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New compensation limits

A number of new compensation limits come into force on 1 February 2007.

	Previously	From 01.02.07
Limits on guarantee payments	£18.90/ day	£19.60
Limit on a week's pay	£290	£310
Maximum amount of a week's pay for calculating basic or additional award of compensation for unfair dismissal or redundancy payment.	£290	£310
Maximum basic award for unfair dismissal (30 weeks' pay)	£8,700	£9,300
Minimum basic award for dismissal on trade union, health and safety, occupational pension scheme trustee, employee representative and on working time grounds only	£4,000	£4,200
Maximum compensatory award for unfair dismissal	£58,400*	£60,600*
Minimum award for employees excluded or expelled from a trade union	£6,300	£6,600

* 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.

In dispute

The Government has announced a review of the framework for settling disputes between employers and employees.

This will look at options for simplifying and improving all aspects of the current system (see "It's good to talk" page 10) and will involve business representatives, unions and other interested parties.

The review will build on evidence gathered recently by the Government about the effect of previous changes to the dispute resolution system.

It will look at all aspects of the system, including the current legal requirements, how employment tribunals work, and the scope for new initiatives to help resolve disputes at an earlier stage. It is expected to make recommendations for change in spring 2007.

Work and families

According to a recent survey of employers by the HR organisation, the Chartered Institute of Personnel and Development, and accountants KPMG, only one in 10 thought that the provisions of the Work and Families Act 2006 would be beneficial to their organisations.

Almost two-thirds of employers thought that the paternity leave provisions would cause them some difficulties while over half thought that the maternity and adoption pay provisions would cause difficulties.

Attitudes towards extending the right to request flexible working were more positive, however.

Only four per cent of employers thought that the new right for carers to request flexible working would cause them significant difficulties, and 35 per cent were strongly in favour of extending the right to all employees.

Gain without pain

According to an analysis of unpublished findings from the Government's Labour Force Survey published by the TUC, the UK no longer needs to have a long hours opt out.

The report, *Gain without pain,* showed that removing the opt-out would have little economic effect. This is because:

- the number of UK employees working more than 48 hours has declined by 17.5 per cent since the 1998 peak of four million, with 700,000 fewer employees now working long hours
- the incidence of long hour working has declined in every industry, occupation and region, although the pattern of improvement is very uneven, with some sectors doing much better than others
- a third of UK employees who work more than 48 hours per week are only working one or two extra hours per week.

Go to: www.tuc.org.uk/extras/gainwithoutpain.doc to download a copy of the report.

Women on the board

Although women make up 46 per cent of the workforce, they remain an endangered species on the boards of UK companies, according to the 2006 Female FTSE Report from the Cranfield School of Management.

The report showed that female–held directorships fell from 121 in 2005 to 117 in 2006. Of these, only 15 were held by female executive directors out of a possible 391. Things are not much better at the next level of management either. Only 53 companies have women on their executive committee, 30 have all male committees and the rest refused to say.

For a copy of the report, email: a.southgate@cranfield.ac.uk

Getting equal

Statutory guidance on the Gender Equality Duty (which comes into effect in April 2007) has now been laid before Parliament.

The code of practice gives practical guidance on how to meet the legal requirements of the duty and will help public authorities to make sure they are complying with it.

Although the code is still technically in draft form until it has been before Parliament for 40 sitting days, the current text will not change.

To read more about the duty and to download the code, go to: www.eoc.org.uk//default.aspx?page=19689

A grievance in time

The EAT has said in HM Prison Service -v- Barua that regulation 15 of the 2004 dispute resolution regulations extends the normal time limit for lodging a tribunal case, even if the employee had already started a grievance before the effective date of termination.

Dr Barua was told in February 2005 that his pay was to be cut. He handed in his notice on 25 April, giving the effective date of termination as 31 July.

On 27 June (ie during his notice period) he lodged a formal grievance about the pay cut. On 27 January 2006 he lodged a number of tribunal claims.

Because he lodged his grievance on 27 June, the EAT said he was entitled to the three month extension under regulation 15 which meant that his claim was still in time.

Strike out

If employers fail to obey tribunal orders, they can expect their case to be struck out, which is exactly what happened in Premium Care Homes -v- Osborne.

The employer had already breached various orders that the tribunal had made, when they turned up on the morning of the hearing with a long witness statement which Mrs Osborne had not seen before.

The EAT said that the tribunal was right to debar the employer from defending the claim (except in respect of compensation), because their unreasonable procrastination (which included deliberate delaying tactics) had prejudiced her chances of a fair hearing.

It's unfair

The Court of Appeal has said in Commerzbank AG -v- Keen that section 3 of the Unfair Contract Terms Act 1977 does not apply to employment contracts.

Mr Keen claimed in the High Court that the provision in his contract stating that he would not receive a bonus if he was no longer employed by the bank was unreasonable, and therefore caught by the Unfair Contract Terms Act 1977.

The court disagreed and held that section 3 applied only "as between contracting parties where one of them deals as a consumer or on the other's written standard terms of business".

No such thing as a free-standing right

If someone has less than one year's service, the EAT has said in the case of Scott-Davies -v- Redgate Medical Services (also see "It's good to talk" page 10) that they do not have a free-standing right to complain about a breach of the statutory procedures.

In this case, Redgate Medical Services did not provide Mr Scott-Davies with a statement of his terms and conditions, nor did they follow the grievance or disciplinary procedures when they dismissed him.

However, as he did not have a year's employment, he could not bring a claim of unfair dismissal, because, as the EAT made clear, "the complaint of failure to follow a statutory procedure is invoked only as part of an otherwise valid application".

