working the whole time she was on call, she was able to take the rest periods to which she was entitled.

As for rest breaks, it said that as she was essentially her own boss, there was no reason why she could not take a 20-minute break during the day. Even if it was interrupted by a call from a resident, she could retake it at a later time.

With regards to her claim that she was not being paid the NMW, the tribunal said she was not doing "salaried hours work" as she had argued, but "unmeasured work".

As she did not have to work for the full 96 hours she was on duty, it could not all be counted as working time. Using a pay reference period of 40 hours per week, and including the weekly accommodation allowance she received, she was therefore being paid more than the NMW.

## WHAT DID THE EAT DECIDE?

The EAT said that the tribunal had been wrong to decide that Mrs MacCartney was not working for the whole 24-hour period that she was on call. According to the European Court of Justice in *SIMAP -v- Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, workers who have to be on site for 24 hours are "working" for the whole period, even if they are allowed to sleep during that time.

As for rest periods, the EAT said that: *"to be able to rest effectively, the worker must be able to remove himself from his working environment for a specific number of hours, which must not only be consecutive but must also directly follow a period of work."*

These conditions could not be met, however, where the worker was on call in tied accommodation and Mrs MacCartney was, therefore, being denied the benefit of Regulation 10.

It also said that she was not able to take an uninterrupted period of at least 20 minutes under regulation 12. The fact that she could restart it later was irrelevant.

Finally, she was employed as a "salaried hours" worker as she was entitled to an annual salary, paid monthly. Given the finding that she was at work during the whole time that she was on call, she had been paid less than the NMW.

The EAT said that the extent to which a worker is likely to be called out (unless it is so insignificant as to be trifling) cannot be decisive of the question of whether they are working.

### WORKING TIME RE

**Regulation 2(1)**

"Rest period" ... means a period which is not working time, other than a rest break or leave to which the worker is entitled

"Working time" ... means any period during which [the worker] is working, at his employer's disposal and carrying out his activity or duties

**Regulation 10(1)**

An adult worker is entitled to a rest period of not less than 11 consecutive

# WORKING TO TIME

**In yet another case about the definition of working time –** Anderson -v- Jarvis Hotels **– the employment appeal tribunal (EAT) has applied working time case law to a breach of contract wages claim, moving it on from its normal context of the national minimum wage.**

It said that an employee must be regarded as working (even if they are asleep), if their employer requires them to be on site as part of their contractual duties.

## WHAT WERE THE BASIC FACTS?

Mr Anderson worked for Jarvis Hotels as a guest care manager between April 2003 and January 2004. As part of his duties he had to sleep over in the hotel several nights a week, in case there was an emergency such as fire or a flood, although he only lived a short distance away. During that time he was called out once.

He was disciplined in November 2003 for leaving the hotel between 3.30am and 4.01am during one of these sleep-over periods, for which he received a verbal warning.

However, the hotel did not pay him for the sleep overs, relying on the argument that he did not have to work during them. Mr Anderson claimed that his employer was in breach of contract.

## WHAT DID THE TRIBUNAL DECIDE?

The tribunal decided against him, arguing that, as emergencies were rare events, he was not at his employer's "disposal" nor was he carrying out "activities or duties" during that time. He should only be paid, they said, if he carried out some specific activity during the sleep over period.

They distinguished this case from *Simap* (see opposite) by saying that the claimants in that case were "in the front line" whereas Mr Anderson was *"not responsible during the night for the hotel – that was the responsibility of the night porter".*

## WHAT DID THE PARTIES ARGUE ON APPEAL?

Mr Anderson argued that sleeping over was clearly one of his duties, and that his presence in the hotel was obligatory. He pointed out that, under the Working Time Regulations (WTR), on-call duty has to be regarded as "working time" if the worker has to be physically present on the employer's premises.

The intensity or frequency of work was not relevant to whether or not the period was deemed to be working time. Nor was the fact that the on-call period included periods of sleep or inactivity. And nor did he have to be in the front line of responsibility for the time to be working time.

