

Dispute resolution – we can work it out

In this special edition of Brief we review the key employment law developments of 2007. As predicted in Brief 820, it was a quiet year for legislation, with the increase in paid annual leave, the extension of the right to request flexible working to carers, and the smoking ban in workplaces garnering the most attention. There might, though, be slightly more activity in 2008, with a general theme of consolidation and, in some cases, the correction of recent legislative errors.

End of the statutory procedures

In March the DTI (since renamed the Department for Business, Enterprise and Regulatory Reform – BERR) published its review of the statutory dispute resolution procedures. This confirmed what many of us already knew – that the procedures were making employment law more rather than less complex, and producing harsh results in tribunals. The review recommended, and BERR accepted, that they should be repealed. To this end, the Government introduced the Employment Bill in the House of Lords on 6 December. Unfortunately, it declined to publish the results of the consultation on repealing the procedures prior to publication of the bill, so there remains a good deal of uncertainty as to what any new attempt at statutory workplace dispute resolution will entail.

However, what becomes immediately clear from reading the bill is that Acas is to have a substantially beefed-up role. In addition to extended powers of conciliation and the removal of the much-maligned fixed conciliation periods, the bill (if enacted) will allow an employment tribunal the discretion to increase or decrease an award by up to 25 per cent on a party's failure to comply with the Acas Code of Practice on disciplinary and grievance procedures. It is also clear that S.98A of the Employment Rights Act will be repealed, meaning that the question of procedural fairness in unfair dismissal law will once more be governed by the 'Polkey' principle – for details, see *IDS Employment Law Handbook*, 'Unfair Dismissal' (2005).

Other measures in the Employment Bill include greater powers of enforcement in relation to the national minimum wage and employment agency standards, along with changes to the Trade Union and Labour Relations (Consolidation) Act 1992 to ensure that UK law complies with the decision of the European Court of Human Rights in *ASLEF v United Kingdom* (Brief 825). The bill is expected to be approved by Parliament in 2008, but many of the changes it proposes – including the repeal of the statutory procedures – are unlikely to come into force until 2009. We will, of course, keep you informed of all developments.

Sex discrimination changes ahead

One legislative change that was expected to take place in 2007 was the amendment of the Sex Discrimination Act 1975 following the judicial review case of *EOC v*

Secretary of State for Trade and Industry (Brief 826). There, the High Court ruled that provisions in the SDA relating to the rights to bring claims for harassment on the ground of sex, and discrimination on the grounds of pregnancy or maternity leave, are incompatible with the EC Equal Treatment Directive. Though amending regulations were initially promised for October, the latest word from the Government Equalities Office is that work on these is ongoing, and that they will be introduced at the 'earliest possible opportunity'.

Illegal workers to cost employers dear

Mistakes as to an employee's right to work in the United Kingdom will become more costly from 29 February, when fines of up to £10,000 come into force for employers who employ someone who does not have permission to work in the United Kingdom. These will be followed by a new criminal offence under S.21 of the Immigration, Asylum and Nationality Act 2006 – knowingly employing a person who is subject to immigration control and who does not have permission to work in the United Kingdom. This will carry a maximum sentence of two years' imprisonment. The Government has issued a Code of Practice to accompany these changes, along with guidance for employers on how to avoid race discrimination when checking the right to work of a job applicant or employee.

After a drawn-out Parliamentary passage, the Corporate Manslaughter and Corporate Homicide Act 2007 will come into force on 6 April 2008. Under the Act, a company or organisation can be found guilty of manslaughter if the way in which its activities are managed leads to a breach of a duty of care which results in the death of a person. Somewhat controversially, the punishment for this offence is an unlimited fine – imprisonment of senior managers can only occur if they are separately tried and convicted under the existing manslaughter law.

Discrimination review still on the table

2007 saw the publication of responses to the Discrimination Law Review and the introduction of the Green Paper, 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain'. Many, including Trevor Phillips, head of the new Equality and Human Rights Commission, have expressed concern that the proposals for reforming discrimination law do not go far enough and may even result in a 'levelling down' of protection. Nevertheless, the Government has stated that it remains committed to introducing the Single Equality Bill during this Parliament, and it is expected to be included in the Queen's Speech in November.

As always, we look forward to keeping you up to date with developments, through the Brief, Handbooks and Supplements, conferences and seminars, and our recently improved and re-launched website, www.idsbrief.com. We'd like to wish all our subscribers a Happy New Year.

Sex and sexual orientation discrimination

In 2007 we reported sex discrimination cases concerning the burden of proof rules, indirect discrimination, harassment and victimisation. We also covered two cases brought under the Sexual Orientation Regulations, including one where an organised religion sought to rely on the 'genuine occupational requirement' exception.

Burden of proof

Detailed guidance on the operation of the 'shifting' burden of proof that applies to sex discrimination cases under S.63A of the Sex Discrimination Act 1975 was given by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* (Brief 777) 2005 ICR 931. The Court approved a two-stage approach. The claimant must prove primary facts from which an inference of discrimination can be drawn (stage 1); then, if he or she succeeds, the burden shifts to the employer to provide a non-discriminatory explanation for the treatment in question (stage 2). Last year, these rules were subject to another detailed examination in *Madarassy v Nomura International plc* (Brief 823) 2007 ICR 867. There, the Court of Appeal held that in deciding whether there was a 'prima facie' case at stage 1, the tribunal was correct to consider all the evidence, including any adduced by the employer that undermined the claimant's case. The Court also reiterated that simply proving a difference in sex and a difference in treatment between the complainant and a comparator was insufficient to shift the burden onto the employer.

Direct discrimination

Under S.1(2)(a) SDA a person discriminates against a woman if, on the ground of her sex, he treats her less favourably than he treats or would treat a man. In *B v A* (Brief 838) 2007 IRLR 576 the EAT overturned a tribunal's decision that a solicitor who dismissed his assistant, with whom he was in a personal relationship, upon discovering her apparent infidelity discriminated against her on the ground of her sex. The tribunal's finding that the reason for dismissal was the solicitor's jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because the claimant was a woman. An appropriate hypothetical comparison – a homosexual male employer driven by feelings of jealousy to dismiss a homosexual male employee – illustrated that gender was not the reason for the treatment complained of.

Similarly, in *Kettle Produce Ltd v Ward* (Brief 826) EAT 0016/06, the EAT held that a female employee had not been treated less favourably on the ground of sex when a male manager, believing she was trying to avoid working, reproached her in the female toilets. To construct a proper hypothetical comparison it was necessary to transpose the gender of comparator and claimant, as the invasion of a space reserved for the opposite sex had to be envisaged. Comparing her situation with a hypothetical male comparator upbraided in the male toilets by a female

manager, the EAT held that the comparator would have been treated in the same way.

Indirect discrimination

In *GMB v Allen and ors* (Brief 836) 2007 IRLR 752 a union decided to agree to a low-level settlement of female members' equal pay claims against a public sector employer in order to release monies for pay protection and future pay increases. A group of these members brought tribunal claims against the GMB, arguing that its actions had amounted to indirect discrimination. Some of the claimants succeeded, and the union appealed to the EAT. In the EAT's view the tribunal had correctly concluded that the GMB had adopted a provision, criterion or practice, within the meaning of S.1(2)(b) SDA, which benefited a predominantly male group (those seeking pay protection) at the expense of a predominantly female group (those who had equal pay claims). However, the EAT overturned the tribunal's finding that the union had failed to objectively justify the policy in question. The union had pursued legitimate aims – such as securing the best possible pay protection and avoiding job losses – and the means adopted were proportionate to their attainment.

Harassment

Section 4A(1)(a) of the SDA provides that a person subjects a woman to harassment if, on the ground of her sex, he engages in unwanted conduct that has the purpose or effect of violating her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In *Equal Opportunities Commission v Secretary of State for Trade and Industry* (Brief 826) 2007 ICR 1234 the EOC brought judicial review proceedings before the High Court, contending that this definition fails properly to implement the EC Equal Treatment Amendment Directive (No.2002/73). This defines 'harassment' as occurring where unwanted conduct *related to the sex of a person* has the effect described above. Thus, the EOC argued, the Directive only requires a complainant to prove that the treatment is *connected with sex*, as opposed to proving that the treatment occurred *because* she is a woman.

The High Court agreed that S.4A inappropriately curtailed the scope of protection from harassment. It accepted that the Directive required that offensive conduct directed towards a third party should be capable of giving rise to an employee's claim under S.4A and that, in certain circumstances, an employer ought to be liable for the *conduct* of a third party – for instance, where he knowingly fails to protect an employee from repetitive harassment by a customer. Accordingly, S.4A should be substantially recast.

Victimisation

In *St Helens Borough Council v Derbyshire and ors* (Brief 829) 2007 ICR 841 the House of Lords ruled that letters sent to employees warning them that, if their equal pay claims succeeded, it was likely that most of the catering staff would lose their jobs amounted to victimisation under S.4 SDA. The employer had gone further than was reasonable when protecting its interests in the existing litigation, because it had unduly pressured the employees into settling their claims. This case is further discussed in the Forewords to Brief 829 and in our victimisation feature in Brief 839.

Pregnancy and maternity rights

The judicial review brought by the EOC in *Equal Opportunities Commission v Secretary of State for Trade and Industry* (above) also successfully challenged the pregnancy and maternity leave provisions of the SDA. S.3A provides that a person discriminates against a woman if, on the grounds of the woman's pregnancy or maternity leave, the person treats her less favourably than he or she would treat her had she not become pregnant or gone on maternity leave. The High Court agreed that this definition, contrary to EC law, requires a non-pregnant female comparator for the purpose of establishing discrimination on the grounds of pregnancy or maternity leave. Furthermore, some of the S.6A exceptions from the right to claim discrimination in respect of terms and conditions during maternity leave were unlawfully regressive in that they provided for a lower level of protection than required by European case law. As a result, the High Court ruled that Ss.3A and 6A – as well as the S.4A harassment provision – had to be recast.

Transsexuals

Discrimination against transsexuals in the employment context is outlawed by Ss.2A and 6 SDA. In *Baldwin v Brighton and Hove City Council* (Brief 830) 2007 ICR 680 the EAT upheld a tribunal's decision that a transsexual employee who had applied for a transfer to a new post had not been discriminated against where a person whom he perceived to be prejudiced against transsexuals was appointed to the interview panel. The Council did not know about the claimant's gender reassignment at the time. In any event, the evidence indicated that the reason the claimant declined to attend the job interview was his own perception that the alternative post was inferior to his current position.

Sexual orientation discrimination

Last year we reported two interesting employment tribunal decisions on the Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661. In *Ditton v CP Publishing Ltd* (Brief 826) ET Case Nos. S/101638/06, S/107918/05 a highly paid gay sales manager was subjected to daily mockery, mimicking and abuse because of his sexual orientation and, after only eight days of employment, the company dismissed him. His claims of direct discrimination and harassment succeeded. At a separate remedies hearing, the tribunal held that the

Legislative changes in 2007:

- from 6 April 2007, public authorities have been prohibited from discriminating or committing acts of harassment on the ground of sex when carrying out their public functions – S.83 Equality Act 2006
- also from 6 April, public authorities have been under a general duty when exercising their functions to have regard to the need to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women – S.84 Equality Act 2006
- regulations outlawing discrimination on the ground of sexual orientation in the provision of goods, services and facilities came into force in Great Britain on 30 April 2007. Similar regulations came into operation in Northern Ireland on 1 January 2007
- the EOC merged into the new Equality and Human Rights Commission (EHRC), which also took on responsibilities under the Sexual Orientation Regulations, on 1 October

company's attitude had 'been one of apparent malice and contempt', which resulted in the claimant's suffering from depression for 18 months, affecting his ability to work and his social life. In these circumstances, the tribunal considered an award for injury to feelings of £10,000 to be appropriate. Including loss of earnings, and an uplift for the employer's failure to follow the statutory dispute resolution procedures, total compensation came to £118,000.

In *Reaney v Hereford Diocesan Board of Finance* (Brief 836) ET Case No.1602844/2006 an employment tribunal upheld a claim of direct discrimination brought by a gay man who was rejected for a job in Christian youth work when the Bishop who interviewed him disbelieved his assurance that he was, and would remain, celibate. Although the Diocese contended that it required an assurance of celibacy from every unmarried candidate for the Youth Officer's post, whether heterosexual or homosexual, the evidence clearly showed that the Bishop of Hereford, who had made the final decision, had rejected the claimant because of his sexual orientation. Furthermore, although the Diocese could rely on the 'organised religion' exception in Reg 7(3) of the Regulations and so apply a 'genuine occupational requirement' relating to sexual orientation – i.e. the requirement that the claimant remain celibate – the Diocese was not entitled to reject the claimant's application with reference to that requirement, as its failure to be satisfied that he met it was not reasonable.

The claimant's harassment claim under Reg 5, on the other hand, was dismissed. The tribunal found that the Bishop's questioning and lengthy conversation with the claimant on the issue of homosexuality and the Church did not amount to unwanted conduct, violate his dignity or create a humiliating environment.

Law reform

The main legislation changes that took place in this area in 2007 are summarised in the box above.

Equal pay

Equal pay has been a hot topic throughout 2007, particularly when the Tribunals Service reported a staggering 44,013 claims in the year to 30 March. In Brief, we reported cases on a variety of complex issues such as comparators, pay protection, expert witnesses, the genuine material factor defence, time limits, bonus schemes and retrospective claims.

Appropriate comparator

As we identified in the feature article in Brief 832, the first stage in getting an equal pay claim off the ground is to identify an individual of the opposite sex with whom to compare the claimant's pay. S.1(2) of the Equal Pay Act 1970 requires that the comparator be in the 'same employment' as the claimant and doing 'like work', 'work of equal value' or 'work rated as equivalent'. S.1(6) explains that 'same employment' means that the comparator must be employed by the same employer or an associated employer at the same establishment or 'at establishments in Great Britain which include that one and at which common terms and conditions are observed'.

Such common terms and conditions were present, held the Court of Appeal, in **South Tyneside Metropolitan Borough Council v Anderson and ors** (Brief 834) 2007 ICR 1581. The Court concluded that women employed as school support staff by a local education authority on the recommendation of school governing bodies were entitled to compare themselves, for equal pay purposes, with men employed by the same authority in non-school capacities, where the men and women were covered by the same collective agreement.

In **Redcar and Cleveland Borough Council v Bainbridge and ors** (Brief 839) 2007 IRLR 984 – one of a number of decisions in complex and ongoing litigation against that Council – the Court of Appeal ruled that women whose jobs had been given a higher value than a group of men's under a job evaluation study (JES), but who were paid less than those men, could pursue equal pay claims, notwithstanding the fact that the comparators' jobs were not, strictly speaking, rated as 'equivalent' to theirs. The wording of S.1(5) EqPA suggests a need for the compared jobs to be of *equal* value, but the Court took the sensible view that to apply too literal an interpretation would defeat the purpose of equal pay legislation. As a result it adopted a 'black pencilling' approach to S.1(5), directing that it be read as: 'a woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value *or her job has been given a higher value*'.

A confusing issue concerning multiple comparators arose in **Bainbridge and ors v Redcar and Cleveland Borough Council (No.2)** (Brief 828) 2007 IRLR 494. There, the majority of the EAT held that a claimant who has pursued an equal pay claim to judgment in respect of a particular period of time may later seek to run another equal pay claim in relation to the same pay period, but with a different comparator. The second claim would not

be prevented from proceeding by the legal rule of 'res judicata', which requires that an action should only be tried once. In the EAT's view, an employer's obligation under the EqPA to pay A the same as B could be distinguished from its obligation under the Act to pay A the same as C.

Also in this case, the EAT held that other female claimants whose jobs were rated as equivalent to those of higher paid men under a JES were not entitled to seek compensation in respect of a period preceding the implementation of that study. In this regard, the wording of S.1(2)(b) EqPA, which sets out the right to equal pay where work has been rated as equivalent, was decisive. It was impossible to construe that section to say that where a claimant's job was rated as equivalent with that of her comparator under a JES from a particular date, it was so rated prior to that date.

Genuine material factor defence

Section 1(3) EqPA provides an employer with a defence if he can prove that any difference in pay between men and women performing equal work is 'genuinely due to a material factor which is not the difference of sex'. This has become known as the 'genuine material factor' (GMF) defence.