Age amendments

Following the briefest of consultations, the Government has now laid before Parliament a set of regulations that make a number of changes to Schedule 2 of the Employment Equality (Age) Regulations 2006.

These relate to the issue of pensions and age discrimination, and clarify and extend many of the exemptions relating to trustees and managers of pension schemes. The CBI called the changes "a victory for common sense".

Go to: www.opsi.gov.uk/si/si2006/ 20062931.htm for a full copy of the regulations,

Caring for carers

After consulting carers' groups and business organisations, the Government has announced the definition of "carer" that will be used for the right to request to work flexibly from 1 April 2007.

A carer will be an employee who is or expects to be caring for an adult who:

- is married to, or is the partner or civil partner of the employee; or
- is a near relative of the employee; or
- falls into neither category but lives at the same address as the employee.

The "near relative" definition includes parents, parents-in-law, adult child, adopted adult child, siblings, uncles, aunts or grandparents and step-relatives.

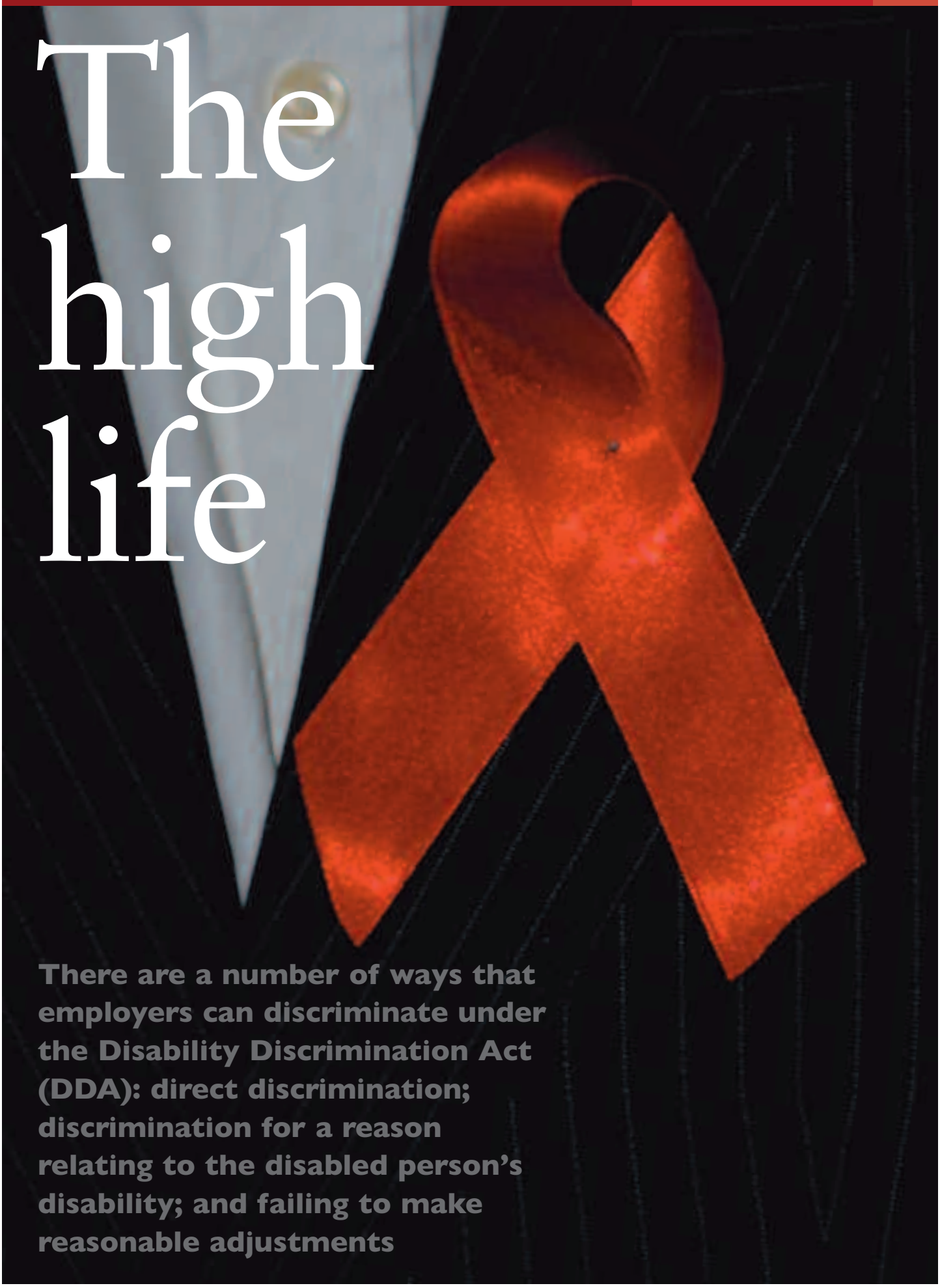
DTI rights guide

***Individual rights and responsibilities of employees: a guide for employers and employees* is a free, up-to-date DTI overview of employment law.**

It covers all the main topics – pay, dismissal, parental legislation, time off, anti-discrimination law, other statutory employment rights, complaints and remedies – of interest to trade union officials. And it's written in plain English.

To order a copy of the guide, go to: www.dti.gov.uk/publications/index.html, press search and enter URN 06/1833

The high life



There are a number of ways that employers can discriminate under the Disability Discrimination Act (DDA): direct discrimination; discrimination for a reason relating to the disabled person's disability; and failing to make reasonable adjustments

In **High Quality Lifestyles Ltd -v- Watts (2006, IRLR 850)**, the Employment Appeal Tribunal (EAT) said that, to prove direct discrimination, claimants have to show that the discrimination was "on the ground" of their disability; and that they were treated less favourably than someone else in similar circumstances.