The hotel relied on the case of *MacCartney* (see opposite) to substantiate its claim that, if an employee was very unlikely to be called out during an on-call period, then it could not be regarded as working time. It pointed to the fact that not only did Mrs MacCartney have to be available, but that she often had to respond to emergencies.

## WHAT DID THE EAT DECIDE?

The EAT disagreed. It said that an employee must be regarded as working (even if they are asleep), if their employer requires them to be on site as part of their contractual duties. The fact that Mr Anderson was not in "the front line" in terms of his responsibilities was irrelevant and any attempt to limit *MacCartney* in that way was wrong.

The EAT concluded that *"being present in the premises was, primarily, what he was employed to do during sleep-over periods. That was, accordingly, his 'work'. I am readily satisfied that the Tribunal were in error in taking the view, as they did, that he could only be regarded as working if he was carrying out some specific activity during a sleep-over period. That approach simply misses the point."*

As Mr. Anderson was an hourly paid worker, the EAT held that he should be paid at those rates for the time that he was working.

**EGULATIONS 1998**

hours in each 24-hour period during which he works for his employer

**Regulation 12 (1) and (3)**

12.(1) Where an adult worker's daily working time is more than six hours, he is entitled to a rest break.

(3) ... [of] an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation ...

# a brief overview of

# YOU'RE

**The Employment Equality (Age) Regulations 2006 come into effect on 1 October 2006, implementing the Framework Directive 2000/78/EC. For the first time in the UK, discrimination on grounds of age will be unlawful.**

***Richard Arthur***, a solicitor from Thompsons Employment Rights Unit in London, provides an overview of what they say.

## WHO AND WHAT DO THE REGULATIONS COVER?

The regulations cover contract workers, temporary workers, casual staff and even self-employed staff who are personally engaged to do the work, people applying for jobs, as well as those who have left their job.

Picture: RexClusive

The regulations apply to trade unions, barristers, the police, professional or trade associations and employment agencies. Unpaid office holders, politicians, unpaid volunteers and members of the army, navy and air force are excluded.

## WHAT IS DIRECT DISCRIMINATION?

Direct discrimination occurs when A treats B less favourably than C (who can be real or hypothetical) because of B's age. The reason for the difference in treatment must be B's age, or their "apparent age".

Proving discrimination is difficult, but if a claimant can produce enough evidence for a tribunal to draw inferences from it, then the burden of proof shifts to the employer to show there was an innocent explanation for their action.

But if someone is refused a job because they are 60, how old does their comparator have to be? Given the obvious difficulties in that sort of comparison, tribunals will probably not focus on the precise age of the comparator, but instead on the reason for the treatment.

## CAN IT BE JUSTIFIED?

Unlike other equality legislation, direct discrimination on grounds of age can be justified. Employers will have to show that the less favourable treatment was necessary to achieve a "legitimate aim" and was "proportionate".

Financial cost alone will not amount to a "legitimate aim", but it is likely that cost can be "put into the balance" alongside other factors.

The European Court of Justice has recently restricted the opportunity for a social policy justification of age discrimination *(Mangold -v- Helm (2006, IRLR 143; LELR 110)*, saying that blanket exclusions would infringe the principle of proportionality.

## WHAT IS INDIRECT DISCRIMINATION?

Indirect discrimination occurs when A applies to B a "provision, criterion or practice", which is applied equally to persons of other age groups but which puts people in B's age group at a disadvantage, and puts B at a disadvantage.

One example given by the DTI in its 2005 consultation document is that of a business requiring applicants for a courier job to have held a driving licence for five years. According to the DTI *"it is likely that a higher proportion of those aged, say, 40 will have fulfilled this requirement than of those aged, say 25".*

As with direct discrimination, indirect discrimination can be justified by employers where the less favourable treatment is a necessary means of achieving a legitimate objective and is proportionate.

## WHAT IS HARASSMENT?

Harassment will occur where, on grounds of B's age, A subjects B to unwanted conduct which has the effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

## WHAT IS VICTIMISATION?

As with other strands of equality legislation. less favourable treatment of an age-related protected act will amount to victimisation.