In **Glasgow City Council and ors v Marshall and ors** (Brief 656) 2000 ICR 196 the House of Lords stated that, where a GMF is tainted by direct or indirect sex discrimination – such as having an adverse disparate impact on women – it falls on the employer to show that the difference in pay is objectively justified. In **Grundy v British Airways plc** (Brief 843) 2007 EWCA Civ 1020, the key question was whether a tribunal, in concluding that the GMF in question – BA's historical pay arrangements – had an adverse disparate impact on women and thus fell to be justified, had carried out an inappropriate analysis. The Court of Appeal, having trawled through the relevant case law, including **Secretary of State for Trade and Industry v Rutherford (No.2)** (Brief 805) 2006 ICR 785, held that it had not. In the Court's view, there is no one-size-fits-all approach to assessing disparate impact. In the circumstances of the case, the tribunal had been entitled to focus on those disadvantaged by the arrangements in question – a group in which women outnumbered men by 14 to one. There is no legal principle that tribunals must always focus on the 'advantaged group'.

Many of the public sector equal pay claims currently swamping the employment tribunals system relate to bonus schemes paid to those in predominantly male posts which

were not available to those in female-dominated roles. One such piece of litigation is **South Tyneside Metropolitan Borough Council v Anderson and ors** (Brief 834) EAT 0684/05; 0525/06 – another aspect of which we examined above. In this particular decision, the EAT upheld a tribunal's ruling that a local authority had failed to show that differences in pay resulting from a productivity-related bonus scheme were by reason of a genuine material factor which was not the difference of sex.

By way of contrast, in **Redcar and Cleveland Borough Council v Bainbridge and ors** (Brief 822) 2007 IRLR 91 the EAT held that, having found that a productivity-related bonus scheme was justified where it resulted in savings and greater efficiency, an employment tribunal should not have gone on to find that the Council's GMF defence was not made out. The Council's failure to apply a different kind of bonus scheme to the claimants did not mean that the differences in pay were not objectively justified – particularly as the tribunal had found that such a scheme would neither have financed itself nor resulted in any savings.

In **Blackburn and anor v Chief Constable of West Midlands Police** (Brief 821) ET Case No.1305651/03 an employment tribunal held that a bonus scheme designed to reward police officers available to work at night indirectly discriminated against women, who were more likely than men to be unable to fulfil this. Although the employer's wish to reward night-time working was a legitimate aim, it could have been achieved by less discriminatory means, such as excusing officers with childcare commitments from the requirement to work night shifts in order to qualify for bonus payments. In a judgment to be reported in the next Brief, the EAT has now overturned the tribunal's decision.

Pay protection

As councils up and down the country try to avoid equal pay litigation by undergoing job evaluation studies (JESs) and introducing so-called 'single status agreements' on pay, trade unions have negotiated pay protection schemes for those employees whose pay would be downgraded following a JES. In **Redcar and Cleveland Borough Council v Bainbridge and ors** (above) the EAT upheld a tribunal's decision that pay protection awarded to predominantly male workers following a JES was not objectively justified. While it accepted that the reason for the claimants' not receiving the benefit of pay protection was that it was only paid to those receiving higher pay at the time the JES was introduced, the reason the claimants were not receiving higher pay in the first place was historic pay discrimination. It followed that the tribunal had been entitled to find that the GMF (the pay protection provision) was tainted by sex discrimination, and, in the absence of justification, could not be relied upon.

To employers' relief, the EAT reached the opposite conclusion in **Middlesbrough Borough Council v Surtees and ors** (Brief 834) 2007 IRLR 869. There, the EAT held that a Council's decision to offer pay protection only to employees who, following the introduction of a JES,

would otherwise have suffered an actual drop in pay was objectively justified. This was so notwithstanding the fact – established at a later date – that, contrary to equal pay law, some female employees were being underpaid at the relevant time, and would have qualified for pay protection had the employer been paying them at the correct rate. Note that the Council in **Bainbridge**, and the employees in **Surtees**, have appealed to the Court of Appeal against the above decisions. Their appeals will be heard together in January 2008.

Time limits

Under S.2ZA(3) EqPA an equal pay claim must be brought within six months of the last date on which the woman was 'employed in the employment'. In **Preston and ors v Wolverhampton Healthcare NHS Trust and ors** (No.3) (formerly **Powerhouse Retail Ltd and ors v Burroughs and ors**) (Brief 802) 2006 ICR 606, the House of Lords established that where there has been a TUPE transfer, and where an equal pay claim is concerned with the denial of pension rights under an occupational pension scheme before the date of the transfer, the six-month time limit runs from the end of the claimants' employment with the transferor.

In **Unison v Allen and ors** (Brief 837) 2007 IRLR 975 the EAT determined that claims brought by employees of an amalgamated union in respect of their occupational pension rights prior to amalgamation were out of time. Since pension liabilities are excluded from the scope of TUPE, and the claimants' contracts had not transferred under the statutory provisions on trade union amalgamation, there were no grounds for holding that time should not begin to run until termination of the claimants' employment with their new employer. The case is, however, perhaps more significant for the gloss which the EAT provided to the House of Lords' decision in **Preston** (No.3). In the EAT's view, their Lordships in **Preston** were stating that the question of whether contractual liability has transferred under TUPE has no bearing on the equal pay time limit. Accordingly, where a claim follows a TUPE-transfer and relates solely to a breach of the equality clause by the transferor – with regard to pensions or otherwise – it would need to be brought within six months of the transfer.

Expert witnesses

The vast scale of equal pay litigation led to the streamlined equal value procedure being introduced in 2004 (see Brief 767). Under this procedure, tribunals can appoint independent experts (IEs) to assess whether claimants were doing 'work of equal value' to that of their chosen comparators. In **Middlesbrough Borough Council v Surtees and ors** (No.2) (Brief 841) 2007 IRLR 981 the EAT held that a Council was not precluded by the procedure from calling its own expert to challenge the methodology of an IE appointed by the tribunal. However, it further held that evidence from a party's own expert will not be admissible in so far as it challenges facts already found by the tribunal or agreed between the parties.

Race and religion discrimination

Key race discrimination cases in 2007 saw rulings on the burden of proof provisions, whether an employer can be liable for a third party's offensive conduct towards its employees, and the extent to which an employer can protect itself in litigation without falling foul of the victimisation rules. With regard to religion or belief discrimination, we reported the first appellate decision on the 'genuine occupational requirement' defences.

Burden of proof

Section 54A of the Race Relations Act 1976 sets out the two-stage 'burden of proof' test that applies to race discrimination and harassment claims. First, the claimant must prove primary facts from which an inference of discrimination could be drawn (stage 1). If he or she succeeds, then the burden shifts to the employer to provide a non-discriminatory explanation for the treatment (stage 2). Although it is normally good practice to apply this two-stage test, in **Brown v Croydon London Borough Council and anor** (Brief 823) 2007 ICR 909 the Court of Appeal held that it is not an error of law for a tribunal to proceed straight to the second stage, and conclude that the employer has proved that discrimination was not the reason for the offending treatment. In the Court's view, this approach was particularly appropriate in cases where the facts are not in dispute.

The burden of proof provisions were examined once more in **Oyarce v Cheshire County Council** (Brief 835) EAT 0557/06. There, the EAT held that S.54A RRA covers only claims of direct discrimination, indirect discrimination or harassment, and not victimisation claims. To these, the common law burden of proof applies, under which a tribunal *may* draw inferences of discrimination from a 'prima facie' case, but is not compelled to do so.

Direct discrimination

Section 1(1)(a) RRA provides that direct race discrimination occurs where, on racial grounds, a person is treated less favourably than others are or would be treated. In **Mehmet t/a Rose Hotel Group v Aduma** (Brief 832) EAT 0573-4/06 the EAT dismissed an employer's appeal against a tribunal's decision that an employee suffered race discrimination when he was paid less than the national minimum wage. The tribunal had been entitled to find that a British or British-based comparator would not have been so underpaid. It had also been entitled to infer that the employer had discriminated against the employee by putting pressure on him not to apply for a national insurance number and by dismissing him.

Indirect discrimination

In **British Medical Association v Chaudhary** (Brief 837) 2007 IRLR 700 the BMA refused to support C's race discrimination claims against the Royal College of Surgeons. C claimed that this was indirect discrimination, and a tribunal and the EAT agreed. The Court of Appeal overturned this decision. On the facts, there was nothing to suggest that the BMA imposed a requirement that a member seeking its support in a

discrimination claim could not bring such a claim against the RCS or its officials. In any event, the tribunal had carried out an inappropriate analysis in concluding that this supposed requirement had a disparate adverse impact on the BMA's Asian members. The Court thus set aside the tribunal's record race discrimination award of £814,877.

Harassment

An employee is subjected to unlawful harassment when, on racial grounds, he or she is subjected to unwanted conduct which has the purpose or effect of violating his or her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her – S.3A(1) RRA. In **Queenscourt Ltd v Nyateka** (Brief 836) EAT 0182/06 the EAT held that an employee was not precluded from bringing a claim of racial harassment simply because there was a high level of racist banter in the workplace, in which she herself had allegedly engaged. A tribunal had thus been entitled to find that she had been subjected to racial harassment under the RRA owing to comments made by her manager. Nor had it erred in finding in her favour in respect of a direct race discrimination claim – the employer's conduct in suspending her without pay while merely issuing the manager with a written warning raised an inference of race discrimination that the employer had failed to rebut.

In **Gravell v London Borough of Bexley** (Brief 830) EAT 0587/06 the EAT considered whether an employer could be liable under S.3A for the harassment of its employees by a third party. The employee was told at the start of her employment that the employer's policy was to ignore racist comments from customers and she subsequently had to listen to such comments – which offended and upset her – without being able to point out that they were unacceptable. An employment tribunal struck out her S.3A claim against her employer but the EAT set this decision aside. In the EAT's view, case law doubting the possibility of an employer being guilty of *direct discrimination* under the RRA in respect of the actions of third parties did not necessarily prevent liability being established under the statutory tort of harassment. Accordingly, the employer's policy of not challenging customers' racist behaviour could, if established on the facts, constitute racial harassment under S.3A.

Victimisation

Victimisation under S.2(1)(a) RRA occurs where a person treats another less favourably than he treats or would treat others, and does so by reason that the person victimised has brought proceedings under the RRA against him or

any other person. In **British Medical Association v Chaudhary** (above) the Court of Appeal overturned a tribunal's decision that the BMA victimised the claimant surgeon in declining to support his race discrimination claims against the Royal College of Surgeons. The tribunal had reached its decision on the basis that the BMA refused to reconsider providing the claimant with support because of its concern that he might bring race discrimination claims against it. The Court held, however, that the BMA had simply tried, honestly and reasonably, to protect its position in respect of threatened litigation, and that this did not constitute an act of victimisation.

Aiding unlawful acts

Liability for acts of race discrimination in employment normally rests with the employer. However, S.33 RRA provides that a person who 'knowingly aids another person to do an act made unlawful by [the RRA] shall be treated... as himself doing an unlawful act of the like description'. In **Bird v Sylvester and anor** (Brief 842) 2007 EWCA Civ 1052 the Court of Appeal held that a solicitor's role in advising an employer to take allegedly discriminatory disciplinary proceedings against an employee did not amount to aiding an unlawful act for the purposes of S.33. While it could not be said that a solicitor's actions under instruction could never fall foul of this provision, it was difficult to see how a solicitor giving objective advice in good faith as to the proper protection of his or her client's interests could thereby commit an act of discrimination.

Time limits

Generally, a tribunal does not have jurisdiction to hear a complaint of race discrimination unless the complaint is presented within three months of the act complained of – S.68(1) RRA. In determining when time starts to run, an 'act extending over a period' is treated as having been done at the end of that period – S.68(7)(b) RRA. In **Lyfar v Brighton and Sussex University Hospitals Trust** (Brief 821) 2006 EWCA Civ 1548 the Court of Appeal ruled that, to ascertain whether an employee has been subjected to a discriminatory 'act extending over a period', tribunals should look at the substance of the complaints – as opposed to the existence of a policy or regime – and decide whether they can be said to be part of one continuous act of discrimination. In this case, the tribunal had correctly found that the alleged discriminatory acts were not linked: any discrimination in respect of disciplinary action taken against the employee came to an end when the charges were dismissed, and any discrimination that may have occurred after that date was distinct and separate.

Religion or belief discrimination

Questions of direct and indirect discrimination under the Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660 arose in **Azmi v Kirklees Metropolitan Borough Council** (Brief 828) 2007 ICR 1154. There, the EAT considered whether an employer had discriminated against a female Muslim teaching assistant in suspending her for refusing to remove her veil while teaching. In relation to

2007 changes to Religion or Belief Regulations

- discrimination on grounds of religion or belief in the provision of goods, services and facilities outlawed
- protection extended to non-believers
- removal of requirement that a philosophical belief needs to be 'similar' to a religious belief
- new direct discrimination definition which expressly covers associative discrimination – e.g. discrimination on the ground of a claimant's partner's religion
- prescribed forms for questionnaire procedure

direct discrimination, the EAT held that a tribunal had not erred in finding that the employee had not been treated less favourably than a comparator because a woman who, whether Muslim or not, wore a face-covering for a reason other than religious belief would also have been suspended. Furthermore, although the requirement to remove her veil was a provision, criterion or practice that put her at a disadvantage compared to others not of the same belief, any indirect discrimination was justified as being a proportionate response to the legitimate aim of providing effective tuition.

In **McClintock v Department for Constitutional Affairs** (Brief 841) EAT 0223/07 the EAT agreed with a tribunal that a Justice of the Peace, who resigned from office when his request to be excused from cases that might lead to the adoption of a child by a same-sex couple was rejected, was not discriminated against indirectly on the ground of his religious belief. At no stage had he indicated that his objections to same-sex adoption were connected to his religion. In any event, the DCA was fully justified in insisting that magistrates must, regardless of their moral or other principled objections, apply the law of the land as their oath required.

Last year we reported the first appellate decision – by the Scottish EAT – on the 'genuine occupational requirement' (GOR) defences contained in the Religion or Belief Regulations. The case, **Glasgow City Council v McNab** (Brief 825) 2007 IRLR 476, concerned an atheist teacher working in a local authority-maintained Roman Catholic school who was not interviewed for a promotion on the basis that being of the Roman Catholic faith was a prerequisite for the post. A tribunal considered whether Reg 7(1)(b) applied. This allows an employer to treat an employee differently on the grounds of religion or belief in relation to a promotion, transfer or training for any employment if being of a particular religion or belief is a GOR for the post in question.

The tribunal found that the 'general' GOR contained in Reg 7(2) was not available to the employer, as the nature of a pastoral care teacher's post clearly did not require its holder to be Roman Catholic. Next, the tribunal considered whether, relying on Reg 7(3), the employer could show that the school was founded on an 'ethos based on a religion or belief' and thus that a GOR applied where in other circumstances it would not. Again, the tribunal rejected this defence, finding that the Council, an education authority, did not have such an ethos. On appeal, the EAT upheld the tribunal's findings.

Finally, note that in the news section of Brief 834 we reported **Murphy v Police Service of Northern Ireland** ET Case No.12/05FET; 84/05, in which the Fair Employment Tribunal, which determines complaints of discrimination on the grounds of religious belief and/or political opinion in Northern Ireland, found that a Presbyterian employee of the police service had been discriminated against on the ground that he became engaged to a Catholic.

Law reform

As widely publicised, the Commission for Racial Equality (CRE) was incorporated into the new Equality and Human Rights Commission (EHRC) in October 2007. The EHRC has also taken responsibility for the religion or belief rules.

On 29 June the UK Government received a reasoned opinion from the European Commission concerning the implementation of the EC Race Directive (No.2000/43).

The Commission considered that the United Kingdom has not fully implemented the Directive in that the definition of indirect discrimination is different from that of the Directive and the definition of the prohibition to give instructions to discriminate is not clear. The Government has stated that it is going to fully transpose the Directive into domestic law.

As for the Religion or Belief Regulations, changes have been brought about by the coming into force of various provisions of the Equality Act 2006 on 30 April 2007 – see the box on p.8. On the same day, the Religion or Belief (Questions and Replies) Order 2007 SI 2007/1038 took effect, containing the standard forms to be used by potential claimants for the purpose of serving questions on their employers where they feel they may have been discriminated against on religious grounds.

Disability discrimination

Last year's appellate disability discrimination decisions focused mainly on the definition of 'disability' in the Disability Discrimination Act 1995 – in particular, on the terms 'normal day-to-day activities' and 'long-term effect' – and on the duty on employers to make reasonable adjustments. There was also an interesting case concerning time limits, in which a disabled employee's out-of-time claim was allowed to proceed where the reason for late presentation was the employee's reluctance to accept that his depression amounted to a disability.

