



September 2009 Update

Employment Law Newsletter by

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New ACAS Code

The revised ACAS Code of Practice on Time Off for Trade Union Duties and Activities has been approved by the Government. It will come into force when it has received Parliamentary approval, i.e. on 1 October 2009. The Code is accompanied by a Guide and both can be accessed by going to:-

www.acas.org.uk/index.aspx?articleid+2391

Personnel Today reported on 21 July 2009 that the number of applications by trade unions to the Central Arbitration

Committee for statutory recognition had fallen from 64 in 2007-08 to just 42 in 2008-09. According to Brendan Barber the TUC's General Secretary: "Experience has shown that a small minority of poor employers will try any number of delaying tactics in an attempt to avoid recognition. For this reason, unions will try wherever they can to get a deal sorted within the workplace."

CASE REPORTS

TUPE 2006

The EAT in *Tapere v. South London & Maudsley NHS Trust*, UKEAT/0410/08 (19 August 2009), has decided that "detriment" in regulation 4(9) of TUPE 2006 requires the subjective approach used in discrimination law, i.e. *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, UKHL. Regulation 4(9) states that an employee may treat the contract of employment as having been terminated if there is a substantial change in her working conditions which is to her material detriment. The Claimant resisted a move from Camberwell to Beckenham and resigned and claimed constructive dismissal. She was unsuccessful in the Employment Tribunal but her appeal succeeded in the EAT. The mobility clause in her contract of employment with the Lewisham Primary Care Trust applied to that Trust's geographical area and did not transfer under TUPE to the South London & Maudsley Trust's geographical area.

RACE DISCRIMINATION

The EAT in *Amnesty International v. Ahmed* UKEAT/0447/08/ZT (13 August 2009) has upheld an Employment Tribunal decision that motive is irrelevant when deciding whether there has been direct race discrimination under section 1(1) of the RRA 1976. The Claimant was refused promotion on the grounds that her ethnicity (she is of northern Sudanese origin) would expose her to safety risks when visiting Eastern Chad or Sudan. However, the EAT reversed the Employment Tribunal's decision that she had been constructively dismissed on the grounds that the failure to promote her did not mean that trust and confidence had been undermined as Amnesty had not been motivated by racial prejudice.

DISABILITY DISCRIMINATION

The EAT found in *Chief Constable of Lothian and Borders Police v Cumming* UKEATS/0077/08 (29th July in front of Lady Smith) that refusal to allow someone's progression into professional life does not amount to a substantial adverse effect on a person's ability to carry out day-to-day activities for the purposes of the DDA 1995.

PRACTICE AND PROCEDURE—STRIKE OUTS

The EAT found in *A v (1) B (2) C* UKEAT/0450/08/JOJ (17 August 2009 HHJ Hand QC). Cases warranting a factual investigation by a tribunal, in particular discrimination cases, should not be struck out unless they fall into the exceptional category of being *merely fanciful*.

PRACTICE AND PROCEDURE—CASE MANAGEMENT

The EAT found in *GMB v (1) Hughes (2) Beaumont (3) Hoggarth* UKEAT/0528/08/JOJ (HHJ Peter Clark) that it will only interfere with a tribunal's wide discretion to make case management orders in limited circumstances, namely when (1) the order is outside the tribunal's powers, (2) the discretion has not been exercised within guiding legal principles, or (3) the order made was *Wednesbury* unreasonable:

PRACTICE AND PROCEDURE—Failure to raise statutory grievance need not be raised in ET3 (jurisdiction)

The EAT found in *Glasgow City Council v (1) Stefan Cross claimants (2) Unison claimants (3) GMB claimants* UKEATS/0007/09/BI (11 August 2009 Lady Smith) that a respondent who, when presenting the original ET3, has failed to raise the issue of a claimant not having raised a grievance under the statutory grievance procedures prior to bringing a complaint, may subsequently do so either by seeking leave to amend the ET3 or by raising the issue orally, although either way it should be done prior to the tribunal considering the merits of the complaint.

Employment Appeal Tribunal cases can be accessed on:-

www.employmentappeals.gov.uk/

Court of Appeal and House of Lord cases can be accessed on:-

www.bailii.org/uk/cases/

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