What were the basic facts?

Mr Watts started work as a residential support worker in March 2004. He worked with people with severely challenging behaviour who sometimes scratched and bit the support workers, to the point of drawing blood.

He had not mentioned the fact that he was HIV positive on his application form, but told his area manager in July 2004. The company contacted his consultant who said that the risk of transmission to anyone else was very small.

Mr Watts was then told at a meeting on 10 August that the company would carry out a risk assessment. He was suspended on 16 August and dismissed on 6 October, following a risk assessment, which found that injuries involving broken skin and biting were a common occurrence.

What did Mr Watts claim?

Mr Watts claimed that he had been discriminated against under section 3A(1) of the DDA for a reason related to his disability, arguing that the company had treated him less favourably than someone "to whom that reason does not or would not apply", and that the company could not justify treating him in that way.

He also claimed direct discrimination under section 3A(5). This states that: "A person directly discriminates against a disabled person if, on the ground of the disabled person's disability he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances including his abilities, are the same as, or not materially different from, those of the disabled person."

There is no defence of justification to a claim of direct discrimination.

What did the tribunal decide?

The tribunal agreed that Mr Watts' employers had breached section 3A(5) when they dismissed him. It also said that they had discriminated against him for a disability-related reason contrary to section 3A(1)(a) by suspending and dismissing him, and by breaching confidentiality when they disclosed his HIV status to his line manager and another colleague.

What did the EAT decide?

The EAT said that Mr Watts had not been directly discriminated under section 3A(5) when he was suspended and dismissed.

His employers had adopted this course of action, not because of his HIV status, but to reduce the risk of transmission to others.

To prove direct discrimination, it said claimants have to show two things: that the discrimination was "on the ground" of their disability; and that their treatment was less favourable than a hypothetical comparator whose relevant circumstances (including their abilities, but not limited to them) were the same as or "not materially different" to theirs.

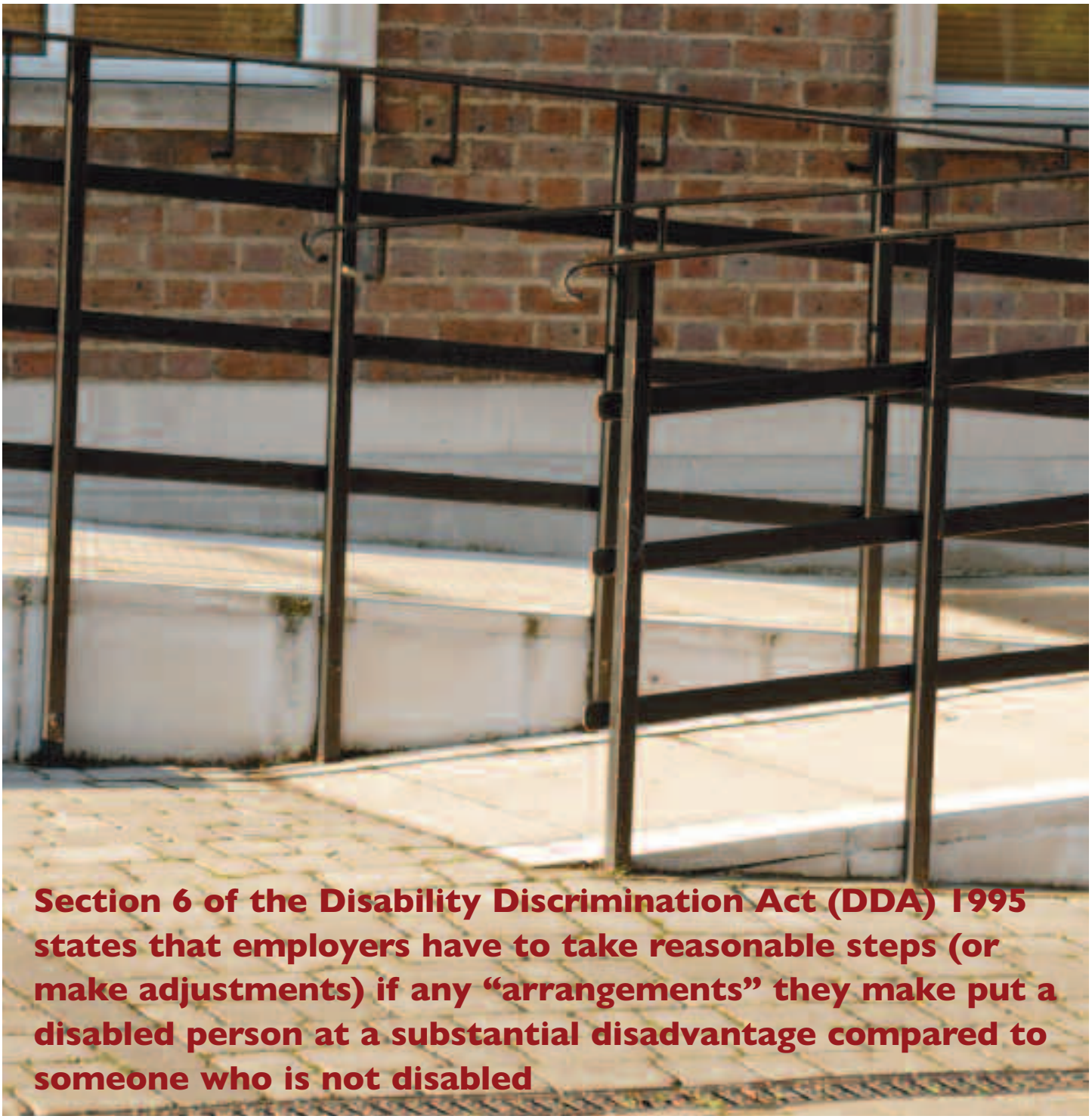
In this case, the comparator needed to be someone who was not HIV positive, but who posed the same serious risk. To shift the burden of proof to the employers, Mr Watts then needed to prove that his comparator would not have been dismissed, but he had not done this.