Meaning of disability

A person has a disability for the purposes of the Disability Discrimination Act 1995 if he or she has a 'physical or mental impairment which has a substantial and long-term adverse effect on his [or her] ability to carry out normal day-to-day activities' – S.1(1).

So, the first hurdle for a claimant is establishing that he or she has a physical or mental impairment. A claimant does not have to identify the condition giving rise to his or her physical symptoms in order to establish the existence of a physical impairment – *College of Ripon and York St John v Hobbs* (Brief 706) 2002 IRLR 185, EAT. However, an employer is entitled to disprove the existence of such an impairment by showing that a claimant's physical symptoms are not genuine. In *Hospice of St Mary of Furness v Howard* (Brief 831) 2007 IRLR 944 the EAT decided that an employer, having already jointly instructed an expert with a claimant, was entitled to call its own expert witness in an attempt to show that the claimant had no physical impairment within the meaning of the DDA. In the circumstances, where there was no identifiable cause of the claimant's symptoms, the employer's line of argument could not be described as 'fanciful'.

In *McDougall v Richmond Adult Community College* (Brief 837) 2007 ICR 1567, the EAT held that, as a matter of law, a person satisfying the conditions for compulsory admission (i.e. sectioning) under the Mental Health Act 1983 did not necessarily satisfy the conditions for disability under the DDA. It went on to say, however, that in practice a mental impairment leading to sectioning

limits a person's ability to carry out normal day-to-day activities, and has a substantial adverse effect thereon. Furthermore, in the circumstances of the case, the severity of the employee's condition – which left her unable to understand the real world – meant that she was disabled for DDA purposes.

In the light of the ECJ's decision in *Chacón Navas v Eurest Colectividades SA* (Brief 810) 2006 IRLR 706, 'normal day-to-day activities' must be interpreted as including activities relevant to professional life. So held the EAT in *Paterson v Commissioner of Police of the Metropolis* (Brief 837) 2007 ICR 1522. Owing to this, the Appeal Tribunal concluded that taking high-pressure examinations for the purpose of gaining promotion constituted a 'normal', if irregular, everyday activity. It followed that the claimant police officer, who was at a disadvantage because of his dyslexia when sitting examinations for promotion, was disabled within the meaning of the Act.

Paragraph 2(1) of Schedule 1 to the DDA provides that the adverse effect of an impairment is 'long-term' for the purposes of S.1(1) if, among other things, it is likely to last for at least 12 months. Furthermore, where an impairment ceases to have a substantial adverse effect, it is treated as continuing to have that effect if the effect is likely to recur – para 2(2). Last year, the EAT gave conflicting decisions on whether tribunals, when assessing the 'likelihood' of a recurrence, should only take into account the facts known at the time of the act complained of, or whether they can take into account events taking place between the date of the alleged discrimination and the tribunal hearing.

In **Spence v Intype Libra Ltd** (Brief 832) EAT 0617/06 the EAT commented that, while in practice it may be difficult for tribunals to disregard evidence of how a claimant's illness has in fact progressed, they should nevertheless do so, as subsequent events cannot be material to the question of whether the employee is disabled on the date the alleged discrimination takes place. However, the EAT in **McDougall v Richmond Adult Community College** (above) took the opposite view, holding that a tribunal, in concluding that the effect of a claimant's impairment was not 'long-term', had erroneously disregarded the fact that the claimant's mental illness had recurred after the alleged discriminatory act.

Disability-related discrimination

Disability-related discrimination occurs where an employer, for a reason related to an employee's disability, treats that employee less favourably than he treats or would treat others to whom that reason does not apply, and that treatment is not justified – S.3A(1) DDA. This provision was invoked in **O'Hanlon v Revenue and Customs Commrs** (Brief 831) 2007 ICR 1359 by a disabled employee who had exhausted her entitlement under her employer's sick pay policy. An employment tribunal dismissed her claim, concluding that she had not suffered less favourable treatment for a disability-related reason since a non-disabled person absent for the same length of time would have been treated in exactly the same way. The EAT (Brief 813; 0109/06) held that the tribunal had been wrong. However, it went on to conclude that the tribunal's alternative finding – that any less favourable treatment was justified – would stand, and thus the claim failed. The Court of Appeal has now rejected the employee's appeal against the EAT's decision.

Reasonable adjustments

Section 4A of the DDA places employers under a duty to make reasonable adjustments to prevent disabled persons being placed at a substantial disadvantage in comparison with those who are not disabled. In **Mid Staffordshire General Hospitals NHS Trust v Cambridge** (Brief 743) 2003 IRLR 566 the EAT held that an employer's failure to make an initial assessment to decide what steps it would be reasonable to take to prevent a disabled employee being disadvantaged amounted, in itself, to a breach of the S.4A duty. By contrast, the EAT in **Tarbuck v Sainsbury's Supermarkets Ltd** (Brief 811) 2006 IRLR 664 held that an employer is not under a separate and distinct duty to consult the disabled employee as to what adjustments are necessary. In **Spence v Intype Libra Ltd** (see above) the EAT followed **Tarbuck**, holding that the key issue was whether or not reasonable adjustments had, in fact, been made. Accordingly, the employer's failure to obtain an up-to-date medical report before dismissing the disabled employee did not, of itself, amount to a breach of the duty to make reasonable adjustments.

In determining whether it is reasonable for a person to have to take a particular step, a tribunal must consider the matters set out in S.18B(1) DDA. The first of these is the extent to which taking the step will prevent the effect – i.e. the substantial disadvantage – in relation to which the duty to make adjustments is imposed. In **Romec Ltd v Rudham** (Brief 836) EAT 0069/07 the EAT held that a tribunal had erred in finding that an employer had breached its duty to make reasonable adjustments in failing to extend a disabled employee's return-to-work programme. The tribunal should first have considered whether the extension would have removed the substantial disadvantage caused by the claimant's disability, thus enabling him to resume his full-time duties. The case was thus remitted to the tribunal for further consideration.

The employer in **Arthur v Northern Ireland Housing Executive and anor** (Brief 841) 2007 NICA 25 allowed a dyslexic job applicant 20 per cent extra time to complete pre-interview aptitude tests. His score was too low to be invited for interview, and he brought a tribunal claim arguing that the employer had not complied with its duty to make reasonable adjustments. The tribunal rejected his claim, even though the employer's own code of practice provided that such tests should not be used in the shortlisting of disabled candidates. It was clear on the facts that the adjustments made to the test had placed the disabled applicant on the same footing as other, non-disabled candidates, meaning that he was no longer under any substantial disadvantage. The Northern Ireland Court of Appeal upheld this decision.

The duty to make reasonable adjustments in the context of an employer's sick pay scheme was examined in **O'Hanlon v Revenue and Customs Commrs** (see above). There, the EAT held that an employer had not been obliged to amend its sick pay policy to favour a disabled employee – a decision that has now been upheld by the Court of Appeal. The Court saw 'much force' in the EAT's comment that it would be a rare case indeed where an adjustment in the form of giving a greater level of sick pay to disabled employees than non-disabled employees would be reasonable. In the course of his judgment, Hooper LJ indicated that one such case might arise where, as in **Meikle v Nottinghamshire County Council** (Brief 762), the employer had caused the absence in the first place by failing to make reasonable adjustments that would have enabled the employee to remain in work.

The claimant in **NTL Group Ltd v Difolco** (Brief 823) 2006 EWCA Civ 1508 suffered an accident at work which left her partially paralysed. She returned on a part-time basis but, a year later, was informed that she was to be made redundant. The employer proposed an alternative, albeit full-time position, which she did not apply for. She brought DDA claims before a tribunal, which concluded that her employer had failed to comply with its duty to make reasonable adjustments. The Court of Appeal overturned this decision.

As there was no link between the employee's redundancy dismissal and her disability, no duty to make adjustments arose. Nor was the duty triggered in relation to the proposed alternative post, as the claimant never actually applied for that job.

Time limits

A complaint of disability discrimination must be presented to the employment tribunal within the period of three months beginning with the date of the act complained of – para 3(1), Sch 3 DDA. If the complaint is presented outside the three-month period, the tribunal will have no jurisdiction to hear the claim unless it considers that, in all the circumstances, it is just and equitable to do so – para 3(2).

In *Department of Constitutional Affairs v Jones* (Brief 839) 2007 EWCA Civ 894 a tribunal extended time to allow a dismissed claimant, who had received legal advice that his depression amounted to a disability under the DDA but nevertheless held off presenting his claim until the time limit had passed, to proceed. The tribunal decided to exercise its discretion under para 3(2) partly owing to the claimant's reluctance to admit to himself and to others that he had a mental illness amounting to a disability, which was the reason for the late presentation of his claim. In addition, the tribunal took into account that the employer had hurried

the disciplinary procedure which led to the employee's dismissal, conducting the disciplinary hearing at a time when the claimant was too ill to attend. The tribunal made the express finding that had the hearing been postponed until he had been well enough to attend, it was likely that he would have presented a DDA claim 'well within time'. The Court of Appeal upheld this decision, stating that the exceptional circumstances warranted an extension of time.

Compensation

In *Taylor v Dumfries and Galloway Citizens Advice Service* (Brief 830) 2007 CSIH 28 a tribunal found that an employer had failed to make reasonable adjustments to enable the claimant to take up the offer of a higher paid post. However, in assessing the claimant's loss of future earnings, the tribunal declined to base its calculation on the higher salary, of which he had never been in receipt. The Court of Session held that this was an error, since the aim of the exercise was to place the claimant in the position he would have been in but for the discrimination.

Law reform

On 1 October 2007 the Disability Rights Commission was incorporated into the new Equality and Human Rights Commission.

Age discrimination

On 1 October 2006 discrimination in employment on the ground of age was outlawed by the Employment Equality (Age) Regulations. The avalanche of tribunal claims predicted by some has not materialised, but nevertheless there have been interesting decisions to report. The headline-grabbing issue has been the ongoing litigation instigated by Heyday, which claims that the national default retirement age of 65 contained in the legislation is incompatible with European law.

Direct discrimination

Under Reg 3(1)(a) of the Employment Equality (Age) Regulations 2006 SI 2006/1031, direct age discrimination occurs where 'on grounds of B's age, A treats B less favourably than he treats or would treat other persons... and A cannot show the treatment... to be a proportionate means of achieving a legitimate aim'. This provision was invoked successfully in *Martin v SS Photay and Associates* (Brief 834) ET Case No.1100242/07 by a cleaner who was dismissed by her employer two days after her 70th birthday. The dismissal letter specifically referred to age as one of the reasons for the termination and, although the employer argued that it had dismissed her because of concerns about her health, it had obtained no medical evidence to substantiate this. Furthermore, no statutory retirement procedure (see below) had been carried out.

When the Age Regulations came into force, there was much talk that the rules would provide additional protection for senior employees dismissed from lucrative posts. A case giving weight to this point was *Court v Dennis Publishing Ltd* (Brief 840) ET Case No.2200327/07. There, a tribunal

held that a company directly discriminated against a 55-year-old senior employee on the ground of his age when it selected him for redundancy. A number of factors led the tribunal to draw an inference of discrimination, including a general culture within the company that younger, cheaper employees were preferable to older, more expensive staff; the fact that the company's owner had written a book singing the praises of younger employees; and the company's failure to consider for redundancy any other employees, who were all at least 20 years younger than the claimant.

Compulsory retirement

Compulsory retirement is, on the face of it, direct discrimination on the ground of an employee's age – if it were not for the employee's age, his or her employment would continue. Nevertheless, the Regulations expressly allow retirement dismissals at or over the 'default retirement age' of 65. Theoretically at least, where an employer follows the statutory retirement procedure contained in Schedule 6 to the Regulations it will receive protection against both age discrimination and unfair dismissal liability. This, in fact, was the outcome in *Holmes v Active Sensors Ltd* (Brief 835) ET Case No.3100214/07.

Age questions referred to the ECJ

The questions to be put to the ECJ in the Heyday litigation were, in essence, as follows:

- does the EC Equal Treatment Framework Directive apply to statutory retirement procedures generally, and to the UK rules in particular?
- if retirement procedures are exempted from the Directive, does that exemption extend to procedures introduced during the Directive's transposition period (as the UK procedures were), or only to those already in place before the Directive took effect?
- does the Directive give a general scope for direct age discrimination to be objectively justified, or must justification be founded upon a given reason, such as those listed in the Directive?
- is the standard required by the Directive for objective justification of direct age discrimination higher than that required for indirect age discrimination?

We say 'theoretically' because in July 2006 Heyday (a not-for-profit membership organisation) brought judicial review proceedings in the High Court, arguing that, in permitting forced retirement, the Regulations are in breach of the Government's obligations under the EC Equal Treatment Framework Directive (No.2000/78). In December 2006 the High Court agreed to refer the matter to the European Court, and the questions to be put to the ECJ were eventually determined in July last year (see box above).

Hot on the heels of the Heyday referral came **Palacios de la Villa v Cortefiel Servicios SA** (Brief 840) 2007 IRLR 989. There, the ECJ – contrary to the Advocate General's Opinion given in February 2007 – held that national laws providing for compulsory retirement are not automatically excluded from the Directive's scope, and hence must be objectively justified. In the circumstances, a Spanish law allowing collective agreements to include clauses authorising compulsory retirement passed the objective justification test: it was an appropriate and necessary means of checking unemployment and encouraging recruitment, and hence did not infringe European law. Had the ECJ in **Palacios** agreed with the Advocate General that national retirement provisions are not within the scope of the Framework Directive, the Heyday challenge would effectively have been dead in the water. Now, however, Heyday at least has the chance to go to the ECJ and test the UK Government's objective justification of the mandatory retirement provisions contained in the Age Regulations.

The recent case of **Johns v Solent SD Ltd** EAT 0449/07 (see the news section of Brief 842) indicated that the Heyday litigation is alive and well. There, the EAT overturned a tribunal's decision to strike out a 'retired' employee's age discrimination and unfair dismissal claims where the employer had complied with the statutory retirement procedure. The EAT reinstated the claims, concluding that they should have been stayed pending the outcome of Heyday's challenge, which is expected in early 2009. Then, on 8 November 2007, the President of the Employment Tribunals directed that all current and future claims concerning the statutory

retirement provisions should likewise be stayed. For more details on the Heyday challenge and its implications, see Briefs 836, 840 and 842.

Pensions

When the Age Regulations came into force, one feature that caught employment lawyers' interest was the possibility of defending a direct discrimination claim by putting forward an objective justification for the treatment complained of. A successful justification defence was mounted by the employer in **Bloxham v Freshfields Bruckhaus Deringer** (Brief 840) ET Case No.2205086/06. There, a tribunal found that transitional arrangements for the reform of a law firm's pension scheme amounted to less favourable treatment of the claimant on the ground of age. However, the treatment was a proportionate response to the need to tackle 'intergenerational unfairness' in the scheme, and so the claim of direct discrimination under the Regulations failed.

Another case concerning pension rights was that of **R (on the application of Unison) v First Secretary of State** (Brief 822) 2006 IRLR 926. There, the High Court rejected Unison's challenge to the Secretary of State's removal of the 'rule of 85' – which allowed local government employees to draw an unreduced pension from the age of 60 if their age and length of service added up to at least 85 years – with effect from 1 October 2006. The rule discriminated on the ground of age contrary to the Framework Directive, and the Secretary of State had been entitled to conclude that it was not justified.

Unfair dismissal age limit

Until October 2006, the right to claim unfair dismissal did not apply to employees at or over the 'normal retiring age' for their position or, where there was no such NRA, to employees at or over the age of 65 – S.109(1)(b) Employment Rights Act 1996. This limit was removed by the Age Regulations as part of the UK Government's implementation of the Framework Directive.

Eyebrows were raised when, in **Mangold v Helm** (Brief 803) 2006 IRLR 143, the ECJ delivered a ruling suggesting that age discrimination was unlawful even before the deadline for implementation of the Directive. In **Lloyd-Briden v Worthing College** (Brief 834) EAT 0065/07 the EAT considered an appeal by an employee – who had been dismissed at the age of 82 – who argued that the effect of **Mangold** was that the employment tribunal had been obliged to set aside the S.109(1)(b) age limit and let his claim of unfair dismissal proceed, even though the Age Regulations were not in force at the time of his dismissal. The EAT rejected this contention, holding that the tribunal had been correct to strike out the employee's claim. The circumstances of the case were different to those in **Mangold**. Significantly, in **Mangold** the offending legislation was enacted during the Directive's transposition period, whereas S.109(1)(b) ERA pre-dated the Directive.