## WHAT ARE THE EXCEPTIONS?

There are extensive exceptions to the regulations, which will

# HOW OLD?

significantly limit their application, as follows:

- Retirement: employers are allowed to retire their employees at age 65 or above. This is the most controversial exception and it remains to be seen whether it is even consistent with the Framework Directive.
- Genuine Occupational Requirement: this only applies to recruitment, promotion, training and dismissal and not to contractual terms. It will apply very rarely, for instance to actors.
- Pensions: trustees and pension scheme managers can discriminate on the basis of age in relation to minimum and maximum ages for joining; setting ages for entitlements to benefits; fixing early and late retirement ages; using age in actuarial calculations; varying contribution rates according to age; and linking pension levels to pensionable service.
- Redundancy: statutory redundancy payments using age-related criteria are still lawful
- Differential wage rates are allowed if they mirror the national minimum wage
- Actions required by statute or regulation are exempted
- Service-related benefits that require less than five years' service are exempted, but. any above that have to be justified by the employer showing that it *"reasonably appeared to him" that the benefit "fulfilled a business need, for example by encouraging loyalty, motivation or rewarding experience".*

## WHAT IS THE "DUTY TO CONSIDER" PROCEDURE?

Under the regulations, employers are allowed to retire their employees at age 65 or above; or, if they can objectively justify it, at a lower retirement age than normal.

They have to give between one year and six months' notice of the retirement date to their employees, and must comply with the procedures set down in the regulations to consider any request to stay on, past the intended retirement date.

The employee only has the right to ask to stay on at least three months before the due date, and if the employer does not agree to the request, must invite them to a meeting to discuss it. Employees are not entitled to a reason if their employer refuses their request to continue working, but have the right to appeal the decision. This is known as the "duty to consider" procedure.

If the employer fails to notify the employee up to two weeks before the retirement date, they can claim compensation of up to eight weeks' pay. After that, normal unfair dismissal compensation rules apply.

## CAN PEOPLE OVER 65 NOW CLAIM UNFAIR DISMISSAL?

Yes, the Government removed the upper age limit or normal retirement date of 65 for bringing an unfair dismissal (or redundancy payment) claim. Similarly, they removed the lower age limit of 18 for redundancy and the tapering reduction for unfair dismissal compensation and redundancy payments

## WHAT HAPPENS TO RETIREMENTS BEFORE 1 OCTOBER?

If an employee is given notice before 1 October that they are to be retired during the transitional period, they are either entitled to their contractual notice period, or at least four weeks' notice if their notice is longer than that.

Employers have to write to their employees on 1 October (or as soon as possible after that), telling them that they have the right to request to work longer. Employees can make the request for up to four weeks after their contract has been terminated.

## WHAT ARE THE TRANSITIONAL ARRANGEMENTS AFTER 1 OCTOBER?

If the employee is given notice after 1 October, the employer must write to the employee notifying them of the intended retirement date, offering them either their contractual or statutory notice period (whichever is longer).

Employers have to write to their employees on 1 October (or as soon as possible after that), telling them that they have the right to request to work longer.

Employees can either make their request four weeks before the intended retirement date or, if that is not practical, as soon as possible after receiving their notification. The request can be made up to four weeks after the termination of their contract.

# STRESSED OUT

**For a claim of workplace negligence to be successful, claimants have to be able to show, among other things, that their employer could have foreseen their injury. And they usually have to make their claim within three years.**

But what about claimants who, for whatever reason, cannot bring a claim of common law negligence?

In Majrowski -v- Guy's & St Thomas' NHS Trust the House of Lords said that employees can also bring claims against their employers for a breach of a statutory duty, as set out in the Protection from Harassment Act 1997 (PHA).

## WHAT HAPPENED IN THIS CASE?

Mr Majrowski, a clinical audit coordinator, alleged that his departmental manager had harassed him. He said she was excessively critical of him; that she refused to talk to him; that she was rude and abusive to him in front of other staff; and that she set unrealistic targets for his performance.