Nor had there been a breach of confidentiality. Disclosing the consultant's letter to his line manager and telling a colleague with whom he had discussed his condition, could not be said to be a breach of confidentiality.

However, it agreed that Mr Watts' employers had not been able to justify discriminating against him for a disability-related reason under section 3A(1). They had not carried out a proper investigation, nor had they undertaken an adequate risk assessment of the situation.

They had also failed to consider what reasonable adjustments they could make. Instead they had just imposed a requirement that a support worker "should not pose a risk of transmitting a serious medical condition (such as HIV)". This placed Mr Watts at a substantial disadvantage compared with someone who was not HIV positive.

Adjusting for disability



Section 6 of the Disability Discrimination Act (DDA) 1995 states that employers have to take reasonable steps (or make adjustments) if any "arrangements" they make put a disabled person at a substantial disadvantage compared to someone who is not disabled

In **NTL Group Ltd -v- Difolco**, the Court of Appeal said that employers do not have to make adjustments to a job until a disabled applicant has actually applied for it.

What were the basic facts?

Ms Difolco started work for NTL in March 2002 in Hampshire, but shortly after had an accident at work which left her disabled. She subsequently worked part time from October 2002, partly from her parents' home in the north east and partly from NTL's Teesside office.

After being selected for redundancy in February 2004, Ms Dilfolco was offered another job as "suitable alternative employment". This was a full-time post but NTL said that it would consider changing it to part time if she was appointed. .

Ms Difolco wanted the role to be changed to part time before she applied. She was dismissed in March 2004.

What does the law say?

Section 6(1) of the DDA 1995 (ie before it was amended) said: "Where

a) any arrangement made by or on behalf of an employer, or
b) any physical feature of premises occupied by the employer

place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect."

What did the tribunal decide?

The tribunal said that to comply with section 6(1), NTL should have first found out whether the job could be done on a part time basis. If so, the company should have offered it to Ms Difolco without making her go through an interview.

It relied on the case of Archibald -v- Fife Council (LELR 92), in which the House of Lords said that employers may have to make a reasonable adjustment by offering disabled employees a vacant role over and above non-disabled employees provided they satisfied the basic minimum criteria.

NTL appealed unsuccessfully to the EAT. It then took its case to the Court of Appeal on the ground that the "arrangements" it had made in relation to Ms Difolco did not amount to a "substantial disadvantage" under section 6. If there was no substantial disadvantage, it argued, there could not be a duty on them to make an adjustment.

What did the Court of Appeal decide?

And the Court of Appeal agreed with NTL. It said that Ms Difolco first had to show, as required under section 6(1) that the "arrangements" it offered put her at a substantial disadvantage.

Ms Difolco argued there were two "arrangements" – that NTL required her to compete for the Teesside job; and that NTL offered it to her on a full time basis only. The Court of Appeal did not consider that the tribunal's reasoning supported her argument and the EAT was not, therefore, entitled to rule as though it had.

It pointed out that "If the mere fact of advertising for a full-time job can constitute an arrangement for the purposes of the DDA then on the face of it, it would potentially discriminate against the whole innominate class of possible disabled applicants for the job. That, it may well be thought would be a reductio ad absurdum."

As there was no link between Ms Difolco's redundancy dismissal and her disability, the Court said that NTL was not under any duty to offer her an alternative position without interviewing her first.

It concluded that employers do not have to make adjustments to a role to "remedy the substantial disadvantage of a disabled potential candidate" until they actually apply for the job.

Comment

This case shows that trade union members who are disabled under the DDA and require adjustments to their jobs (such as part time working) should not avoid applying for positions that are advertised without adjustments. If the employer then refuses to make the necessary adjustment, they may be able to pursue a claim under the DDA.

It's good to talk

A brief overview of statutory grievance procedure case law

It is now over two years since the Government introduced legislation to regulate disputes in the workplace. Not surprisingly, quite a few cases have already made their way to the Employment Appeal Tribunal (EAT), although none (as yet) to the Court of Appeal.

In this article, **Joe O'Hara**, a solicitor from Thompsons Employment Rights Unit in London, looks at what the EAT has said about how the standard grievance procedure (which applies to complaints such as constructive dismissal, deductions from wages, equal pay and discrimination) should work.

Standard grievance procedure

Step 1: the employee gives the written grievance to their employer.

Step 2: the employer invites the employee to a meeting to discuss the grievance, after which they inform their employee of their decision and of the right to appeal. Before the meeting takes place, the employee must inform the employer of the basis for the grievance and the employer must take all reasonable steps to attend the meeting.

Step 3: in the event of an appeal, the employer must invite the employee to a further meeting, after which the employer gives their final decision.

Modified grievance procedure

Step 1: the letter from the employee must set out not just the grievance, but also the basis for it.

Step 2: the employer sends their employee a written response. The parties do not meet and there is no appeal.

Criteria

The following criteria apply to both procedures:
- each step must be taken without unreasonable delay
- timings and locations of meetings must be reasonable
- meetings must be conducted so as to enable both sides to explain their case.

What has the EAT said about step one?

In both **Shergold -v- Fieldway Medical Centre** (LELR 109) and **Galaxy Showers Ltd -v- Wilson** the EAT said that a letter of resignation can amount to a step one letter, even though the employer might not have a chance to respond to it.