Unfair dismissal

As with the previous few years, 2007 saw a number of cases concerning unfair dismissal compensation issues, including calculating future loss, reductions for contributory fault, notice pay and loss of statutory rights. We also reported a range of decisions dealing with the nuts and bolts of unfair dismissal liability, such as establishing whether a dismissal has occurred, identifying the reason for a dismissal, and ascertaining whether a dismissal is reasonable in the circumstances.

Right to claim

Prior to its repeal by the Employment Equality (Age) Regulations 2006 SI 2006/1031, S.109 of the Employment Rights Act 1996 prevented employees from claiming unfair dismissal where they had attained the 'normal retiring age' for their job or, in the absence of an NRA, where they had reached the age of 65. In **Lloyd-Briden v Worthing College** (Brief 834) EAT 0065/07 an 82-year-old employee, who was dismissed prior to the repeal of S.109 ERA, argued that the provision was contrary to EC law and should be disapplied. The EAT, however, upheld a tribunal's decision that it had no jurisdiction to hear his claim. The United Kingdom had not been obliged to repeal S.109 until the end of the transposition period of the EC Equal Treatment Framework Directive (No.2000/78), and in enacting the Age Regulations in October 2006 it had complied with this obligation.

In **The New Testament Church of God v Stewart** (Brief 842) 2007 IRLR 178 the Court of Appeal considered whether a church minister was an 'employee' within S.230 ERA and hence had the right to claim unfair dismissal. The Church made reference to a line of authorities for the principle that the duties of a minister of religion are inconsistent with an intention to create legal relations – a prerequisite of a contract of employment. While accepting these authorities as valid, the Court of Appeal distinguished the instant case on its facts. Here, the minister was subject to various standards and guidelines laid down by the Church; the Church deducted income tax and national insurance from his salary; and it described him as an employee. The Court therefore agreed with an employment tribunal that the minister's unfair dismissal claim could proceed.

Express dismissal

An employee who wishes to claim unfair dismissal must first show that he or she has been 'dismissed' within the meaning of S.95 ERA. In **Sandhu v Jan de Rijk Transport Ltd** (Brief 831) 2007 ICR 1137 an employee was called to a meeting by his employer and told that he was being dismissed amid allegations of mistrust. The employee denied the allegations but, faced with immediate dismissal, managed to agree that his termination date would be delayed, and that he would retain his company car and phone for a limited period. He later brought a number of claims including unfair dismissal. An employment tribunal rejected this claim on the basis that he had voluntarily resigned. The Court of Appeal overturned this decision, which in its view was perverse.

At the meeting, the employee had merely tried to salvage what he could in the face of imminent dismissal. He had not negotiated his departure freely, and the only possible conclusion was that he had been dismissed.

Constructive dismissal

An employee who is not expressly dismissed by his or her employer can, in certain circumstances, still proceed with an unfair dismissal claim. That is because S.95(1)(c) ERA provides that a 'dismissal' occurs where 'the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct' – commonly known as a 'constructive dismissal'. Often, employees claiming constructive dismissal rely upon the implied contractual term of mutual trust and confidence. That, as explained by Lord Steyn in **Malik and anor v Bank of Credit and Commerce International SA** (in compulsory liquidation) (Brief 592) 1997 ICR 606, requires an employer to 'not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.

In **Baldwin v Brighton and Hove City Council** (Brief 830) 2007 ICR 680 the EAT thought it important to clarify the proper formulation of that implied term. His Honour Judge Clark explained that use of the word 'and' in *calculated and likely* as cited in **Malik** suggested that an employee in a constructive dismissal case must show not only that the employer's conduct was likely to destroy or seriously damage mutual trust and confidence, but also that it was *intended* to do so. This would impose a higher burden than set out in the earlier EAT decision of **Woods v WM Car Services (Peterborough) Ltd** 1981 ICR 666, which only required that an employee establish conduct 'calculated *or* likely' to have this effect. In the EAT's view, the use of the word 'and' in the **Malik** judgment was an error in the transcription. It was clear from the remainder of Lord Steyn's opinion that he had approved the **Woods** formulation, and had never intended to impose a higher standard than was set out therein.

Nevertheless, in the circumstances of the instant case, the employee failed to show that a constructive dismissal had occurred. The act relied upon – the employer's appointment to an internal interview panel of a person whom the employee perceived to be prejudiced against transsexuals – could not be described as conduct which, objectively considered, was likely to undermine trust and confidence, where the employer had not been aware of the employee's gender reassignment.

In **Abbey National plc v Fairbrother** (Brief 826) 2007 IRLR 320 an employee resigned and claimed unfair constructive dismissal, arguing that her employer's handling of a grievance she had raised in respect of two co-workers amounted to a breach of the implied term of mutual trust and confidence. A tribunal upheld her claim, but this decision was overturned by the EAT, which held that conduct breaches the implied term only if the employer has no reasonable and proper cause for it. Furthermore, in this case it could not be said that the employer had no reasonable and proper cause unless its conduct fell outside the range of reasonable responses to the grievance presented by the claimant. Given this, on the facts of the case the employer had not breached the implied term, and the employee's constructive dismissal claim therefore failed.

In **GAB Robins (UK) Ltd v Triggs** (Brief 833) 2007 ICR 1424 – another case of resignation in response to the alleged mishandling of an employee's grievance – the EAT refused to follow *Abbey National*, stating that the range of reasonable responses test adopted in that case does not apply where the alleged failings in a grievance procedure are the 'final straw' leading to resignation. The EAT noted that the 'final straw' should be an act forming part of a series whose cumulative effect amounts to a breach of mutual trust and confidence. It does not have to be of the same character as the earlier acts, nor must it necessarily constitute blameworthy conduct, but it must *contribute* (from an objective perspective, and however slightly) to breach of the implied term. In the circumstances, the EAT rejected the employer's appeal against a tribunal's finding that the claimant had been constructively dismissed.

When considering whether an employer has committed a fundamental breach of contract giving rise to a constructive dismissal claim, only the employer's conduct, or conduct for which the employer is responsible, can be taken into account. Thus, in **Yorke and anor v Moonlight** (Brief 826) EAT 0025/06, an employee who resigned as a result of the conduct of a third party could not claim unfair constructive dismissal. Although the employee regarded the third party as her 'overall boss', he was in fact neither the employer nor another employee for whom the employer was responsible.

Reason for dismissal

Where an employee claims unfair dismissal, it is for the employer to show, on a balance of probabilities, that the dismissal was for one of the six potentially fair reasons set out in S.98(1) and (2) ERA. However, it is also open to a claimant to show that a dismissal was for a proscribed reason, rendering it *automatically* unfair. In **Coulombeau v Enterprise Rent-A-Car (UK) Ltd** (Brief 826) ET Case No.2600296/06 an employee was dismissed allegedly for dishonesty (misconduct being a potentially fair reason for dismissal under S.98(2)). However, it became evident on the facts that the real reason for dismissal was the employer's belief that the employee would require increased periods of leave in the

future, owing to her desire to become an adoptive mother. Consequently, S.99(3)(ba) ERA (where the reason or principal reason for dismissal relates to ordinary or additional adoption leave) applied, making the dismissal automatically unfair.

In **Klusova v London Borough of Hounslow** (Brief 843) 2007 EWCA Civ 1127 a Council dismissed a Russian employee, having been informed by the Home Office that she had no right to work owing to her immigration status. It transpired, however, that the employee had been entitled to work, and she brought an unfair dismissal claim. The Council asserted that the reason for her dismissal was that she could not continue in employment without contravening a statutory restriction – namely, S.8 of the Asylum and Immigration Act 1996 – and that this amounted to a potentially fair reason under S.98(2)(d) ERA. Furthermore, the employer argued that it had not been obliged to follow the statutory dismissal procedure which, owing to Reg 4(1)(f) of the Employment Act 2002 (Dispute Resolution) Regulations 2004 SI 2004/752, does not apply to statutory restriction dismissals. The Court of Appeal, however, upheld a tribunal's decision that since there was no statutory restriction on the employee's employment at the time of her dismissal, no S.98(2)(d) reason had been made out. In the Court's view, the employer's genuine but mistaken belief in the unlawfulness of an employee's continued employment could amount to 'some other substantial reason for dismissal' under S.98(1)(b). However, in these circumstances, the employer's failure to follow the statutory procedure rendered the dismissal automatically unfair.

Reasonableness of dismissal

Once an employer has shown a tribunal that one of the six potentially fair reasons for dismissal applies, the tribunal must then determine, in accordance with S.98(4), whether the employer acted reasonably in dismissing for that reason. The EAT, in **Iceland Frozen Foods v Jones** 1982 ICR 17, established that a tribunal, when applying S.98(4), must decide whether the dismissal fell within the 'band of reasonable responses' available to the employer.

In **McAdie v Royal Bank of Scotland plc** (Brief 838) 2007 IRLR 89 the Court of Appeal, upholding the EAT's decision (Brief 821; 0268/06), considered how this test should be applied where an employer was responsible for an employee's incapacity, and dismissed the employee by reason of that incapacity. The Court held that the crucial question is whether it was reasonable for the employer to dismiss in these circumstances, and not whether it was reasonable for the employer to *cause* the incapacity in the first place. If the tribunal had asked that question, it could only have found that dismissal was the only option open to the employer in this case: the employee had no prospect of recovery and had stated that she would never be able to return to work.

The question of whether a dismissal induced by third party pressure was fair arose in **Greenwood v Whitehyll Plastics Ltd** (Brief 839) EAT 0219/07. The EAT's answer

was that it could be – the dismissal being for ‘some other substantial reason’ under S.98(1)(b) ERA. However, before finding a dismissal fair in these circumstances, a tribunal should consider the extent of any injustice caused to the employee by the dismissal. Relevant considerations would be the employee’s length of service, his or her work record, and the difficulties he or she might have in obtaining future employment. In rejecting the employee’s claim the tribunal had not carried out this exercise, so its decision was overturned.

The ban on smoking in enclosed public spaces and workplaces took effect in Scotland on 26 March 2006. In light of this, the employer in **Smith v Michelin Tyre plc** (Brief 839) ET Case No.100726/07 amended its smoking policy to prohibit smoking anywhere inside its factory. An employee caught smoking in breach of this policy was dismissed, and brought an unfair dismissal claim before an employment tribunal. The tribunal held that the dismissal was fair notwithstanding that the employee had a long period of service and that his was a one-off offence. Weighing the employee’s personal circumstances against the importance of preserving lives and property (flammable products were used in the business), the tribunal concluded that dismissal had been a reasonable response.

Procedural fairness

A dismissing employer’s failure to follow a ‘procedure’ *over and above* the statutory dismissal and disciplinary procedures contained in the Employment Act 2002 will not render the dismissal unfair if the dismissal would have occurred even if the procedure in question had been followed – S.98A(2) ERA. However, if a tribunal finds a less than 50 per cent chance that the dismissal would have occurred in any event, the dismissal will be procedurally unfair. Nevertheless, in such circumstances the tribunal may reduce the claimant’s compensatory award by a figure of between naught and 50 per cent if there was some chance that the dismissal would have occurred had the employer acted appropriately. This is known as a ‘Polkey reduction.’

In **Software 2000 Ltd v Andrews and ors** (Brief 825) 2007 ICR 825 the EAT set out two key principles concerning S.98A(2) ERA. The first is that the word ‘procedure’ in that provision is to be given a broad meaning (which clearly serves the interests of employers as opposed to employees). The second is that when S.98A(2) is advanced by the employer, tribunals *must* – in pursuance of their ‘statutory duty’ to assess what compensation is just and equitable – attempt the task (no matter how speculative) of evaluating the evidence on what might have happened had there been no unfair dismissal. If the tribunal finds that the evidence in this regard is too unreliable to determine that dismissal would have occurred in any event, it must nevertheless move on to consider whether there is evidence to support a Polkey reduction. The consequence of not doing so, especially when considering future loss, is that the employee could be overcompensated. Note that in **Loosley v Social Action for Health** (Brief 828) EAT 0378/06 the EAT

applied the Software decision in holding that an employer’s failure to alert an employee to suitable alternative employment was a breach of ‘procedure’ within the meaning of S.98A(2).

In **Sinclair v Wandsworth Council** (Brief 843) EAT 0145/07 the Appeal Tribunal upheld a tribunal’s finding that a Council’s failure to apply its alcohol policy when dismissing an employee for being drunk at work rendered the dismissal unfair. There were two unreasonable and material defaults on the Council’s part: first, the alcohol policy had not been provided to the employee until immediately before the disciplinary hearing that resulted in his dismissal, and secondly, the Council had failed to spell out precisely what the employee was required to do under the policy – essentially, seek treatment for his alcoholism – in order to stop the disciplinary action taking place.

Compensation

Section 123(1) ERA provides that the unfair dismissal compensatory award should be ‘such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal’. In **Scope v Thornett** (Brief 821) 2007 ICR 236 the Court of Appeal accepted that any assessment of a future loss inevitably involves a speculative element. However, the tribunal had erred by failing to give sufficient reasons for finding that a constructively dismissed employee’s compensation should be limited to six months’ pay as she would have been dismissed in any event within that timeframe.

GAB Robins (UK) Ltd v Triggs (above) was another constructive dismissal case. There, applying the core principles of S.123(1) as set out above, the EAT found that a tribunal had not erred in awarding an unfairly constructively dismissed employee compensation in respect of future loss of earnings resulting from her ill health, even though she had been on sick leave prior to her ‘dismissal’. It was clear that the employer’s breach of the implied term of trust and confidence caused the employee’s ill health as well as her constructive dismissal. In these circumstances, the employee’s ill health would be treated as a consequence of her dismissal, meaning that loss of earnings would form part of her compensatory award.

Section 122(2) ERA states that a tribunal may reduce the basic award if it considers that the claimant’s conduct before dismissal was such that it would be ‘just and equitable to do so’. S.123(6) ERA, a similarly worded provision, can be used to apply a reduction in respect of the compensatory award. In **Mullinger v Department for Work and Pensions** (Brief 830) EAT 0515/05, the EAT confirmed that only *pre*-dismissal conduct can be considered for a reduction under Ss.122(2) and 123(6). On this basis, the tribunal’s decision to make a contributory fault reduction for the employee’s *post*-dismissal conduct was overturned.

Another contributory fault case was **Sinclair v Wandsworth Council** (above). There, the EAT held that a tribunal had

erred in deciding that an employee's being unfit to work owing to alcoholism could not amount to contributory conduct for the purpose of assessing his compensation. It was wrong to say that an employee's unacceptable conduct should be ignored in this context simply because it is connected with a 'background or underlying illness'. Accordingly, the EAT remitted the case to the tribunal to decide the appropriate contribution percentage.

In *Norton Tool Co Ltd v Tewson* 1972 ICR 501 the National Industrial Relations Court held that an employee dismissed without notice, and without pay in lieu of notice, is entitled to include net pay for the statutory or contractual notice period in a claim for unfair dismissal, and does not have to give credit for any new earnings during the notice period. In *Burlo v Langley and anor* (Brief 824) 2007 IRLR 145 the Court of Appeal accepted that *Norton Tool* enunciated a wide principle that 'might apply to any number of as-yet unformulated precepts of good industrial practice'. However, the Court – citing *Babcock FATA Ltd v Addison* 1987 IRLR 173, CA – held that the *Norton Tool* principle (or any interpretations of good industrial practice that arise from it) can never be used to award a claimant

compensation *in excess* of their actual loss. It followed that the employee in the instant case was not entitled, as part of her unfair dismissal compensation, to full pay in respect of her notice period, since, had she been given proper notice, she would only have received statutory sick pay owing to her absence at the relevant time.

An employee who has been unfairly dismissed will – unless reinstated or re-engaged – undoubtedly lose a number of statutory employment protection rights, and in particular the right not to be unfairly dismissed until he or she has worked long enough for a new employer. In *Dugdale plc v Cartledge* (Brief 836) EAT 0508/06 a tribunal noted that it might be some considerable time before the employee in question was able to obtain other permanent employment. On this basis, it awarded £500 for loss of statutory rights. On appeal, the EAT held that this was contrary to the established practice of awarding a conventional, standard sum in respect of this head of loss. This sum, continued the EAT, should be based on the figure of £100 set by the EAT in *SH Muffett Ltd v Head* 1986 IRLR 488, increased to take account of inflation. The relevant sum today, in the EAT's view, was £250.

