



July 2009 Update

Employment Law Newsletter  
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## (1) Damages Based Contingency Fees

The Government are consulting over how to regulate the use of contingency fees ('no win no fee' agreements) which are also known as damages based contingency fees (DBCFs). This is a growing phenomenon in the Employment Tribunals. The last Survey of Employment Tribunal Applications in 2003 indicated that 11% of cases were funded by DBCFs. Amongst other things the Government is proposing that there should be a maximum cap on the damages that can taken as fees from an award and that lawyers should provide Claimants with full information on the costs of their case.

The consultation ends on 25 September 2009. For further information go to:

<http://www.justice.gov.uk/consultation/docs/regulating-damages-based-agreements.pdf>

## (2) Whistleblowing claims

The Government is proposing that ET1s containing whistleblowing claims, or relevant extracts from the ET1s, should be sent to the relevant regulators for them to make an assessment of the underlying allegation of wrongdoing. Claimants would have to consent to this step and in those cases the Respondent would be informed. Changes to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 will come into effect in April 2010. The consultation closes on 2 October 2009. The relevant regulators are set out in the Public Interest Disclosure (Prescribed Persons) Order 1999 (SI 1999/1549).

<http://www.berr.gov.uk/files/file51554.pdf>

## (3) Parental Leave

The European Commission is proposing to increase the length of parental leave for all workers from three to four months per parent. One of the four months will be non-transferable between the parents. A new Directive will have to be adopted by a qualified majority of the Council. To read the new Framework Agreement go to:

[www.etuc.org/IMG/pdf\\_framework\\_agreement\\_parental\\_leave\\_revised\\_18062009.pdf](http://www.etuc.org/IMG/pdf_framework_agreement_parental_leave_revised_18062009.pdf)

## CASE REPORTS

Court of Appeal and House of Lords cases can be accessed on:

[www.bailii.org/uk/cases/](http://www.bailii.org/uk/cases/)

Employment Appeal Tribunal cases can be accessed on:

[www.employmentappeals.gov.uk/](http://www.employmentappeals.gov.uk/)

## Unpaid holiday pay

(4) The House of Lords in Revenue and **Customs v. Stringer** [2009] UKHL 31 (10 June 2009) have decided that a claim for holiday pay under the Working Time Regulations 1998 can be pursued using the Employment Rights Act 1996 as a claim for an unlawful deduction from wages, i.e. section 27(1) of the ERA. Time runs from the last in a series of deductions, i.e. section 23(3).

## Disability discrimination

(5) The House of Lords in **SCA Packaging Ltd v. Boyle** (Northern Ireland) [2009] UKHL 37 (1 July 2009) have analysed the meaning of the word 'likely' in schedule 1, paragraphs 2(2) and 6(1) of the Disability Discrimination Act 1995. 'Likely' now means an outcome that 'could well happen' rather than the higher hurdle of 'more probable than not', i.e. 51% plus.

## The Transfer of Undertakings (Protection of Employment)

## Regulations 2006

(6) The EAT in **Metropolitan Resources Ltd v. Churchill Dulwich Ltd** UKEAT/0286/08/RN has decided that it is a question of fact whether there has been a service provision change, i.e. the Employment Tribunal has to decide if the activities carried out by the transferee are fundamentally or essentially the same as those carried on by the transferor.

(7) The EAT have decided in **Small v. Boots Co Plc** UKEAT/0248/08 that labelling a bonus scheme as "discretionary" does not mean that it does not have contractual effect. Small and his colleagues transferred under TUPE 1981 to Unipart from Boots and later transferred back to Boots from Unipart under TUPE 2006. Unipart did not pay them bonuses in 2005 and 2006 and Boots did not pay them bonuses in 2007. The EAT partly upheld the Claimants' appeal and remitted some matters to the Employment Tribunal.

(8) The EAT in **Mrs B K Carl v. the University of Sheffield** UKEAT/0261/08 have decided that hypothetical comparators are not permitted under these regulations, i.e. like the Equal Pay Act 1970 and unlike the Sex Discrimination Act 1975. *Sharma v. Manchester City Council* [2008] IRLR 336, EAT, is identified as the leading authority. The EAT in Carl said that "Part time work must be the effective and predominant cause of the less favourable treatment complained of; it need not be the only cause."

## Equal Pay

(9) In **McAvoy v. South Tyneside Borough Council** UKEAT/0058/08 the EAT has dealt with the question of whether a male comparator can put in an equal pay claim before his female comparator's claim has been determined by an Employment Tribunal. The answer is yes and the EAT said that "Male colleagues of female equal pay claimants may bring "piggyback" contingent claims using the female claimants as comparators and may receive sums equivalent to those awarded to such comparators by way of arrears."

## Reinstatement and compensation

(10) The EAT in **Central & North West London NHS Trust v. Abimola** UKEAT/0542/08 has overturned an Employment Tribunal reinstatement order and set out the factors that an Employment Tribunal needs to take into account when ordering reinstatement under section 116 of the Employment Rights Act 1996.

(11) In **Saunders v. OCS Group** UKEAT/0051/09 the EAT has said that when an Employment Tribunal is considering making a compensatory award it must identify the loss the Claimant has suffered at the time of his/her dismissal and then go on to decide whether that loss is attributable to the action taken by his/her employer.

## The Employment Act 2002 Statutory Procedures

(12) According to the EAT in **Miss S C Eagles v. Rugged Systems Ltd** UKEAT/0018/09/ZT negotiations over a compromise agreement have the effect of extending time for presenting an ET1 from 3 to 6 months under regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004.

## Costs in the Employment Tribunal

(13) In the event of a "hopeless" strike out application both Counsel's fees for attending the pre-hearing review and his/her Solicitor's reasonable costs of preparing for and attending that hearing are to be paid by the party that made the failed application (the EAT in **Verma v. Harrogate NHS trust** UKEAT/0155/09/ZT).

## The Employment Equality (Religion or Belief) Regulations 2003

(14) An Employment Tribunal in **T W Nicholson v. Grainger Plc** has decided that a Claimant's beliefs about climate change and the environment are capable of being a belief for the purposes of the regulations. The judgment followed *McClintock v. Department of Constitutional Affairs* [2008] IRLR 29, EAT, which at paragraph 41 said that "The test for determining whether views can properly be considered to fall into the category of a philosophical belief is whether they have sufficient cogency, seriousness, cohesion and importance and are worthy of respect in a democratic society."

## Working time:

(15) **Archer-Hoblin Contractors v MacGettigan** UKEAT/0037/09/ZT concerns employment status and the question of substitution. The EAT has decided that the right to send a substitute with similar experience and qualifications, as opposed to a right which only applies when e.g. the contracting party is 'unable' to perform his or her obligations, is inconsistent with an obligation to personal or service and therefore the individual was not a worker for the purposes of the working time regulations.

## Confidential information

(16) If a former employee acquires from his employer information (knowing that it should not be in his possession), with the necessary quality of confidence about it and it is used to the employer's detriment, then the employer will be able to bring a successful action for breach of confidence. (**JN Dairies v Johal Dairies and Singh EWHC 1331 (Ch)**).

## Discrimination and specific disclosure

(17) The Court of Appeal has found that where documents had come to light, which appeared to show race discrimination by the respondent, this can be used to justify an order for much more wide-ranging specific disclosure almost amounting to a fishing expedition (**Canadian Imperial Bank of Commerce v Beck** [2009] EWCA Civ 619).

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