Indeed, the employee does not even have to make it plain that they are invoking the grievance procedure in the letter, as long as the general nature of the complaint they are making is clear to the employer.

In **Galaxy Showers** the EAT rejected the employer's argument that the employee had to make clear in their written grievance that they wanted to go ahead and have it resolved. It said that the subject matter of the grievance just had to be broadly the same as their tribunal claim.

How detailed should the letter be?

It's best if employees set out the grievance and its background clearly in the step one letter, although it only has to state the basic fact of the grievance in the standard grievance procedure.

In **Shergold** the EAT said that the step one grievance letter did not have to contain the actual basis of the grievance, as this can be cleared up before the step two meeting (although it can be fatal if it isn't).

Employees can also draw on decisions dealing with the statutory dismissal and disciplinary procedure (since the wording is practically identical). So, for instance, in **Martin -v- Class Security Installations Ltd**, the EAT said that a letter complaining of repudiatory breach of contract was enough for a complaint of unfair constructive dismissal.

And in **Draper -v- Mears Ltd**, the EAT said that, when deciding whether a document meets the requirements for a disciplinary step one letter, tribunals can take into account whether the employee could have been in any doubt about its status.

If the tribunal finds there was ambiguity, it can then widen its investigation and look, for instance, at whether the employee knew what the allegations against them were. The same reasoning applies to step one grievance letters, but the wisest course of action is to set out the grievance and its background in the step one letter (which employees have to do for the modified procedure anyway).

In **Canary Wharf Management Ltd -v- Edebi**, the employee complained about working conditions and the effect that they had on his health and that of his colleagues. The EAT said that this was not sufficient to raise a grievance about a breach of the Disability Discrimination Act, which was not mentioned anywhere in the letter. So the complaint to the employer must be essentially the same complaint that is subsequently advanced before the employment tribunal.

Furthermore, the EAT in **Holc-Gale -v- Makers UK Ltd** (LELR 108) confirmed that regulation 14 of the 2004 dispute resolution regulations excludes all the contents of a discrimination questionnaire (for instance under the Sex Discrimination Act). If the employee serves a statutory questionnaire, they must also serve a separate step one letter.

Does the employee have to write the letter?

That is certainly what paragraphs six and nine of Schedule 2 to the 2002 Employment Act both state, but in **Mark Warner Ltd -v- Aspland** the EAT said that the employee's agent could write the step one letter. In that case, the

employee's solicitor wrote a "letter before action" to the employer's solicitor.

This decision should be helpful to trade unions, provided they have their member's authority to write the letter, even where they fail to name every relevant member and so fall outside regulation nine (collective grievances).

What has the EAT said about step two?

It follows that an employee who has set out the barest information in their step one letter must, before the step two meeting, make sure that the employer knows the basis of the grievance. For instance, in an equal pay complaint, who the comparator is and what increase they want.

The employee must take all reasonable steps to attend the step two meeting.

In **Galaxy Showers Ltd -v- Wilson**, the EAT said that, although the meeting can discuss both discipline and grievance, part of the purpose of the meeting must be to discuss the substance of the grievance itself.

That means the employer must indicate to the employee that there is to be a meeting that will (at least in part) deal with the complaints already made.

When does the SGP apply?

The EAT has looked at two issues about whether the standard grievance procedure (SGP) applies at all.

The first concerns complaints against a fellow-employee for whose actions the employee says the employer is vicariously liable, such as racial harassment by a manager.

The EAT has made two conflicting decisions: **Bisset -v- Martins and Castlehill Housing Association Ltd** (LELR 115) says the SGP does not apply; but **London Borough of Lambeth & others -v- Corlett** says it does. Until that difference of opinion is resolved, claimants should follow the SGP but without relying on the three-month extension to the tribunal deadline.

The second concerns the overlap between dismissals and grievances. Except for constructive dismissals, regulation 6(5) says that the SGP does not apply if the grievance is that the employer dismissed or contemplated dismissing the employee.

> An employee who has set out the barest information in their step one letter must, before the step two meeting, make sure that the employer knows the basis of the grievance

London Borough of Lambeth & others -v- Corlett concerned a claim by an employee for damages for breach of contract arising from his summary dismissal. The EAT said that the complaint was that the employee had been dismissed and so the statutory dismissal and disciplinary procedure, not the SGP, applied.

Thompsons does not think this case has been correctly decided. Until it has been overruled, however, employees who have been dismissed and are owed notice pay, holiday pay or redundancy pay, should lodge a grievance, if possible wait 28 days, then rely on the shorter of the two possible time limit extensions.

Thompsons agrees, however, with the decision in **Jones -v- Department for Constitutional Affairs**, which says that a grievance that the employer had dismissed, or had contemplated dismissing, someone included a complaint about the manner in which the employer was contemplating dismissal – so the SGP did not apply.

How are time limits affected?

If an employee triggers the SGP within the tribunal time limit, that time limit is then extended by three months. In **Singh t/a Rainbow International -v- Taylor**, the EAT suggested that this was three months and one day, but Thompsons believes that is wrong. For example, in a sex discrimination case, time expires six months minus a day from the act complained of.

More usefully, in a decision covering two cases, **Bupa Care Homes (BNH) Ltd -v- Cann** and **Spillett -v- Tesco Stores Ltd**, the EAT ruled that the dispute resolution rules do not affect the normal tribunal discretion to extend the time limit. For instance, in discrimination cases where it is just and reasonable to do so.

What impact have the rules had on procedural issues?

In **Scott-Davies -v- Redgate Medical Services** the EAT confirmed that employees do not have a free-standing right to complain of a breach of the statutory procedures in the absence of a valid claim of unfair dismissal (in this case someone with less than one year's service).