Redundancy

Although interesting appellate redundancy decisions were thin on the ground last year, there were some significant developments. In particular, the EAT widened the scope of an employer's duty to consult in respect of collective redundancies.

Duty to consult

Under section 188(1A)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992, where an employer proposes to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less, he must consult appropriate representatives of any of the employees who might be affected. Consultation must begin 'in good time', and in any event at least 90 days before the first of the dismissals takes effect.

In *UK Mining Ltd v National Union of Mineworkers (Northumberland Area) and anor* (Brief 841) 0397/06 the EAT considered the wording of Article 2(2) of the EC Collective Redundancies Directive (No.98/59), which S.188 transposed into domestic law. In its view, the reference in Article 2(2) to 'consultation over the ways of avoiding redundancies' clearly envisaged consultation over the *business reasons* behind the redundancies and not simply consultation *about* the redundancies per se. Moreover, the EAT held, it was possible to give effect to S.188 so as to achieve the Directive's aim in this regard. In the view of Mr Justice Elias, President of the EAT, where business closure and redundancy dismissals were inextricably linked, a duty to consult over the reasons for closure arose.

If an employer fails to comply with the statutory requirements for consultation, a complaint may be made to an employment tribunal. Where a tribunal finds such a complaint to be well founded, it shall make a declaration to that effect and may also make a 'protective award' –

S.189(2) TULR(C)A. If such an award is made, it shall comprise remuneration for the 'protected period' (which is up to 90 days) in respect of certain affected employees. In *Transport and General Workers Union v Brauer Coley Ltd (in administration)* (Brief 823) 2007 ICR 226 the EAT confirmed that a protective award obtained by a trade union could only be enforced by employees in respect of whom that union was recognised. Thus, a tribunal had been correct to hold that employees who were members of the union in question but who were not represented by it for collective bargaining purposes could not benefit from the protective award obtained by that union.

Alternative employment

Under S.138(2) of the Employment Rights Act 1996 a redundant employee will not lose redundancy status (i.e. will still be regarded as dismissed and entitled to a redundancy payment) if the alternative employment he or she has been offered differs in terms of the capacity and place in which the employee is employed, and the other terms and conditions of employment; *and* the redundant employee terminates this alternative employment within the first four weeks (known as the 'trial period'). In *Optical Express Ltd v Williams* (Brief 841) 2007 IRLR 936 the EAT confirmed that no common law trial period ran alongside the statutory trial period under S.138 in the case of a redundancy dismissal. Consequently, when the employee resigned two weeks after the four-week statutory trial period had expired, she had forfeited her right to a redundancy payment.

Transfer of undertakings

Last year saw the first case law on the Transfer of Undertakings Regulations 2006, as well as a number of landmark decisions based on the previous TUPE regime. Among the areas covered in Brief were changes of professional service provider, share sales, objections to a transfer, post-transfer variations to contracts, service provision changes, 'ETO reasons' for dismissal, and insolvency.

Identifying a relevant transfer

The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 (TUPE) only take effect where a 'relevant transfer' occurs. Under TUPE 2006 there are two different (although not mutually exclusive) ways in which such a transfer can arise: first, where the traditional definition contained in Reg 3(1)(a) – under which there must be a transfer of an economic entity that retains its identity – is satisfied; and, secondly, where a 'service provision change' (SPC) as defined by Reg 3(1)(b) takes place. In order for an SPC to fall within Reg 3(1)(b), the conditions set out in Reg 3(3) must be met. The first of these is that 'immediately before the service provision change there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client'.

Prior to the introduction of the Reg 3(1)(b) SPC definition – which goes beyond what is required by the EC Acquired Rights Directive (No.2001/23), and brings the vast majority of SPCs within TUPE's scope – there was much debate as to whether 'professional business services', such as legal or accounting services, should be excluded. In the event, the Government decided against such an exclusion. Thus, in **Hunt v Storm Communications Ltd and ors** (Brief 834) ET Case No.2702546/06 an employment tribunal felt able to hold that an SPC had occurred where a client company changed its provider of specialist public relations services. A single employee – a PR professional who spent around 70 per cent of her time working on the client's account – comprised an 'organised grouping of employees' whose 'principal purpose' was carrying out the relevant activities on behalf of the client, with the result that her employment TUPE-transferred to the new provider. The tribunal's decision is due to go on appeal to the EAT in 2008.

It has long been accepted that a change in the legal control of an employer, as happens when the ownership of shares is transferred, does not attract the application of TUPE – see **Brookes and ors v Borough Care Services and anor** (Brief 624) 1998 ICR 1198, EAT. However, in **The Print Factory (London) 1991 Ltd v Millam** (Brief 829) 2007 ICR 1331 the Court of Appeal held that an employment tribunal had been entitled to find that a share sale, whereby an employee's employer was purchased by another company, gave rise to a TUPE-transfer. The tribunal had not, as the EAT had held, impermissibly 'pierced the corporate veil' in so holding, but had instead found, as a matter of fact, that the degree of integration of the two businesses in question was such that a relevant transfer had taken place. It is fair to say that the Court's decision in *Millam* has put the cat

among the pigeons somewhat. The essential circumstances of the case – where the purchasing company effectively took over the running of the purchased company – are not particularly unusual, so it is at least arguable that a significant number of share sales do fall under TUPE's auspices.

As touched on above, the source of TUPE is EC Law – the Regulations came into being to implement the EC Acquired Rights Directive. Under Article 1(1)(a) of the Directive, an employee is protected by the rules where there is a 'transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger'. Article 1(1)(b) adds that there must be 'a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. This is the definition of a transfer that is reflected in Reg 3(1)(a). In **Jouini v Princess Personal Service GmbH** (Brief 841) 2007 IRLR 1005 the ECJ considered a reference from an Austrian court on the question of whether an economic entity had been transferred in circumstances where some of the administrative personnel and temporary employees of an employment business were employed by another temporary employment business. The ECJ held that Article 1(1) must be interpreted as applying to a situation where such personnel and temporary employees are transferred from one temporary employment business to another in order to carry out the same activities in that business for the same clients. However, the question of whether the grouping of staff in the instant case actually amounted to an economic entity was a matter for the national court.

Objecting to a transfer

Regulation 4(7) of TUPE 2006 provides that the automatic transfer of an employment contract will not occur in respect of an employee 'who informs the transferor or the transferee that he objects to becoming employed by the transferee'. Instead, Reg 4(8) continues, the employee's contract terminates on the date of the transfer, and he or she will not for any purpose be treated as having been dismissed. A literal reading of Reg 4(7) suggests that such an objection has to be raised prior to the transfer taking place. However, in **New ISG Ltd v Vernon and ors** (Brief 843) 2007 EWHC 2665 the High Court held that an employee who had not known the identity of the transferee until after the transfer had taken place had made a valid objection under Reg 4(7) by resigning two days after the transfer occurred. It followed that the employee had not, at any stage, been employed by the transferee, meaning that the transferee was unable

to enforce the restrictive covenants contained in his contract with the transferor.

Dismissal prior to transfer

Regulation 8(1) of TUPE 1981 (now Reg 7(1) of TUPE 2006) provided that an employee was automatically unfairly dismissed if the sole or principal reason for the dismissal was a transfer or a reason connected with the transfer. However, Reg 8(2) (now Reg 7(2)) went on to provide that, where the dismissal was for an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer (ETO reason), it would be potentially fair, subject to the normal unfair dismissal rules contained in the Employment Rights Act 1996.

In *Hynd v Armstrong and ors* (Brief 828) 2007 IRLR 338 the Court of Session held that the dismissal of an employee prior to a TUPE-transfer, made on the ground of the transferee's reduced need for staff following the transfer, was a dismissal by reason of the transfer, and therefore automatically unfair. A transferor is only able to rely on an ETO reason which relates to its own future conduct of the business, and not one which solely relates to the transferee.

Contractual rights

TUPE 1981 did not expressly address the issue of whether a transferee employer can alter the terms and conditions of transferred employees' contracts by agreement. However, in *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* 1988 IRLR 315 the ECJ held that, under the EC Acquired Rights Directive, which TUPE implements, it was not permissible for an employee to waive the rights conferred by the old contract with the transferor, even where the overall change in working conditions did not place him or her in a less advantageous position.

Nevertheless, it remained unclear whether a transferee could rely on TUPE or the Directive to resile from a contractual variation agreed with a transferred employee which was to the employee's benefit. In *Regent Security Services Ltd v Power* (Brief 843) 2007 EWCA Civ 1188 the Court of Appeal addressed exactly this question. Upholding the decision of the EAT (Brief 824; 0499/06), the Court held that, following a TUPE-transfer, P's contractual retirement age was validly varied from 60 to 65 with the result that, when dismissed at the age of 60, he was free to pursue a claim of unfair dismissal. The Court explained that P had never lost his pre-transfer right to retire at 60, but had obtained an additional right to retire at 65, and was free to choose between this additional right and his existing right. The employer could not rely on TUPE to set aside the variation, since the purpose of both the Regulations and the Directive is to safeguard the rights of *employees*, not those of employers. The decision in *Power* was made under TUPE 1981 but would not have been materially different under TUPE 2006.

A number of questions are left open by the Court's decision in *Power*, not least that of whether an employee

Key cases

The Print Factory v Millam (London) 1991 Ltd – a share sale could give rise to a relevant transfer where the purchasing company effectively took over the running of the purchased company.

Regent Security Services Ltd v Power – a transferee could not rely upon TUPE to resile from a transfer-related contractual variation it had agreed with an employee. TUPE enables employees, but not employers, to choose between enforcing a pre-transfer contractual term and enforcing a more favourable variation.

who has agreed to a detrimental variation to some terms and conditions *in exchange for* an improvement in others can rely on TUPE to void the detrimental terms, yet nevertheless take the contractual benefit of the improved ones. The EAT in *Power* expressed the view that there were powerful arguments to suggest that an employee would have to surrender the benefits offered in exchange for the varied term, but the Court of Appeal did not address this issue. See the Forewords to Brief 843 for further details.

In *Jackson v Computershare Investor Services plc* (Brief 841) 2007 EWCA Civ 1065 the Court of Appeal confirmed that TUPE cannot be relied upon to create rights that did not exist prior to the transfer. Thus, an employee who transferred under TUPE in 2004, having been employed by the transferor since 1999, was not entitled to the benefit of an enhanced redundancy scheme available only to employees who had joined the transferee prior to 2002. The contractual entitlement turned on the date J had actually joined the transferee, which was at the time of the transfer. To allow the fact that she was deemed to have been employed by CIS since 1999 to afford her a right which she did not enjoy pre-transfer would, in the words of Lord Justice Mummery, 'make artificial use of TUPE'.

Insolvency

Regulation 8 of TUPE 2006 prevents certain liabilities in respect of employees transferring to transferee employers where the transferor company is subject to insolvency proceedings. In such circumstances, liabilities including outstanding back pay and holiday pay are met by the Secretary of State out of the National Insurance Fund. However, this only occurs where 'relevant insolvency proceedings' are under way at the time of the transfer, under the supervision of an insolvency practitioner.

In *Secretary of State for Trade and Industry v Slater and ors* (Brief 834) 2007 IRLR 928 a transferee was held to be liable for an insolvent transferor's liabilities in respect of back pay and holiday pay. Reg 8 was not engaged because, at the time the transfer was made, the insolvency proceedings were not yet under way. Furthermore, had the proceedings begun by that point, they were not in any event under the supervision of an 'insolvency practitioner' within the meaning of S.388 of the Insolvency Act 1986.

Practice and procedure

Now that the dust has settled on the procedural reforms introduced in 2004, practice and procedure cases in 2007 focused on more long-standing issues like privilege, time limits and jurisdiction. Nonetheless, there were a handful of cases on points covered by the 2004 reforms such as tribunal constitution and strike-out. Cases arising out of the statutory disciplinary, dismissal and grievance procedures are covered in the article on page 22.

Privilege and disclosure

Cases on the ‘without prejudice’ rule, under which evidence relating to negotiations regarding the compromise of a claim can be legally privileged and therefore inadmissible in proceedings, don’t crop up that often in the employment context. However, in May this year, two came before the Court of Appeal. In **Framlington Group Ltd and anor v Barnetson** (Brief 831) 2007 ICR 1439 the Court held that details of discussions concerning the terms of a termination package were ‘without prejudice’ and so could not form part of the claimant’s witness statement in his wrongful dismissal claim. For the ‘without prejudice’ rule to be engaged, there had to be a dispute between the parties at the time of the discussions at issue. This depended on whether, in the course of negotiations, the parties contemplated or might reasonably have contemplated litigation. In this case, the discussions had taken place after the employer had signalled its intention to dismiss the claimant, and it was implausible that litigation had not been contemplated given the large amount of money at stake and the manner and content of the negotiations.

A differently constituted Court of Appeal held in **Brunel University and anor v Webster and anor** (Brief 831) 2007 IRLR 592 that two employees could rely on so-called ‘without prejudice’ discussions, referred to at internal grievance proceedings, in support of their subsequent tribunal claims. Although privilege would normally attach to the discussions at issue, the grievance proceedings in which they were referred to had taken place in very formal and adversarial circumstances and, in effect, amounted to a mini-trial of the employees’ victimisation allegations. In these circumstances, the Court was satisfied that both parties had waived privilege with regard to the discussions.

The EAT gave guidance on disclosure of confidential witness statements in **Arqiva Ltd v Sagoo** (Brief 829) EAT 0135/07, holding that an employment judge (formerly known as a tribunal chairman) had erred in ordering the disclosure of a witness statement given in confidence during an employer’s investigation of a grievance. The employment judge had incorrectly focused on the document’s relevance to the issues before the tribunal, instead of considering whether disclosure was necessary for disposing fairly of the proceedings, which was the correct test. The employment judge had also failed to give any weight to the issue of confidentiality and the public interest in enabling employers to take statements from employees who wish to give them only in confidence.

Territorial scope

Much confusion was caused by the Government’s decision in 1999 to remove S.196(3) of the Employment Rights Act 1996, under which claimants were not able to bring unfair dismissal claims in employment tribunals if they worked ‘ordinarily outside Great Britain’. Repealing S.196(3) left the ERA silent as to its territorial scope, and it fell to the courts to fill the void. Various judicial approaches were taken, culminating in the test laid down by the House of Lords in **Lawson v Serco Ltd** (Brief 799) 2006 ICR 250, under which employees are able to claim unfair dismissal only if they were ‘employed in Great Britain’. This includes employees working wholly abroad but ‘for the purposes of a business carried on in Great Britain’ (for example, a foreign-based correspondent for a British newspaper).

In contrast to the ERA, the various UK discrimination provisions, such as the Disability Discrimination Act 1995, expressly state their territorial scope. Nevertheless, in **Williams v University of Nottingham** (Brief 835) 2007 IRLR 660 the EAT held that the **Lawson v Serco** test applies to disability discrimination claims. In the EAT’s view, the test so closely mirrors the relevant section of the DDA that the House of Lords in **Lawson v Serco** must have intended the same approach to apply. Note that although this case specifically concerned the territorial scope of the DDA, it is likely to be applied in similar cases involving other discrimination legislation.

Time limits

Proceedings must be instituted within the relevant time limit (normally three months of the act complained of) unless the tribunal exercises its discretion to grant an extension. In unfair dismissal claims, time may be extended where ‘it was not reasonably practicable for the claim to be presented’ within the time limit – S.111(2)(b) Employment Rights Act 1996. In **Beasley v National Grid Electricity Transmissions** (Brief 839) EAT 0626/06 the EAT sympathised with the claimant, whose claim was rejected by a tribunal for having been presented a mere 88 seconds late. However, the length of the delay was immaterial, given that the tribunal had permissibly found on the facts that there were no reasons making it not reasonably practicable to present the claim within the time limit. The tribunal had considered all relevant factors – such as whether the claimant knew of the applicable time limit, the steps that he took, and the impediments preventing him from achieving compliance – and so its decision that it had no jurisdiction to hear the claim could not be faulted.

The difficulty of extending time limits in unfair dismissal applications was again demonstrated in **Royal Bank of Scotland plc v Theobald** (Brief 824) EAT 0444/06, where the EAT held that the tribunal had erred in hearing a late claim when the claimant had been advised by a Citizens Advice Bureau to await the resolution of his internal appeal against dismissal before presenting his claim. The claimant had, in fact, known the outcome of the appeal before the time limit for bringing a claim had expired.

