

# ByteSize

## Employment Law News



Welcome to the June issue of Actons' employment law update  
- keeping you all up to date in Employment Law issues.

We hope you will find it helpful to receive a digest of key developments on a monthly basis.  
We welcome your feedback - please let us know if you have any suggestions for improvements or  
alternative topics

### Smoking ban less than a month away - are you ready?

The smoking ban in England comes into force at 6.00am on 1 July 2007. The legislation will make it a criminal offence to smoke or permit smoking in any workplace that is "enclosed" or "substantially enclosed". All workplaces must become and remain smokefree.

Vehicles will need to be smokefree if they are used to transport members of the public or they are used in the course of paid or voluntary work by more than one person regardless of whether they are in the vehicle at the same time. Therefore a company vehicle that is only used by one person may permit smoking. If the vehicle is shared then it must be smokefree. All smokefree premises and vehicles will need to display no smoking signs. The signs must be displayed in a prominent position at every entrance.

Local authorities will be responsible for enforcing the new law. Anyone who does not comply with the new smokefree laws will be committing a criminal offence. If you need any guidance as the date approaches, please contact a member of our team.

### Warning over employment of illegal immigrants

The Border and Immigration Agency has launched a consultation on measures designed to prevent illegal working. Under proposed regulations which were provided for by the Immigration, Nationality and Asylum Act 2006, an employer who employs illegal migrant workers as a result of negligent employment or recruitment practices will face civil penalties, while an employer who knowingly employs illegal migrant workers will commit a criminal offence punishable by up to two years' imprisonment. The consultation closes on 14 August 2007.

### Did he fall or was he pushed?

In a month in which there have been a surprisingly large number of case reports, we report the case of Sandu v Jan de Rijk Transport Ltd which concerns a warning to employers who put pressure on employees to resign. In this case Mr Sandu was called into a meeting and told he was going to be dismissed. He was then invited to enter into a severance agreement which he did. The employer then sought to argue that he had not been dismissed.

The Court of Appeal found that he had been dismissed: he had not been told why he had been called to the meeting, had been given no opportunity to reflect on the proposals or take advice and the terms of the severance agreement were not particularly favourable to him. The salutary lesson is to take advice when in this situation and, in most cases, to begin an effective statutory procedure before offering an employee the opportunity to reach a settlement.

### To sue or not to sue

In cases where an employer has evidence of an ex-employee acting in breach of restrictive covenants, a decision often has to be made as to whether to attempt to sue the new employer for having induced the breach. In *Mainstream Properties Limited v Young and others*, two senior employees acted in breach of their contracts of employment by diverting work from which their employer would have benefited, to joint venture in which they were interested. The House of Lords has upheld a decision that a third party who provided finance for the joint venture was not liable for the tort of inducing them to breach their contracts, where he knew of their contractual obligations but wrongly thought they would not be in breach. The case provides some useful guidelines on the circumstances in which a claim against a third party is likely to succeed.

For further information, please contact  
Claire Bell, Julie McNicholas or Charlotte Crampton  
20 Regent Street, Nottingham, NG1 5BQ Tel: 0115 9 100 200  
enquiries@actons.co.uk



**Charlotte Crampton, Claire Bell  
& Julie McNicholas**

## When is a grievance not a grievance?

Sadly for the employer in the case of *Kennedy Scott Ltd v Francis*, not where the employer made the written note of the grievance on the employee's behalf because the employee had trouble writing, and then tried to rely on the argument that the note could not amount to step 1 of the grievance procedure because it had not been written by the employee. The EAT thus allowed the claims of sex and race discrimination to proceed, which was entirely unsurprising.

## Some answers for fathers

The DTI has issued a further consultation paper on the implementation of the changes to statutory paternity leave and pay, which are intended to come into force in two years time.

The scheme will allow mothers to pass some of their statutory maternity leave (and pay) to fathers if they (the mums) want to return to work during either OML or AML. This is likely to prove popular with families where the mother earns substantially more than the father.

One of the intriguing aspects of this proposal was how the employers of the mother and the father would liaise to establish the respective entitlements to leave and pay. The government has provided an answer which is that fathers will 'self-certify' that their child's mother is returning to work early and passing maternity entitlements over to them. This will mean employers will not have to carry out any checks themselves. The father will be required to give eight weeks' notice of the commencement of his portion of the leave. It is not proposed that the father's employer carry out any checks with the mother's employer, but HM Revenue & Customs will carry out occasional random checks

to detect and prevent fraud. Consultation on the implementation of the scheme closes on 3rd August 2007.

## Mothers' right to return to the same job

Women who return from maternity leave are normally entitled to return to "the job in which she was employed before her absence". The EAT has handed down the first decision considering what this actually means.

The Claimant was a teacher at a primary school, in which the teachers typically rotated classes every two years. When she commenced maternity leave, she was teaching the reception class. On her return, she was allocated to teach Year 2. She alleged that this was not a return to the same job.

The EAT held that this was the same job. It was necessary to consider three factors when comparing the 'old' and 'new' jobs; nature, capacity and place. The Claimant was employed as a primary school teacher, and she returned to work as a primary school teacher. Therefore the statutory requirement was satisfied.

On a minor note, the EAT substituted a finding that the Claimant was subjected to a detriment because she was not consulted over the class which she would be assigned to teach, as she would have been if she had not been absent on maternity leave.

## Agency workers held to be employees of agency

Another in the long line of cases to find that an agency worker was an employee is the case of *Consistent Group Ltd v Kalwak and Others*. The EAT upheld the finding that the agency employed the workers it supplied, even though it lacked control over the work carried out by the workers in question. There were mutual obligations between the workers and the agency, and they were under a duty of personal service and this was sufficient to hold that the workers were employees of the agency.

This case reinforces the point that the courts will look at the overall picture in assessing employment status and are increasingly willing to find that individuals are employees.

## Disability discrimination: burden of proof in reasonable adjustments case

We reported last month on a decision in a case concerning what amounted to a breach of the obligation to make reasonable adjustments under the Disability Discrimination Act 1998. This month we report on the burden of proof in cases involving reasonable adjustments. In *Project Management Institute v Latif* the EAT upheld a tribunal's finding that a qualifications body (PMI) had failed to make reasonable adjustments in relation to arrangements for a blind candidate to sit a computer-based exam. PMI had allowed Ms Latif extra time to sit the exam, and had provided a reader at their own expense to read the exam questions and describe diagrams to Ms Latif. However, they had not carried out a proper assessment of Ms Latif's needs and had refused her requests to use specialist screen reading software. The EAT held that there had been some errors of law in the tribunal's approach, including a misdirection on the burden of proof and a finding that the failure to carry out a proper assessment was in itself a breach of the Disability Discrimination Act (DDA). However, the EAT held that these failures did not affect the outcome, and dismissed PMI's appeal.

This is the first reported EAT decision on how tribunals should apply the burden of proof in a claim for failure to make reasonable adjustments. The burden will only pass to a respondent once the claimant has shown that they have been disadvantaged by a provision, criterion or practice, and a suggested adjustment has been put forward (either by the claimant or the tribunal itself), as potentially reasonable.

**If you require any further information please contact Claire Bell or a member of her team on 0115 9 100 200 or see our website [www.actons.co.uk](http://www.actons.co.uk)**

**This update is provided free of charge and is a summary of the legal position at June 2007. It is not intended as a substitute for detailed advice. Copyright Actons 2007**