Finally, since an employee's failure to comply with the SGP affects whether tribunals can hear their claim, employers can raise that failure at a very late stage, even where their ET3 form had accepted compliance – **Holc-Gale -v- Makers UK Ltd** and tribunal rule 3(9).

Getting informed

New information and consultation (I and C) rules applying to businesses and organisations with 150 or more staff were introduced in the UK in 2005

The new rules set out the circumstances in which employers have to reach I and C agreements with their staff.

But can employers rely on agreements that already exist? The Employment Appeal Tribunal (EAT) has now provided guidance in **Moray Council -v- Stewart (2006, IRLR 592; IDS 816)** on the status of pre-existing agreements.

What does the law say?

The Information and Consultation of Employees Regulations 2004 state that employers have to negotiate an I and C agreement with employee reps, if they receive a "valid employee request" from 10 per cent of the workforce.

However, if there are pre-existing agreements (PEAs) that have already been approved covering all employees, the employer only has to negotiate a new agreement if 40 per cent of the workforce makes the request.

If only 10-40 per cent ask for the agreement, the employer can hold a ballot to gauge the level of support. The obligation to negotiate then arises if at least 40 per cent of the workforce and a majority of those voting endorse the request.

To be valid, the regulations state that PEAs:
a) must be in writing
b) must cover all employees in the undertaking
c) must have been approved by the employees
d) must set out how the employer will share information with their employees (or representatives) and get their views on it.

What was the background to the case?

In August 2005, Mr Stewart presented the council with a petition signed by over 500 employees (between 10 and 40 per cent of the workforce) asking the council to negotiate an I and C agreement.

The council said its three existing collective agreements with the recognised trade unions amounted to a valid PEA and decided to ballot the workforce. Mr Stewart (a non union member) disagreed and complained to the Central Arbitration Committee (CAC) that the council should have started negotiations.

What did the CAC decide?

The CAC said that the three agreements covered all employees within the meaning of the regulations, despite the fact that the consultation mechanism within them was limited to trade union representatives. Non-union members were covered because the agreements did not differentiate between union members and non members.

It also said that the agreements had been "approved by the employees", because everyone was covered by one or more of the agreements, and the trade union reps represented all employees, whether in a union or not (and the majority were).

But it said that one of the three agreements did not "set out how the employer is to give information to the employees" or seek their views. The statement that the joint negotiating committee was "a forum for discussion and/or consultation" was not detailed enough.

What did the EAT decide?

The EAT said that each of the agreements had to meet the requirements in each of the paragraphs set out in a, c and d. It was not enough for one of the agreements to do so. The only exception was paragraph b, which had to be read differently, because otherwise each agreement would have to cover all employees.

That being so, the employees covered by a particular agreement had to approve it.

These agreements, taken together, covered all employees. The requirement that all employees should be "covered" by the agreements just meant that no "category" of employee could be left out. Just as collective agreements can cover non-union as well as union members, so can I and C agreements.

An agreement can be approved on behalf of employees where the majority were union members, as long as there was no obvious opposition to it.

However, approval had to be obtained for each agreement, by the employees covered by it. In this case, the agreements had been approved by union representatives and as most employees were members, the necessary approval had been given.

However, the agreements did not constitute PEAs because one of them did not spell out in enough detail how the employer would give information to the employees or seek their views.

Shifting burden

In discrimination cases, the first stage is for workers to identify facts from which a tribunal could conclude that there has been unlawful discrimination

The burden of proof then passes to the employer for an explanation at the second stage.

In **Laing -v- Manchester City Council (IDS 814)**, the Employment Appeal Tribunal (EAT) has confirmed that a tribunal does not always have to go through both stages if it is satisfied, from all the facts, that the employer did not discriminate against the claimant.

What were the basic facts?

Mr Laing started work as a community support officer for the council in April 2004. Initially things went well but as the pressure increased, his performance started to deteriorate as did his relations with other members of staff.

After a meeting in June to discuss his attitude, things improved again. However, Mr Laing remained unhappy about the council's request to have his photograph displayed on a board in the reception area.

He was told in July that his placement as an agency worker would be terminated if he did not agree to this "reasonable management request."

He then accused one of his managers of race discrimination. The council initiated an independent investigation which concluded that, although the manager lacked management skills, she was not guilty of bullying or harassment.

The council dismissed Mr Laing for refusing to obey a reasonable instruction, for his general attitude, and because of the breakdown of his relationship with his manager. He brought claims of race discrimination and victimisation.

What did the tribunal decide?

The tribunal dismissed his claim of race discrimination, describing him as "a very difficult employee". Although it agreed his manager lacked adequate management skills, it said that her failings were apparent in her dealings with all staff, not just Mr Laing or, indeed, other black staff.

It also rejected his victimisation claim. Although he was dismissed soon after making allegations of race discrimination, the tribunal accepted the council's reasons for doing so and decided they were not discriminatory.

What did the EAT decide?

The EAT rejected Mr Laing's argument that only his evidence (and any from the employer that supported his case) should be considered when deciding whether he had been discriminated against before the burden of proof passed to the employer for an explanation.

Relying on the Court of Appeal case of **Igen Ltd -v- Wong**, the EAT said it was clear that tribunals have to consider all the facts at this first stage, whether or not some of them undermined the complainant's case.

The reference in section 54A of the Race Relations Act 1976 to "the claimant proving facts" did not mean that the other side could not do so as well. It just meant that the burden was on the claimant to prove that they had enough of a case before it passed to the employer for an explanation.