Late claims of unlawful discrimination may be heard where the tribunal considers it 'just and equitable' to do so. This test is slightly less stringent than the 'not reasonably practicable' test for late unfair dismissal claims, as illustrated by **Department of Constitutional Affairs v Jones** (Brief 839) 2007 EWCA Civ 894. There, the Court of Appeal held that an employment judge had correctly exercised his discretion to allow an out-of-time disability discrimination complaint to proceed where the claimant's delay was, to an extent, caused by his reluctance to admit to himself and others that his depression was severe enough to amount to a disability.

The Court stressed that this was one of those rare cases in which a number of factors justified an extension, and commented that the claimant's knowledge of his or her disability is potentially relevant only where there is a physical injury on the margin of being disabling or in the case of a mental condition, and not where there is an obvious and substantial physical injury.

Strike-out and bias

Striking out a claim or response is a draconian measure which tribunals may only employ on the grounds set out in rule 18(7) of the Employment Tribunal Rules of Procedure 2004 (contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI 2004/1861). These include the ground that a claim has no reasonable prospect of success – rule 18(7)(b). In **Ezsias v North Glamorgan NHS Trust** (Brief 830) 2007 ICR 1126 the Court of Appeal gave some guidance on this, stating that where the facts themselves are in issue it can only be in the most extreme case that an employment judge is able to say, without any evidence being tested in cross-examination, that the disputed facts will inevitably or almost inevitably be resolved against the claimant. This is especially so in discrimination and whistleblowing cases, which tend to be particularly fact-sensitive.

In any event, the Court of Appeal held that the employment judge's decision to strike out the claimant's whistleblowing claim had been vitiated by an appearance of bias on the judge's part. In effect, she had given her opinion on the strike-out application before the parties had been given proper notice of it or had had the opportunity to make submissions. Although a provisional view, even if expressed in trenchant terms, did not necessarily mean that an employment judge has predetermined an issue, in this case her view was clearly stated in concluded terms.

Ansar v Lloyds TSB Bank plc and ors (Brief 826) 2007 IRLR 211 was another Court of Appeal case involving an allegation of bias. There, the Court found the allegation to be unsubstantiated, holding that the employment judge had been entitled to refuse a request to withdraw himself from a pre-hearing review, despite outstanding complaints of bias against him in connection with his dismissal of the claimant's earlier case against the same respondents. The allegations were not of a kind that would lead a fair-minded observer to conclude that there was any real possibility that the employment judge was biased against the claimant in the second set of proceedings.

This ruling endorses the comments made by Mr Justice Burton who, when the case was before the EAT, emphasised the importance of judges not acceding too readily to withdrawal requests. Otherwise, parties might see this as a way of selecting who would hear their cases.

Constitution of the tribunal

Section 4(3) of the Employment Tribunals Act 1996 lists a number of claims which are normally heard by an employment judge sitting alone, unless he or she requires a full panel to be constituted having regard to the factors set out in S.4(5). These include the desirability of having a three-member panel available to settle a factual dispute and any views of any of the parties as to whether a one-member or three-member panel is required. In **Sterling Developments (London) Ltd v Pagano** (Brief 833) 2007 IRLR 471 the EAT held that an employment judge sitting alone in an unlawful deductions case did not err in law by failing to consider whether he should convene a full tribunal, as a single-member tribunal was the default position in such cases. Although the notice of hearing had erroneously indicated that a full tribunal would be convened, the employer could have objected to the absence of a full tribunal at the beginning of the hearing itself. It failed to do so, and its appeal that the tribunal was not fully established and therefore incompetent was dismissed.

Costs

Unlike in the employment tribunals, where there are strictly limited grounds on which costs awards may be made, costs in the civil courts tend to follow judgment as a matter of course. In **Fox Gregory Ltd v Spinks and anor** (Brief 823) 2006 EWCA Civ 1544 the Court of Appeal decided that an employer was entitled to recover the cost of taking legal action against a competitor to prevent that competitor using commercial information unlawfully obtained by an ex-employee. Given the competitor's inadequate response to the employer's letter before action, it was reasonable for the employer to issue proceedings and to continue them until the competitor had complied with its belated voluntary undertaking to hand over the confidential material. Having acted reasonably, the employer should not be penalised by having to pay the costs incurred in the High Court action that was necessary to obtain performance of the competitor's undertaking.

Compromise agreements

Compromise agreements are subject to general contractual principles and may be conditional upon the employee performing a particular action or giving a particular assurance, or 'warranty'. However, it is not always clear what the effect is of a party giving a false warranty, or failing to perform the action promised. In **Collidge v Freepport plc** (Brief 832) 2007 EWHC 1216 the High Court held that an employer was not obliged to pay an employee under a compromise agreement where the employee had falsely warranted that at the time of the agreement he was unaware of circumstances that would have amounted to a repudiatory breach of contract entitling the employer to dismiss him without notice. The Court considered the warranty to be an indispensable condition of the liability to pay. In other words, if the warranty was not true, the obligation to pay did not arise.

The law of misrepresentation also applies to compromise agreements. In **Crystal Palace FC (2000) Ltd v Dowie** (Brief 837) 2007 IRLR 682 a football manager fraudulently misrepresented to his club chairman that he wanted to leave his job to move closer to his family, with the intention and effect of inducing the chairman to enter a compromise agreement releasing him from a contractual agreement to pay the club compensation. The manager in fact intended to join a neighbouring club. The High Court held that the manager's stated reason for leaving was a major factor influencing the club's decision to waive its right to compensation. The club was therefore entitled to damages or some other financial relief.

As a general rule, employees cannot 'contract out' of their rights to bring claims under employment protection legislation. However, the ERA and the discrimination legislation permit claims to be settled by way of a compromise agreement provided certain conditions are met. These include that the agreement must relate to the particular proceedings or complaint, and must state that the conditions regulating compromise agreements under the relevant statute are satisfied. In **Palihakkara v British Telecommunications plc** (Brief 823) EAT 0185-86/06 the EAT held that an agreement under which a claimant purported to settle 'all claims past or future arising out of her termination of employment' was insufficient to compromise race and sex discrimination claims which arose during the course of her employment. In any event, the agreement did not contain the required statement confirming that the statutory conditions regulating compromise agreements had been satisfied.

Appeals

There is a 42-day time limit for instituting an appeal from the employment tribunal – rule 3(3), Employment Appeal Tribunal Rules 1993 SI 1993/2584. Under rule 37 the EAT has a discretion to extend this time limit. However, the discretion will not be exercised lightly. This was highlighted in four cases taken together, **Muschett v London Borough of Hounslow**; **Khan v London**

Probation Service; **Ogbunke v Minster Lodge and ors**; **Tallington Lakes Ltd v Reilly and anor** (Brief 840) EAT 0281/07; 0285/07; 0400/07; 1870/06. There, the EAT restated the well-established principle that the time limit will only be extended in highly exceptional circumstances, and emphasised that a party must demonstrate good reasons for failing to appeal during the course of the entire period in which the appeal should have been lodged. The EAT also reminded would-be appellants of the need to provide the documents stipulated in the 1993 Rules and the 2004 Practice Direction along with the Notice of Appeal, and stressed that litigants in person will be held to the same standard as those with professional advisers.

The EAT normally only has jurisdiction to deal with questions of law arising from a tribunal's decision, and cannot deal with points of law conceded or not taken before the tribunal. However, in **Lipscombe v Forestry Commission** (Brief 832) 2007 EWCA Civ 428 the Court of Appeal held that the EAT had been entitled to conclude that a new point of law advanced by the claimant could be raised on appeal, as there were exceptional circumstances. These included the fact that the claimant was a litigant in person and could not be blamed for failing to take the point before the tribunal; that the new point was confirmed as correct by a separate EAT hearing, which happened to fall after the tribunal's decision in the claimant's case; and that the employer conceded before the EAT that, had the point been put, the tribunal would have accepted it.

In **Secretary of State for Health and anor v Rance and ors and other cases** (Brief 838) 2007 IRLR 665 it was the employer who benefited from the EAT's discretion to hear on appeal a new point of law. In these cases, the employer, responding to several thousand equal pay claims, had admitted liability through an administrative error. On discovering its mistake, the employer sought reviews of the tribunal's judgments and, having failed in those applications, appealed to the EAT. The EAT considered that although it should exercise its discretion only exceptionally, the facts of the present case – including that the concession had been made through error rather than as a tactical decision and that the employer had attempted to raise the point on review before appealing – justified such an exercise.

Law reform

The Tribunals, Courts and Enforcement Act 2007 received Royal Assent on 19 July 2007 and will be gradually implemented over the next two years. The Act's main purpose is to bring together the numerous tribunals within one simplified system administered by the Tribunals Service. It also introduces changes regarding enforcement of tribunal awards and judicial mediation (which are not yet in force), together with provision for tribunal chairmen to be referred to as 'employment judges', a change of terminology which came into force on 1 December 2007. Full details can be found in our feature article on practice and procedure issues in Brief 840.

Statutory disciplinary and grievance procedures

The much-criticised statutory dispute resolution procedures are due to be abolished by the Employment Bill. However, as it might be some time before the bill becomes law, the procedural cases we reported in 2007 will be of more than academic interest for the foreseeable future.

The Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004 SI 2004/752 introduced minimum statutory procedures that employers and employees alike are obliged to follow in relation to disciplinary and grievance matters.

Statutory disciplinary procedures

The statutory disciplinary and dismissal procedures (DDPs) apply where an employer is contemplating dismissing or taking 'relevant disciplinary action' against an employee – Reg 3(1) of the 2004 Regulations. Where an employee is dismissed with at least one year's service, and the employer has failed to observe an appropriate DDP, the dismissal is automatically unfair under S.98A(1) of the Employment Rights Act 1996, and any compensation awarded to the employee may be increased by between 10 and 50 per cent at the tribunal's discretion under S.31(3) of the 2002 Act.

Tribunal jurisdiction

In *Scott-Davies v Redgate Medical Services* (Brief 823) 2007 ICR 348 the EAT upheld a tribunal's decision that it had no jurisdiction to hear an employee's claim for compensation for his employer's failure to follow a DDP, because he had not completed one year's service and so did not have an underlying claim of unfair dismissal. The EAT confirmed that there is no free-standing right to complain of a failure to comply with the DDPs.

Time limits

The three-month time limit that ordinarily applies to unfair dismissal claims is extended by three months under Reg 15(2) of the 2004 Regulations if, at the date when the normal time limit expired, the employee had reasonable grounds for believing that a dismissal or disciplinary procedure – statutory or otherwise – was being followed. In *Harris v Towergate London Market Ltd* (Brief 832) EAT 0090/07 the EAT overturned a tribunal's decision that an employee who mistakenly raised a grievance about her redundancy dismissal, rather than pursuing an appeal, was out of time for bringing an unfair dismissal claim. Time would be automatically extended because, on the date the original time limit expired, the employee had reasonable grounds for believing that some sort of dismissal procedure was ongoing.

Compliance with the procedures

Step 1 of the three-step standard DDP involves the employer sending a statement of grounds for dismissal or disciplinary action, known as a 'Step 1 letter', to the employee. In *Sahatciu v DPP Restaurants Ltd* (Brief 832) EAT 177/06 a dismissed employee complained that the letter he had been sent was too vague to amount to a Step 1 letter. However, the EAT considered that there was no need to be unduly

pedantic when applying the DDPs, and held that the employer had correctly followed the procedure. Similarly, in *Dugdale plc v Cartledge* (Brief 836) EAT 0508/06 the EAT held that a tribunal had taken too strict a view of an employer's responsibilities, stating that the DDPs are concerned only with establishing a 'basic statutory minimum standard' and that it had not been Parliament's intention that every procedural defect should render a dismissal automatically unfair. Accordingly, the 20 per cent uplift that the tribunal applied to the employee's compensation owing to the employer's alleged failure to complete the minimum statutory procedures was overturned.

Compensation uplift

In *Aptuit (Edinburgh) Ltd v Kennedy* (Brief 843) EAT 0057/06 the Scottish EAT held that only circumstances surrounding the failure to complete the statutory procedure could be taken into account when exercising the discretion to apply the S.31(3) uplift. A tribunal had therefore erred in taking into account the size of the organisation and the 'shoddy' manner in which the employee had been treated. In another recent decision on the uplift, *CEX Ltd v Lewis* (Brief 843) EAT 0057/06, the EAT said that tribunals have a 'broad discretion' to make an uplift, and held that an employment tribunal had been entitled to limit the uplift to 10 per cent where an employer failed to complete the DDP through ignorance rather than deliberate disregard.

Statutory grievance procedures

The statutory grievance procedures (GPs) apply, under Reg 6 of the 2004 Regulations, to most complaints about action by an employer that could result in a tribunal claim. The three-step standard GP is instigated by the employee submitting a written grievance to the employer, which has 28 days to respond. There is then a meeting to discuss the grievance, and the possibility of an appeal. The modified GP, which applies in limited circumstances when employment has ended, involves only two steps, there being no provision for a meeting or an appeal. An employee's failure to initiate the applicable GP means that the tribunal has no jurisdiction to hear a claim relating to the employee's complaint – S.32 of the 2002 Act.

Applicability of GPs

Regulation 6(5) of the 2004 Regulations states that an employee does not have to commence a GP where the grievance in question is that the employer has dismissed or is contemplating dismissing the employee. In *Lawrence v HM Prison Service* (Brief 833) 2007 IRLR 468 the EAT held that a complaint that a dismissal was discriminatory on the ground of disability was a complaint about dismissal, and so did not attract the statutory GPs. A tribunal therefore

erred in law in declining to hear the employee's discrimination claim simply because no grievance had been lodged in respect of it.

Generally, an employee wishing to claim constructive dismissal is obliged to lodge a grievance, as such a dismissal does not fall within the definition of 'dismissal' for the purposes of Reg 6(5). However, in **South Kent College v Hall** EAT 0087/07 (Brief 833), the EAT rejected the proposition that a grievance is required in *every* constructive dismissal case. Where an employee resigns in response to the employer's instigation of disciplinary proceedings with a view to dismissing him or her, Reg 6(5) is engaged and the employee is excused from the GP's requirements. On the facts of that case, however, the disciplinary proceedings were not so advanced that the employer could be said to be contemplating dismissal, and so the Reg 6(5) exemption did not apply.

Continuing complaints

In **Smith v Network Rail Infrastructure Ltd** (Brief 830) EAT 0047/07 the EAT held that an employer's alleged failure to make reasonable adjustments to assist a disabled employee in finding alternative employment was a continuing complaint of discrimination. Accordingly, the employee's grievance letter in relation to that complaint was valid for the entire duration of that failure up until the date that tribunal proceedings were

instituted. This seemed to contradict the EAT's earlier decision in **Humphries v Chevler Packaging Ltd** (Brief 819) EAT 0224/06 that, in the context of time limits, a failure to make reasonable adjustments is ordinarily to be regarded as a one-off omission.

Modified GP

Step 1 of the modified GP is more onerous than Step 1 of the standard GP, in that it requires the employee to put in writing to the employer not only the grievance but also the basis for it. In **City of Bradford Metropolitan District Council v Pratt** (Brief 823) EAT 0391/06 the EAT held that a former employee's letter indicating an equal pay grievance without giving details of the comparators or the payments she was claiming did not comply with Step 1 of the modified GP. The letter did not set out her complaint in sufficient detail to enable the employer to respond.

Law reform

The Employment Bill, due to work its way through Parliament in 2008, will abolish the statutory procedures and repeal S.98A, with the result that the House of Lords' decision in **Polkey v AE Dayton Services Ltd** 1988 ICR 142 will once again become the basis for deciding whether a dismissal is unfair on procedural grounds – see *IDS Employment Law Handbook*, 'Unfair Dismissal' (2005) for details.

Employment protection

2007 saw some interesting decisions under the whistleblowing provisions, including an important clarification of what amounts to 'reasonable belief' in malpractice for the purpose of whistleblowing protection. In addition, the EAT revisited the lawfulness of rolled-up holiday pay arrangements. We also reported cases covering fixed-term workers, working time, information and consultation, maternity rights, and wages.