Picture: Peter Finnie

Rather than making a claim for negligence (because of evidential and limitation problems), however, Mr Majroswki claimed that the hospital was vicariously liable for breach of a statutory duty imposed on his manager under the PHA.

## WHAT DID THE LOWER COURTS DECIDE?

The county court Judge decided that the trust could not be held vicariously liable under the Act for Mrs Freeman's behaviour.

He said that the purpose of the Act was only to penalise the conduct of specific and identifiable individuals, and Mr Majrowski could only therefore bring an action against his manager, and not the trust.

The Court of Appeal disagreed (see LELR 100). It said that the essential test should be *"whether, looking at the matter in the round, it is just and reasonable to hold the employers vicariously liable"*. However, there must be a strong connection between what the employee had done and the employment in question.

On the basis of that new, broader test, the court concluded that *"an employer may be vicariously liable for a breach of statutory duty imposed on his employee, though not on him".*

## WHAT DID THE HOUSE OF LORDS DECIDE?

Their Lordships agreed with the Court of Appeal. They said that the principle of vicarious liability applied to situations where an employee committed a breach of a statutory obligation while acting in the course of their employment, *"unless the statute expressly or impliedly indicates otherwise."*

So did this one? To answer that question, their Lordships looked to Scotland and the way in which the Prescription and Limitation (Scotland) Act 1973 had been amended when the Protection from Harassment Act was introduced in England. This named the employer as a person who could be responsible for the alleged harassment.

They concluded that, as Parliament could not have intended that situation only to apply to Scotland, the change in Scottish law was the most *"direct and compelling indication of the intention of Parliament that there should be vicarious liability in a case such as the present."*

## COMMENT

Some commentators have suggested that *Majorswki* will open the floodgates for this kind of litigation. Although cases under the PHA are not straightforward, the advantages are that:

- unlike discrimination legislation, workers do not need to show that the harassment was on one of the prohibited grounds of discrimination
- the statutory defence under discrimination legislation that the employer took all reasonable practicable steps to prevent the discrimination, is not available under the PHA
- there is a six-year time limit (three years in Scotland) to bring claims
- claimants do not have to show that the harm was foreseeable or that they suffered a recognisable injury as long as they can show the kind of distress suffered, unlike stress claims brought as negligence actions.

# TIME TRANSFER

**In a long-running saga, the House of Lords has decided in the case of** Celtic Ltd -v- Astley (2006, IRLR 635)**, that the contracts of seconded civil servants had automatically transferred over at the start of their secondment.**

## WHAT WERE THE BASIC FACTS?

The three claimants were civil servants employed by the Department of Employment (DOE) in Wales.

In September 1990 they were seconded for three years to newly formed Training and Enterprise Councils (TECs) which had taken over some of their work. They all resigned from the civil service at the end of their secondments and became employees of the TECs.

In 1998, Ms Hawkes was made redundant by Celtec. It refused to accept that she had continuity of service from the date on which she joined the civil service in 1986.

The other two claimants – Mr Astley and Ms Hawkes – asked the tribunal to decide their length of service as well in case they were made redundant.

## WHAT DID THE NATIONAL COURTS DECIDE?

The tribunal said that there had been a transfer of an undertaking, but to preserve their continuity of service the three claimants had to show they had been employed by the DOE immediately prior to their transfer to the TEC.

But when exactly did it happen? The tribunal decided that it took place over several years, and that it only became effective when the seconded civil servants became employees of the TEC, giving them continuity of employment from the date they joined the civil service.

The employers appealed and the case eventually made its way to the House of Lords (LELR 102), which asked the European Court of Justice (ECJ) to decide whether a transfer could take place over several years.

It ruled that the "date of a transfer" has to be a particular point in time, in this case the date on which the employees were originally seconded.

## WHAT DID THE PARTIES ARGUE?

Celtec argued that the ECJ decision meant that the period of continuous service began after the claimants resigned from the civil service and started working for the TEC.