In this case, when all the evidence was considered, the fact that Mr Laing's manager was equally abrupt to all staff, was highly significant. Even if the tribunal was wrong to conclude that Mr Laing had not made out his case of discrimination on the facts, the tribunal had considered the explanation from the employer as to why he was dismissed and concluded that it had nothing to do with race.

The EAT clarified that "ultimately the issue is whether or not the employer has committed an act of race discrimination.

"The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race."

The focus of the tribunal's analysis must therefore always be whether or not they can properly and fairly infer race discrimination.

If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then "that is the end of the matter".

Railway racism

It is notoriously difficult for claimants to win in race discrimination cases not least because the discrimination is rarely overt or because there is little or no concrete evidence

Although tribunals can infer discrimination from the basic facts presented by the claimant, the EAT has said in **Network Rail Infrastructure Ltd -v- Griffiths-Henry (2006, IRLR 865)** that just because an employer acted unfairly did not mean they were guilty of discrimination.

What were the basic facts?

Ms Griffiths-Henry (who is black) started work for Network Rail as an area finance manager in September 2000. Between June 2003 and July 2004, the company underwent a major reorganisation which resulted in a TUPE transfer of 15,000 staff.

Following the transfer, Ms Griffiths-Henry was told that she was one of nine finance controllers competing for five jobs. The company started a redundancy process in which all the candidates were assessed according to a set of skills-based criteria.

Ms Griffiths-Henry was given the second lowest score out of the nine and was told that she would be made redundant. All the other candidates were white men. She claimed unfair dismissal, race and sex discrimination.

What did the tribunal decide?

The tribunal agreed that Ms Griffiths-Henry had been less favourably assessed in the procedure carried out by the company, which made the dismissal unfair.

It also said that she had established enough facts from which it could infer both sex and race discrimination, because "she is the only black person and the only female in the group. The failure to select her was clearly to her detriment. We conclude that there was a difference of race and sex and a difference of treatment."

Given these findings, the tribunal looked to the employer for an explanation, but was not convinced by it. It decided that the assessment process had been "tainted by subjectivity", and concluded that Network Rail could not show that "the process was not tainted by either race or sex discrimination and we find the claimant's complaint made out."

What did the EAT decide?

The EAT said that although the tribunal was entitled to infer race and sex discrimination from the facts, the mere fact that she was a black woman and the others were white men was not, in itself, enough to establish discrimination.

It agreed with the suggestion in **Dresdner Kleinwort Wasserstein Ltd -v- Adebayo** that an employee would be able to establish a case "if he were black, was at least as well qualified as the white comparator, and was not promoted", but only if there were two candidates for the job.

If the unsuccessful black candidate was rejected along with a number of equally well qualified white candidates, then the justification for inferring a "prima facie" case would be much weaker. In this case, the tribunal established Ms Griffiths-Henry was, on the face of it, as well qualified as the five successful candidates. It then fell to the employers to explain why five white men were selected and she was not.

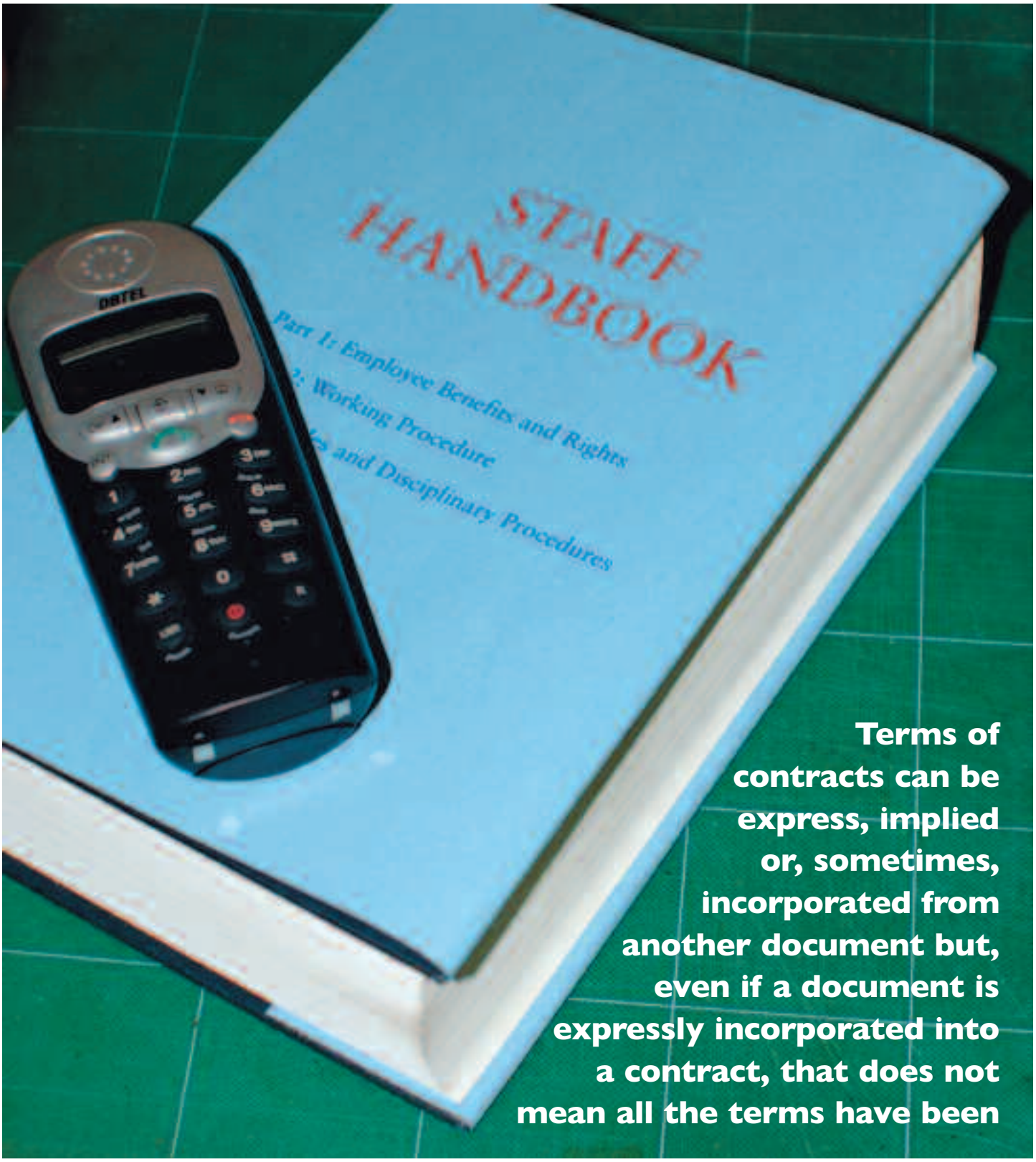
However, it was crucial at this second stage for the tribunal to have only concerned itself "with the reason why the employer acted as he did". Although the tribunal found that there was a certain inconsistency in the way the redundancy process was carried out, that did not mean it was necessarily tainted by race or sex discrimination.