Whistleblowing

The Employment Rights Act 1996 protects workers from being subjected to a detriment by reason of their making a 'protected disclosure' (colloquially known as 'whistleblowing') – S.47B(1). In **Croke v Hydro Aluminium Worcester Ltd** (Brief 831) 2007 ICR 1303 the EAT held that a tribunal had erred in finding that it had no jurisdiction to hear a claimant's S.47B complaint. Although he supplied his services to an employment agency through his own company, and the agency in turn provided the services of that company to an end user, the claimant was a 'worker' of the end user for the purposes of S.43K ERA, which contains a wider definition than that which applies to the rest of the Act.

'Employees', as defined by S.230 ERA, benefit from additional whistleblowing protection against unfair dismissal – S.103A. In **Kuzel v Roche Products Ltd** (Brief 833) 2007 ICR 945 the EAT held that although this amounts to protection from a form of discrimination, it did not follow that the more favourable burden of proof rules that apply in discrimination cases should also apply to

whistleblowing claims. Thus, where an employee alleged that she had been dismissed for making protected disclosures, it did not follow that the tribunal was obliged to find that this was the real reason for her dismissal simply because the employer had failed to establish that it had in fact dismissed her for some other substantial reason.

The whistleblowing rules in the ERA do not contain any specific provision fixing an employer with liability for the acts of its employees. However, the EAT, in **Cumbria County Council v Carlisle-Morgan** (Brief 827) 2007 IRLR 314, confirmed that the common law principle of vicarious liability applies to claims under S.47B. The appropriate test is whether the perpetrator's wrongful conduct was so closely connected with the acts that he or she was authorised to do that it could properly be regarded as done by him or her while acting in the course of employment. An employment tribunal was therefore entitled to hold that an employer was vicariously liable for detriment suffered by an employee at the hands of a colleague on the ground of protected disclosures she had made.

In order to be protected, a disclosure must consist of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the malpractices listed in S.43B(1)(a)–(f) ERA. In *Kraus v Penna plc and anor* (Brief 759) 2004 IRLR 260 the EAT somewhat controversially concluded that a worker could not claim the protection of the legislation if the malpractice which is the subject of disclosure does not actually exist. Last year, the Court of Appeal in *Babula v Waltham Forest College* (Brief 826) 2007 ICR 1026 held that *Kraus* was incorrect and should no longer be followed. A whistleblower has only to establish a *reasonable belief* that the information being disclosed ‘tends to show’ one or more of the situations in paras (a)–(f) to come within the protection afforded by the ERA, and not that the belief is actually correct.

In 2006, the EAT concluded that a teacher who resigned after being given a written warning for hacking into his school’s computer system to demonstrate its vulnerability had not been subjected to a detriment or automatically unfairly dismissed contrary to the whistleblowing provisions, since he had been disciplined for misconduct and not for making a protected disclosure. This decision was upheld last year by the Court of Appeal in *Bolton School v Evans* (Brief 823) 2007 ICR 641.

Fixed-term workers

Under the EC Fixed-term Work Directive (No.99/70), fixed-term workers may not be treated in a less favourable manner than comparable permanent workers because of their fixed-term status, unless such treatment is justified on objective grounds. In *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* (Brief 842) C-307/05 the ECJ clarified that less favourable treatment cannot be objectively justified solely on the basis that it is provided for by statutory or secondary legislation – in this case, a Spanish statute and collective agreement which excluded temporary staff working in the Spanish health sector from length of service allowances paid to comparable permanent workers. The ECJ also confirmed that the Directive applies to public sector workers and to complaints about less favourable treatment in relation to pay.

In *Commissioners for Her Majesty’s Revenue and Customs v Thorn Baker Ltd and ors* (Brief 836) 2007 EWCA Civ 626 CA an agency worker, who was engaged on a fixed-term contract of not more than three months, failed in his claim for statutory sick pay (SSP). Although the statutory provision excluding those on such short-term contracts from claiming SSP was repealed by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 SI 2002/2034, the worker in this case could not avail himself of that repealing provision because, under Reg 19, the 2002 Regulations do not have effect in relation to agency workers.

Working time

Under the EC Working Time Directive (No.2003/88), workers are entitled to four weeks’ paid annual leave. In *Robinson-Steele v RD Retail Services Ltd* (Brief 802)

2006 ICR 932 the European Court of Justice considered the lawfulness of ‘rolled-up’ holiday pay arrangements whereby the employer makes hourly or weekly contractual payments that expressly include an element of holiday pay, and then makes no additional payment when the worker actually takes holiday. The ECJ held that these arrangements are incompatible with the Directive, but went on to say that such payments may, if made ‘transparently and comprehensibly’, be set off against a worker’s entitlement to payment when he or she actually takes leave.

In *Lyddon v Englefield Brickwork Ltd* (Brief 842) EAT 0301/07 the EAT held that an employer’s rolled-up holiday pay arrangements met the requirements of transparency and comprehensibility, even though there was no written provision in the claimant’s contract specifying the exact amount of pay attributable to his leave entitlement. Accordingly, payments made under the arrangements could be set off against the claimant’s entitlement to holiday pay under the Working Time Regulations 1998 SI 1998/1833 (which transpose the Directive into UK law).

Law reform

The Working Time (Amendment) Regulations 2007 SI 2007/2079 amended the 1998 Regulations to increase annual leave entitlement from 4 to 5.6 weeks (i.e. a maximum of 28 days for a five-day-a-week worker). The entitlement was initially increased to 4.8 weeks on 1 October 2007, and will rise to the full 5.6 weeks on 1 April 2009. For a detailed examination of the new leave entitlement and its implications, see our feature article in Brief 835.

Information and consultation

The Information and Consultation of Employees Regulations 2004 SI 2004/3426, which currently apply to businesses with 100 or more employees, oblige employers, in certain circumstances, to negotiate with employees with a view to establishing an information and consultation agreement. Under the standard information and consultation provisions, the employer, as part of the negotiating process, is obliged to arrange a ballot of employees to elect information and consultation representatives – Reg 19(1). In *Amicus v MacMillan Publishers Ltd* (Brief 839) 2007 IRLR 885 the Central Arbitration Committee made a declaration that the company had breached Reg 19(1), and the trade union subsequently applied to the EAT under Reg 22(6) for a penalty notice to be issued in respect of the company’s failure. The EAT assessed the penalty at £55,000, having regard to, among other things, the seriousness of the breach, the number of employees affected by the breach, and the employer’s awareness of its obligations under the Regulations and deliberate delay in implementing them. (Note that from 6 April 2008 the ICE Regulations will apply in respect of businesses with 50 or more employees.)

Key maternity rights changes for employees who gave birth on or after 1 April 2007:

- the removal of the length of service requirement for additional maternity leave – Regs 5 and 6 of the Maternity and Parental Leave etc and the Paternity and Adoption Leave (Amendment) Regulations 2006 SI 2006/2014
- a doubling of the period of notice women are required to give if they wish to return to work early from maternity leave, from 28 days to eight weeks – Reg 8
- the introduction of ‘keeping in touch’ days, whereby an employee on maternity leave can work for up to ten days during the statutory leave period, without losing statutory pay for that week or bringing her leave to an end – Reg 9
- the extension of the period during which a woman is entitled to receive statutory payment during her maternity leave from 26 to 39 weeks – Reg 3 of the Statutory Maternity Pay etc Regulations 2006 SI 2006/2379

Maternity rights

Regulation 18 of the Maternity and Parental Leave etc Regulations 1999 SI 1999/3312 provides that an employee who takes ordinary or additional maternity leave is entitled to return to the job in which she was employed before her absence; or, in the case of additional maternity leave, if that is not reasonably practicable, to another job which is both suitable for her and appropriate for her to do in the circumstances. Reg 2(1) provides that ‘job’ must be defined by reference to ‘the nature of the work which she is employed to do in accordance with her contract and the capacity and place in which she is so employed’.

In *Blundell v Governing Body of St Andrew’s Catholic Primary School and anor* (Brief 830) 2007 ICR 1451 the EAT considered what amounts to the ‘same job’ within the meaning of these provisions. There, a teacher, upon return from maternity leave, alleged a breach of the Regulations by the employer when she was offered either a ‘floating role’ or a year two class, as opposed to the reception class that she had taught before her leave period. The EAT, upholding a tribunal’s decision, held that the employer had offered the employee the ‘same job’ within the meaning of the Regulations. It is for the tribunal to weigh up the factors set out by Reg 2(1) having regard to the Regulations’ overall aim of enabling the woman to return to a work situation as similar as possible to the one she left. In this case, taking into account that the claimant was expected to change classes every two years, the tribunal was entitled to find that the nature of her work was still that of a teacher; her capacity realistically still that of a class teacher rather than a reception class teacher; and her place of work still the school, as opposed to simply the reception classroom.

In *Kiiski v Tampereen kaupunki* (Brief 841) C-116/06 a Finnish employer refused an employee’s request to interrupt her unpaid child-care leave to enable her to take

paid maternity leave, because the applicable collective agreement did not allow alteration of child-care leave dates as a result of a new pregnancy. The European Court of Justice held that this amounted to discrimination contrary to the EC Equal Treatment Directive (No.76/207) and the EC Pregnant Workers Directive (No.92/85). Although similar circumstances will rarely arise in the UK – as the law provides for only 13 weeks’ of unpaid parental leave per child – if they do, the employer will be obliged to allow the employee to cancel or rearrange her parental leave dates in order to take maternity leave. The same principle will apply where any other period of statutory leave overlaps with maternity leave.

Law reform

Last year saw a number of changes to the statutory maternity rules, which we set out in the box opposite. Note also that in November 2007 the Government announced plans to extend the right to request flexible working, which at present only applies to parents with a child under the age of six or a disabled child under 18, and to carers of adults. An independent review to determine how the current right can be extended to parents of older children, and what the upper age limit of a child should be for such purposes, is currently under way.

National minimum wage

To qualify for the national minimum wage, an individual must be either an ‘employee’ or a ‘worker’. In *James v Redcats (Brands) Ltd* (Brief 826) 2007 ICR 1006 the EAT overturned a tribunal’s finding that a courier was not a worker for the purposes of the National Minimum Wage Act 1998. The tribunal had wrongly concluded on the basis of the case-law test for employee status that the claimant worked under a ‘contract for services’. The question of whether or not an individual is a worker for NMW purposes, said the EAT, requires a detailed analysis of the contract, to determine whether the dominant feature is the personal execution of work.

Law reform

The Employment Bill, which was introduced in the House of Lords on 6 December 2007, aims, among other things, to clarify and strengthen the enforcement framework for the national minimum wage. The maximum penalty for NMW offences will increase from a £5,000 fine to an unlimited fine. The bill also introduces a new method of calculating arrears which will have retrospective application to all outstanding claims.

Wages

Section 13 ERA gives employees the right not to suffer unlawful deductions from wages. In *Coors Brewers Ltd v Adcock and ors* (Brief 835) 2007 ICR 983 the Court of Appeal clarified that a tribunal only has jurisdiction to hear a S.13 claim for specified sums. Accordingly, a tribunal had erred in accepting jurisdiction to hear claims that an employer had failed to make payments under a profit-sharing scheme broadly equivalent to those which had been paid under an earlier scheme. The employees’ claims were contractual claims for unliquidated damages, which should be heard in the county court.

Contracts of employment

In 2007 the EAT gave notable guidance on the status of agency workers. Other matters considered by courts and tribunals included continuity of employment, the reasonableness of restrictive covenants, and the scope of the contractual duty of fidelity.

Employment status

Many of the statutory rights under the Employment Rights Act 1996, including the right to claim unfair dismissal, are conferred only on employees, i.e. those who work under a contract of employment. In *Dacas v Brook Street Bureau (UK) Ltd* (Brief 754) 2004 ICR 1437 the Court of Appeal advised that when determining the employment status of an agency worker who is involved in a triangular relationship with an employment business and an end user, a tribunal should consider the possibility of there being an implied contract of employment between the worker and the end user. Although the *Dacas* guidance was obiter (i.e. incidental to the decision and non-binding), it was later approved and applied by the Court of Appeal in *Cable and Wireless plc v Muscat* (Brief 802) 2006 ICR 975.

In *James v Greenwich Council* (Brief 822) 2007 ICR 577, however, the EAT set out guidance that tightly defined the circumstances in which a tribunal may imply an employment contract – see box. Among other things, it ruled that Lord Justice Sedley’s observation in *Dacas* that the fact that a worker has worked for a particular client for a considerable period could give rise to a contract of employment was wrong. Instead, it agreed with Lord Justice Mummery’s comments that, in order to imply a contract to give business reality to what was happening, the question was whether it was *necessary* to imply such a contract. (Note that, in October 2007, the Court of Appeal reserved judgment in the claimant’s appeal against the EAT’s decision. The judgment will be reported in a future edition of the Brief.)

The decision in *James* was followed in two separate decisions of the EAT, *Craigie v London Borough of Haringey* (Brief 828) EAT 0556/06 and *Wood Group Engineering (North Sea) Ltd v Robertson* (Brief 838) EAT 0081/06. In both cases, the EAT held that it was not necessary to imply a contract of employment between an agency worker and an end user as their working relationships were adequately explained by express contractual arrangements.

In *Heatherwood and Wexham Park Hospitals NHS Trust v Kulubowila and ors* (Brief 828) EAT 0633/06 the EAT overturned a tribunal’s decision that an agency worker was employed by a hospital Trust. Although the facts were consistent with there being an employment relationship, they were equally consistent with there being *no* employment relationship. An employment contract would not be implied unless the facts were *only* consistent with there being such a relationship. The EAT came to a similar conclusion in *Cairns v Visteon UK Ltd* (Brief 822) 2007 ICR 616 – decided before *James v Greenwich Council* –

EAT guidance on employment status of agency workers – *James v Greenwich Council*:

- the issue is whether the way in which the contract is performed is consistent with the agency arrangements or whether it is only consistent with an implied contract of employment between the worker and the end user
- where express contracts both explain and are consistent with the nature of the working relationship, it is not then necessary to explain the relationship by reference to an implied contract even if such a contract would also not be inconsistent with the relationship
- a tribunal will rarely be entitled to imply a contract between the worker and the end user when agency arrangements are genuine and accurately represent the actual relationship between the parties
- the mere fact that a temporary agency worker has worked for a particular client for a considerable period does not justify the implication of a contract between the worker and the end user on the ground of necessity
- it will be more readily open to a tribunal to imply a contract where the agency arrangements are superimposed on an existing contractual relationship between the worker and the end user

where it held that it was not necessary to imply a contract of employment between an agency worker and an end user in circumstances where that worker already had a contract of employment with the employment business. The existence of the contract between the employment business and the claimant was a relevant factor that the tribunal had been entitled to take into account.

Whether agency workers were employees of the employment business that supplied them to third parties was considered in *Consistent Group Ltd v (1) Kalwak and ors (2) Welsh Country Foods Ltd* (Brief 833) 2007 IRLR 560. The EAT there agreed with a tribunal’s finding that the employment business exercised an exceptional level of economic control over the claimants that was sufficient to give rise to a contract of employment, even though it did not manage their day-to-day working activities. The exceptional circumstances of this case included that the workers were recruited in Poland, provided with transport and accommodation by the employment business, and had severe practical and legal limits placed on their working elsewhere while the contract with the employment business remained in place.

In 2007 we also reported two EAT cases on employment status that did not arise in an agency context. In *Ministry of Defence HQ Defence Dental Service v Kettle* (Brief 825) EAT 0308/06 the claimant answered an advertisement for

a part-time salaried position for the provision of orthodontic care for MoD personnel. She was engaged on a fixed-term contract, and when this was terminated abruptly brought various tribunal claims for which she required employee status. The tribunal, looking at the contract, the job advertisement and the parties' subsequent conduct, concluded that she had been an MoD employee. The EAT agreed, holding that the tribunal had been entitled to look beyond the written terms of the contract, which was never intended to contain all the terms governing the parties' relationship, and consider other relevant material – including oral exchanges and the parties' conduct – to determine the nature of that relationship.

In **Nesbitt and anor v Secretary of State for Trade and Industry** (Brief 841) 2007 IRLR 847 the EAT held that the fact that an individual holds a majority shareholding and directorship in a company does not affect his or her status as an employee unless the company is a 'mere simulacrum' and the employment contract a sham. In the instant case, the fact that the claimants owned every share but one in a company was insufficient to deprive them of employee status with that company, because they otherwise satisfied all the criteria for employment – they had contracts of employment; they received all their remuneration by way of salary; they behaved like employees; and there were no other factors pointing away from employee status.