The claimants, on the other hand, argued that even if the date of the transfer was September 1990 (and not over a period of time), their continuity of employment was not broken when they resigned from the civil service, even though this took place after the date of the transfer. This was because they were deemed to have been handed over to the TEC at the date of the transfer.

## WHAT DID THE HOUSE OF LORDS DECIDE?

Their Lordships decided that the continuity of employment of the civil servants was preserved by the EC Acquired Rights Directive, although they did not actually resign from the civil service until three years after the transfer.

They said that, despite the secondment arrangements, the claimants' contracts were handed over to the TECs on the date of the actual transfer. This was the case even though the employees thought they were still employed by the civil service for the ensuing three years.

This approach accorded with the principle of automatic transfer, which lies at the heart of TUPE and the EC Directive. The only exception to this principle is when an employee chooses not to take up employment with the transferee, which had not happened in this case.

## COMMENT

This surprising decision means that the parties to a TUPE transfer cannot postpone the legal consequences of the transfer. By definition, it calls into question the whole basis of temporary secondments.

Employees who are seconded to a transferred undertaking may now turn out to have been legally employed by the transferee, regardless of what they agreed with the transferor. That will affect not just the issue of continuous service, but all other contractual rights and obligations.

The lesson of *Astley* is that secondments can in fact turn out to have been transfers of employment. Workers therefore need to be as clear as possible as to the identity of their employer.

# A trusted policy

**The Sex Discrimination Act (SDA) says that employers cannot justify a case of direct discrimination. In** Moyhing -v- Barts and London NHS Trust, **the employment appeal tribunal (EAT) said that the law cannot be changed, however reasonable the policy that led to the discrimination.**

## WHAT WERE THE BASIC FACTS?

Mr Moyhing was a male student nurse undertaking a number of clinical placements as part of his BSc degree at Barts and London NHS Trust.

It had a policy whereby male (but not female) nurses had to be chaperoned during certain intimate procedures on women patients such as performing ECGs which required electrodes to be attached to a patient's chest area; and doing catheterizations which involved inserting a tube into a patient's genital area.

Mr Moyhing argued that this resulted in a culture whereby male nurses were treated as second class citizens, and made him feel like a sexual predator. He said this was unlawful discrimination, contrary to section 14 of the Sex Discrimination Act 1975 (SDA).

## WHAT DOES SECTION 14 SAY?

Section 14 of the SDA says that (1) It is unlawful, in the case of a woman seeking or undergoing training which would fit her for any employment, for any person who provides, or makes arrangements for the provision of, facilities for such training to discriminate against her –

(a) in the terms on which that person affords her access to any training course or other facilities concerned with such training, or

(b) by refusing or deliberately omitting to afford her such access, or

(c) by terminating her training, or

(d) by subjecting her to any detriment in during the course of her training"

## WHAT DID THE TRIBUNAL DECIDE?

The tribunal decided against Mr Moyhing. It said that, as far as the ECG procedure was concerned, there was no like-for-like comparison because touching a woman's chest was different to touching a man's. The first was an intimate area whereas the second was not.

It accepted, however, that a requirement to be chaperoned during the procedure could amount to less favourable treatment. In other words, direct discrimination.

But it agreed with the trusts that the differential treatment was to ensure the safety and welfare of both staff and patients.

It concluded, therefore, that Mr Moyhing had not suffered a "detriment" (or disadvantage) by being asked to have a chaperone present when doing an ECG.

With regard to the procedure of catheterization, the tribunal found, as a matter of fact, that female student nurses could not carry out male catheterizations until post graduate level and that he could not have been treated less favourably, at this stage, on the ground of sex.

My Moyhing appealed to the EAT.

> *'It would be contrary to Parliament's intentions to restrict the concept of detriment so as to make good the limited scope of the present justification defence'*

## WHAT DID THE EAT DECIDE?

The EAT found in favour of Mr Moyhing.

It confirmed that a detriment is any treatment that a reasonable person would regard as being a disadvantage at work.

The reasonableness of the employer's policy was just a factor to be considered in determining what a reasonable person would feel.

It said that the tribunal's approach had the effect of, providing a justification defence in a case of direct discrimination by the back door.