The EAT said it would be inappropriate to find discrimination simply because the tribunal did not think that the explanation given by the employer for the difference in treatment was justified or reasonable.

If that were so, an employer who used unacceptable criteria to select staff or applied them inconsistently could, for that reason alone, be liable for a whole range of discrimination claims in addition to an unfair dismissal claim. That, said the EAT, would "plainly be absurd". Unfairness alone was not enough to establish discrimination.

The EAT was therefore "left with the clear impression that the tribunal here was satisfied that discrimination could be inferred merely because the selection criteria were not applied as objectively as the employer claimed." It had failed to distinguish between unreasonable conduct which rendered the dismissal unfair, and discriminatory treatment. The appeal would therefore be allowed and the case remitted to the tribunal.

Contracted in



Terms of contracts can be express, implied or, sometimes, incorporated from another document but, even if a document is expressly incorporated into a contract, that does not mean all the terms have been

According to the Court of Appeal in **Keeley -v- Fosroc International Ltd (2006, IRLR 961; IDS 817)** a reference in Mr Keeley's contract to an "entitlement" to an enhanced redundancy payment in the staff handbook had contractual status, although other sections in the handbook did not.

What were the basic facts?

Mr Keeley had a contract of employment with Fosroc International Ltd consisting of a written statement of his terms of employment. Incorporated in the statement was a reference to the company's staff handbook.

This was divided into three parts – "Employee Benefits and Rights", "Working Procedures" and "Rules and Disciplinary Procedures". The section headed "redundancy" (in part one) contained a number of contractual provisions, such as the right to paid time off to look for work elsewhere.

It also contained a paragraph headed compensation, which stated that employees with two or more years' service were entitled to an enhanced redundancy payment. The enhanced terms were not spelt out – it just said that details would be discussed during both collective and individual consultation.

This part of the handbook also covered a number of other different employees' rights and benefits, many of which (although not all) were clearly contractual. These included annual leave, retirement, grievance, pregnancy and maternity rights and trade union membership. Likewise the second and third parts.

When Mr Keeley was made redundant in July 2004, he claimed that his contract expressly entitled him to an enhanced redundancy payment, or, alternatively, that he had an implied right because of custom and practice. The company claimed it was too uncertain to have contractual effect.

What did the High Court decide?

The High Court judge said that the terms of the handbook were incorporated into the contract, but only in so far as they spelled out terms of employment.

He accepted that although the provision relating to redundancy was expressed "not as some aspiration but as a statement of the entitlement of the employee … the whole provision must take its colour from the context".

In this case, the context was very much just "an exposition of the principles and particularly the procedures to be applied to handling redundancies". He said it was significant that the document did not spell out what the enhanced terms were (despite pressure from union representatives to include a formula).

He concluded that the section simply signified what the employee could expect to receive under the policy, but could not be said to import an express contractual right to an enhanced redundancy payment into Mr Keeley's contract, nor could it be implied.

What did the Court of Appeal decide?

The Court of Appeal disagreed. Although it agreed with the judge that it was important to look at the context of the provisions in question, it said he had given too much weight to this as a starting point.

As a result, he had not given enough consideration to the other provisions in the "Employee Benefits and Rights" part (i.e. to the "overall bargain" of the remuneration package). Nor had he adequately explained why the context, as he had defined it, should override the plain words of entitlement in the provision itself.

The Court pointed out that there were other sections in the staff handbook, for example, on annual leave, that were also part of the "context" in which the redundancy entitlement should have been considered, and which were clearly contractual.

In addition, the redundancy section itself contained provisions for paid time off to look for work elsewhere and the right to appeal against dismissal. These, said the Court of Appeal, also provided "close supporting context for concluding that statements of entitlement in that section were intended to have contractual effect".

The fact that the enhanced redundancy provision was incorporated by a reference to the statement of employment terms – rather than set out in it – did not mean it could not have contractual effect. Likewise the fact that the formula for calculating it might change from time to time.

The enhanced redundancy provision, in its use of the word "entitled" and in its location in the "Employee Benefits and Rights" part of the staff handbook, clearly referred to a legal right and could be enforced by Mr Keeley. Usefully the Court noted that enhanced redundancy terms were such a widely accepted feature of employment relations that these clauses were particularly appropriate to be considered as contractual terms.

LELR aims to give news and views on employment law developments as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases.

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