Continuity of employment

Section 212(1) of the Employment Rights Act 1996 provides that any week during the whole or part of which an employee's relations with the employer are governed by a contract of employment counts towards his or her period of employment. In **Vernon v Event Management Catering Ltd** (Brief 835) EAT 0161/07 the EAT overturned a tribunal's conclusion that a claimant who worked two or three days a week for the employer over a period of three years did not have the necessary one year's continuous employment to claim unfair dismissal. On a proper application of S.212(1), every week in which the claimant worked for the employer as an employee, for however long, had to count for continuity purposes.

The EAT also held that continuity in this case was preserved by S.212(3)(c) ERA when the employee went on a two-week holiday. That provision bridges gaps during which there is no contract in existence if the employee is absent from work in circumstances such that, by arrangement or custom, he or she is regarded as continuing in employment. Here, there had been such an arrangement as regards the employee's holiday. The EAT noted that any other conclusion would have had the curious result that, when exercising his statutory entitlement to four weeks' holiday under the Working Time Regulations 1998 SI 1998/1833, the employee would destroy the rights he would otherwise have had.

Contractual terms

In **Przybylska v Modus Telecom Ltd** (Brief 833) EAT 0566/06 the EAT held that an employment tribunal had erred in implying a term into an employee's contract enabling the

employer to extend her three-month probationary period to allow it to conduct a performance assessment. It had been unnecessary for the tribunal to imply such a term where the employer had failed to exercise an express term conferring the same power of extension.

Another case in which the employment tribunal erred in implying a contractual term was **Luke v Stoke on Trent City Council** (Brief 838) 2007 IRLR 777. There, the Court of Appeal upheld the tribunal's decision that an employer was entitled to stop paying an employee who refused to accept reasonable terms on which to return to work following the investigation of her bullying complaints, and also rejected offers of temporary placement at a different location. However, the tribunal had erred in reaching this conclusion by implying a contractual right temporarily to redeploy the employee until she could return to her usual place of work. Her original job was still available and all she had to do was accept the employer's reasonable conditions for return. Her refusal made this a simple case of 'no work, no pay'.

In **Wetherill and ors v Birmingham City Council** (Brief 836) 2007 IRLR 781 the Court of Appeal held that a local authority had power to vary the terms of a car-user allowance scheme unilaterally, subject to an implied restriction that it would exercise such a power reasonably. In implementing a change without introducing proper transitional arrangements, the local authority breached the contracts of affected users. However, the employer incurred no liability to pay compensation because any such transitional arrangements would have ended before the commencement of the six-year limitation period applicable to the employees' county court claim, the breach of contract having occurred in 1993.

In **GAP Personnel Franchises Ltd v Robinson** (Brief 843) EAT 0342/07 the EAT held that the employer had been in breach of contract and made an unlawful deduction from the employee's wages when it reimbursed his fuel expenses at a lower rate than contractually agreed. The question of whether the employer had likewise acted unlawfully by continuing to pay the lower rate for the ensuing six months or whether the employee, by continuing to work without protest, had affirmed the employer's unilateral variation of his contract was remitted to the tribunal, which had failed to consider it the first time round.

Bonus

In **Ridgway v JP Morgan Chase Bank National Association** (Brief 835) 2007 EWHC 1325 (QB) the High Court held that an employer had not acted irrationally or perversely in awarding an employee a 'nil bonus', even though it had failed to carry out a full performance review. The employee trader had made a \$2.3 million loss during the relevant period and had failed to contribute in other non-trading ways so as to justify a bonus. The High Court also rejected the employee's argument that his employment had terminated involuntarily when his employer offered him alternative employment at the end of his sabbatical instead of giving him his old job back. This was one of the

factors that led the Court to reject the employee's claim for contractual damages in respect of share options he forfeited upon his resignation.

Illegality

A contract that is lawful when made can become illegal if performed in an illegal way – commonly, when there is some form of tax evasion in the way the employee is paid. In **Enfield Technical Services Ltd v Payne; Grace v BF Components Ltd** (Brief 836) 2007 IRLR 840 the EAT considered whether arrangements in employees' contracts – which had the effect of representing inaccurately to HM Revenue and Customs that the employees were self-employed – rendered the contracts illegal. The EAT held that, for a contract to be rendered unenforceable due to illegality, it is not enough that arrangements have the effect of depriving the Revenue of tax to which it is entitled. There must also be some form of misrepresentation or some attempt to conceal the true facts of the relationship. On the facts of this case there was no illegality because, even though the employees had wrongly characterised their employment relationships, they had done so in good faith and so there was neither misrepresentation nor any attempt to conceal the true facts.

Restrictive covenants

Restrictive covenants are only enforceable to the extent that they are reasonable in scope and do not exceed what is necessary to protect the employer's business interests. In **Thomas v Farr plc and anor** (Brief 827) 2007 ICR 932 the Court of Appeal held that a covenant preventing the claimant, for 12 months after the termination of his employment, from entering similar employment in any place where the employer had conducted business in the 12 months prior to termination was reasonable and therefore enforceable. The claimant's position as managing director exposed him to sensitive information that the employer had a legitimate interest in protecting after his employment had ended.

In **Beckett Investment Management Group Ltd and ors v Hall and ors** (Brief 835) 2007 IRLR 793 the Court of Appeal held that a 12-month restriction on financial advisers dealing with clients of their former employer was reasonable in light of the employees' seniority and importance and what the company would have to do to replace them. Moreover, although the restriction was stated to apply to clients of the holding company in the employer's group of companies, it also applied to clients of the subsidiary company for whom the employees actually worked. Any other interpretation would deprive the covenant of all practical utility and the Court was reluctant to do this in circumstances where the parties were familiar with the background and aim of the clause.

In **PennWell Publishing (UK) Ltd v Ornstien and ors** (Brief 834) 2007 IRLR 700 the High Court considered whether an employee who set up in competition with his former employer after his employment had ended was in

breach of contract. Although he was not subject to a non-competition covenant, his contract precluded him from having an interest in any other business while working for the employer. The High Court found that he breached that term through the preparatory steps taken to set up the competing business. The main issue before the Court, however, related to the ownership of a list of approximately 1,650 journalistic contacts that the employee had downloaded from his e-mail account on the last day of his employment. The High Court held that journalists who build up a contacts list during the course of their careers own these lists provided they are kept separately from any lists maintained by their employer. In this case, however, the employee had recorded his contacts in an e-mail address list on the employer's computer, whereby it became the employer's property, which the employee was contractually obliged to return on termination of employment. However, it was reasonable to imply a term into the employee's contract allowing him to retain details of contacts acquired before his employment.

Duty of fidelity

The implied duty of fidelity imposes an obligation on all employees to render honest, loyal and faithful service during their employment. In **Helmet Integrated Systems Ltd v Tunnard and ors** (Brief 827) 2007 IRLR 126 the Court of Appeal held that a middle-ranking senior salesman who failed to inform his employer that he was taking preparatory steps to develop a product which he intended, following his resignation, to market in competition had not acted in breach of his contractual duty of fidelity. While an employee must not compete with his employer during the course of employment, the duty of fidelity does not prevent him from competing with the former employer once he has left that employment, or from preparing for future activities he intends to undertake following termination of employment.

Nor was the employee in breach of any fiduciary duty that some high-ranking employees owe their employers by virtue of their status. Although, in accordance with his job specification, the employee would have been under a duty to disclose any competitor activity had it been undertaken by a third party, he was under no obligation to inform the employer of his own activities.

Law reform

The Government has published the draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations, which aim to protect agency workers by regulating the practices that can affect the most vulnerable workers. The new rules will come into force on 1 April 2008. Furthermore, the Employment Bill, which was introduced in the House of Lords on 6 December 2007, will, among other things, strengthen the employment agency standards enforcement regime and clarify the extent of investigatory powers.

Miscellaneous issues

Below, we focus on the cases we reported last year that do not fit easily into the other sections of this Review. They cover human rights issues in employee monitoring and surveillance, trade union law, data protection, tax, civil procedure, the common law of negligence and the Protection from Harassment Act 1997.

Monitoring at work

Article 8(1) of the European Convention on Human Rights provides that an individual has the right to respect for his or her private and family life, home and correspondence. However, Article 8(2) permits interference with that right, on certain grounds, where the interference is ‘in accordance with the law and is necessary in a democratic society’. In **Copland v United Kingdom** (Brief 829) ECtHR 62617/00 the European Court of Human Rights held that Article 8(1) was infringed when a public sector employer monitored, collected and stored personal information relating to an employee’s telephone, e-mail and internet usage at work. Since there was no domestic law regulating monitoring at the relevant time, the interference in the instant case was ‘not in accordance with the law’ as required by Article 8(2), and thus could not be justified.

At the time of the events in Copland, the Regulation of Investigatory Powers Act 2000 (RIPA) was not yet in force. RIPA was introduced to allow certain public authorities to undertake necessary surveillance and monitoring within the limits of the Convention. In **C v (1) The Police (2) Secretary of State for the Home Department** (Brief 823) IPT 03/32/H the Investigatory Powers Tribunal had to consider whether a police force’s video surveillance of one of its former employees fell within the definition of ‘directed surveillance’ in S.26 RIPA. It held that it did not – RIPA only regulated the police’s core functions and was not designed to cover its ordinary activities as an employer. The result was that the tribunal did not have jurisdiction to hear the Article 8(1) complaint. As the tribunal pointed out, however, this did not mean that the surveillance activities could not be challenged in private law.

Trade union discipline

Human rights issues also featured in **ASLEF v United Kingdom** (Brief 825) 2007 IRLR 361. Under S.174 of the Trade Union and Labour Relations (Consolidation) Act 1992 an individual may be expelled from a trade union on the ground of conduct, except where the conduct in question is (among other things) his or her membership of a political party. The union ASLEF sought to expel one of its members, L, on the basis that his active membership of the British National Party was incompatible with the union’s stated aim of promoting equality of treatment irrespective of race, religion, etc. L’s S.174 claim of unlawful expulsion was successful, and ASLEF complained to the European Court of Human Rights that its right to freedom of association under Article 11(1) of the Convention had been violated. The Court agreed that Article 11(1) means that a union must be free to choose

its members. Furthermore, although Article 11(2) allows national governments to enact legislation restricting Article 11(1) rights, S.174 did not strike the correct balance between the union’s right to choose its members and an individual’s right to freedom of expression. There had therefore been a violation of Article 11.

In addition to a right not to be expelled on certain grounds, union members benefit from a right not to be unjustifiably disciplined by their union – S.64 TULR(C)A. An employment tribunal (before 2004, the EAT) can award compensation for breach of this right – S.67. In **Massey v UNIFI** (Brief 839) 2007 IRLR 902 the Court of Appeal held that the EAT had not erred in awarding compensation for personal injury to a claimant who suffered a stroke following acts of unjustifiable discipline by her trade union. There is no requirement, as there is in ‘normal’ personal injury cases, that the injury suffered be a reasonably foreseeable consequence of the union’s actions for such compensation to be payable. As with awards under the discrimination legislation, compensation can be awarded for any personal injury arising naturally and directly from the wrongful act, regardless of whether such injury was reasonably foreseeable.

Law reform

As a result of the European Court of Human Rights’ decision in **ASLEF v United Kingdom** (above), the Government is to make an amendment to S.174 TULR(C)A to allow trade unions to expel or exclude members or potential members on the ground of their political party membership. The change will be made by the forthcoming Employment Bill, part of the Government’s agenda for the current session of Parliament as set out in the Queen’s Speech on 6 November 2007.

Data protection

The Data Protection Act 1998 requires that ‘personal data’ (a category that can include employee records held by an employer) must be processed fairly and lawfully. ‘Processing’, for this purpose, means obtaining, recording or holding information as well as ‘carrying out any operation or set of operations’ – S.1(1). In **Johnson v Medical Defence Union** (Brief 830) 2007 EWCA Civ 262 the Court of Appeal held, by a majority, that there had been no ‘processing’ when the respondent conducted a risk assessment of one of its members for insurance purposes by manually selecting and analysing information about complaints against him before recording the results on a computer.

Tax

Whether or not a worker's income tax and national insurance contributions (NICs) are payable through his or her 'employer' depends on the worker's employment status. If he or she is an 'employee', income tax and NICs will be so payable; if he or she is self-employed, he or she must self-assess as an independent contractor. In **Parade Park Hotel and anor v Commissioners for Her Majesty's Revenue and Customs** (Brief 830) UKSPC 00599 the Special Commissioner applied the established common law test for employment status in deciding that a worker engaged to carry out maintenance tasks at a hotel was not an employee. There was no mutuality of obligation between the parties – the hotel did not have to offer any work; nor did the claimant have to accept it – and the hotel exercised limited control over how the claimant went about his work. The fact that he provided his own tools and equipment also pointed away from employee status.

Injunctions

The civil courts have power to issue injunctions preventing a party taking action that might be in breach of contract. Thus it is possible – albeit only in exceptional circumstances – for an employee who is about to be allegedly wrongfully dismissed to force the employer to continue to employ him or her by applying for an injunction preventing the dismissal from taking effect. In **Mezey v South West London and St George's Mental Health NHS Trust** (Brief 828) 2007 IRLR 244 the Court of Appeal confirmed that a court may similarly prevent an employee's suspension. Suspension is not a 'neutral act preserving the employment relationship', as it prevents the employee working and casts a shadow over his or her competence. Accordingly, the High Court had been entitled to grant an interim injunction restraining the employer, pending trial, from suspending the employee.

Negligence

The common law duty of care owed by an employer to his employees can, if breached, give rise to a claim for damages in negligence. In **Buck and ors v Nottinghamshire Healthcare NHS Trust** (Brief 823) 2006 EWCA Civ 1576 the Court of Appeal held that the duty owed by an NHS Trust to provide employees with a safe system of work was breached when employees at a high security psychiatric hospital were assaulted by a patient. The Court held that the scope of the Trust's duty was informed by statutory Directions governing the circumstances in which 'high-risk' patients should be locked in their rooms at night, even though the Directions were not in force at the relevant time. Had the Trust followed the Directions, the patient in question would have been locked in her room and the assault would not have taken place.

Cases of physical injury caused by an employer's negligence are, thankfully, rare. Increasingly common, however, are negligence claims brought by employees

seeking to recover compensation in respect of psychiatric injury caused by stress at work. Extensive guidance on the scope of an employer's duty to take steps to protect employees from workplace stress was given by the Court of Appeal in **Sutherland** (Chairman of the Governors of St Thomas Becket RC High School) *v* **Hatton** and other cases (Brief 704) 2002 ICR 613. In **Daw v Intel Corporation (UK) Ltd** (Brief 824) 2007 ICR 1318 the Court of Appeal heeded that guidance in holding that the employer's provision of a counselling service for employees suffering from stress did not discharge its duty of care. Although the Court in **Hatton** had stated that an employer who offers such a service is unlikely to be found in breach of duty, such services are not a panacea discharging an employer's duty in all cases. On the facts of the present case, only the reduction of her workload by management could have ameliorated the claimant's situation.

In addition to the duties imposed on an employer by the law of negligence, certain duties on an employer to safeguard employees' health arise out of the employment contract. In **Bristol City Council v Deadman** (Brief 838) 2007 IRLR 888, CA, D claimed that the respondent Council's failure to follow a contractual procedure for investigating a complaint of harassment against him caused him stress, resulting in a depressive illness. The High Court upheld his claim, but the Court of Appeal overturned that decision. Although the Council was in breach of the contractual procedure by convening a two-member rather than a three-member panel to investigate the complaint against D, it was not reasonably foreseeable that that breach would cause D injury. Furthermore, the High Court was in error in finding the Council in breach by failing to handle the complaint 'sensitively' – although a requirement of sensitivity was stated to be part of the procedure, it was merely an illustrative term describing how the Council would expect to act, rather than a contractual term capable of giving rise to a legal obligation.

Harassment

As with psychiatric injury caused by stress, psychiatric injury suffered as a result of bullying or harassment at work can give rise to a negligence or contract claim. In addition, workplace harassment can give rise to a claim under the Protection from Harassment Act 1997. An employer can be liable for an employee's conduct in the course of employment that amounts to harassment within the Act's definition. However, that conduct must be oppressive and unreasonable and calculated to cause the victim distress. In **Hammond v International Network Services UK Ltd (in voluntary liquidation)** (Brief 843) 2007 EWHC 2604 (QB) the High Court decided that the claimant's allegations of harassment were not evidenced and, in any event, were not serious enough to amount to 'harassment' for the purposes of the Act.

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