It pointed out that, if a chaperone was not available, a male nurse might not be able to carry out the procedure at all. That would plainly be a detriment. The trust therefore had two options – one was to dispense with chaperones altogether; the other to provide them for everyone.

The EAT sympathized with the position in which their decision put the trust, but said that there was no legal basis for treating male and female nurses differently.

It would be contrary to Parliament's intentions to *"restrict the concept of detriment so as to make good the limited scope of the present justification defence."*

The EAT therefore substituted a finding of unlawful discrimination and awarded Mr Moyhing compensation of £750.

# Paying by results

**Section 221(3) of the Employment Rights Act (ERA) says that if an employee's pay for normal working hours varies with the amount of work done, then a week's pay is calculated at the average hourly rate of pay for the previous 12 weeks.**

In May Gurney Ltd -v- Adshead (and 95 others), the employment appeal tribunal (EAT) said that both a variable and a fixed bonus should be included in the calculation of employees' pay when working out holiday pay.

## WHAT WERE THE BASIC FACTS?

The terms and conditions of the 96 claimants in this case were set out in their contract, as well as a collective agreement that determined how payment for annual leave should be calculated.

The agreement stated that, if an operative's pay varied with the amount of work done, a week's pay should be calculated by averaging the earnings for a normal working week over the 12 weeks worked immediately before the holiday week.

They were also entitled to two types of bonuses (one fixed and one variable). The latter varied depending on whether the employee worked in the mainline or district section.

The claimants argued that their bonuses should be included as part of their pay for calculating holiday pay.

## WHAT DID THE TRIBUNAL DECIDE?

The tribunal decided that the variable bonus should be taken into account when calculating holiday pay, because it was essentially a productivity bonus. As a result, the amount of a week's pay did vary with the amount of work done.

They also decided that the fixed bonus was part of the weekly wage in the sense that it formed part of the pay that an employee would inevitably receive as long as they turned up for work.

The tribunal therefore concluded that the employers had not made the appropriate calculation for holiday pay, in that they had ignored both these bonus elements.

## WHAT DID THE PARTIES ARGUE ON APPEAL?

The employer argued that the tribunal had failed to understand the differences between the two variable bonuses. If it had done a proper analysis of the district bonus arrangement, it would have realized that pay did not vary with the amount of work done. Instead, employees had to reach a threshold before the bonus kicked into place.


In addition, they said that the bonus payable depended on a number of factors unrelated to the efficiency of the workers. All this, they argued, showed that there was no direct correlation between the amount of work done and the pay received.

Not surprisingly, the claimants argued that the productivity arrangement was one where pay clearly did vary with the amount of work done, not least because employees received extra reward for achieving a greater level of output within a fixed period of time.

And in any event, they said that holiday pay should be calculated by taking into account any arrangement that can properly be described as a productivity bonus arrangement, whether the pay varied with the amount of work done or not.

## WHAT DID THE EAT DECIDE?

The EAT rejected the employer's argument that, just because the same level of performance could lead to different output, this meant there was no direct correlation between work and pay. It said that, to a greater or lesser extent, that would almost always be the case.

Nor did they agree with the employer's argument about the threshold level. It said that, although pay was the same until the threshold was reached, it was still the case that, once a certain level of performance was achieved, then the pay varied with performance.

As for the fixed bonus, the EAT said that, since the fixed bonus was part of weekly pay, it should also be included in the calculation for holiday pay.

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HEAD OFFICE
Congress House,
Great Russell Street,
LONDON WC1B 3LW
020 7290 0000

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Email us at lelrch@thompsons.law.co.uk

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To receive regular copies of LELR
email: lelrch@thompsons.law.co.uk

Contributors to this edition:
Richard Arthur, Iain Birrell, Vicki Gough, Rakesh Patel
Caroline Underhill, Anita Vadgama

Editor: Alison Clarke
Design & production: www.rexclusive.co.uk
Print: www.dsigroup.com/talisman
Front cover photo: Kateryna Govorushchenko

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