

**EMPLOYMENT LAW FOR CHARITIES SEMINAR
JUNE 2006**

RECENT DEVELOPMENTS AND IN THE PIPELINE

Presented by Chris Billington, Solicitor

Disability Discrimination Act 2005

The Act is coming into force in stages from December 2005 to December 2006.

The meaning of disability discrimination has been updated to provide that conditions such as HIV and multiple sclerosis will come within the meaning of disability from the point of diagnosis rather than at some later point when they would have the required substantial effect. Cancer is also included, and it has been confirmed that no exceptions are to be made, although there exists the power by regulation to exclude certain cancers.

The Act has also extended the definition of disability to make sure that people with mental illness are protected in the same way as everyone else by removing the requirement that their illness be clinically recognised. This is one of the means by which stress claims have been excluded from the protection of disability legislation in the past and it is likely to lead to a review of whether work related stress claims will have to be dealt with under the amended DDA.

The amended Act expressly applies to discrimination against contract workers and in relation to work experience. It is also unlawful for a placement provider to subject a disabled person to harassment in providing a work placement or applying for a work placement. "Placement provider" means any person who provides a work placement to a person whom he does not employ and this could extend to include volunteers. However, the work placement section does not apply to local education authorities or responsible bodies, which include further and a higher education establishments.

The Act also extends the scope of the legislation by making publishers liable for disability discriminatory advertisements and extends DDA protection into all functions exercised by public authorities, including issuing licences and the appointment of school governors.

From December 2006 the following provisions take effect:

- Land based public transport vehicles to be brought within scope of Part 3 of the DDA 1995.

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- Provide for all rail vehicles to comply with rail vehicle accessibility regulations by 1 January 2020, apply accessibility regulations to refurbishment of rail vehicles and introduce certification and enforcement provisions.
- Extend the duty of reasonable adjustment, other than in respect of physical features, to those who let or manage rented premises, and to commonhold premises.
- Ensure landlords cannot unreasonably withhold consent for a disability-related improvement to certain rented dwelling houses.
- Extend duties of reasonable adjustment to private clubs with 25 or more members.
- Extend duties of reasonable adjustment to local authorities and the Greater London Authority in respect of their disabled members.

There is also an Update on the matters to be taken into account in determining questions relating to the definition of a disability - Issued by the Secretary of State for Works and Pensions the revised guidance will apply to claims arising out of acts of discrimination occurring on or after 1st May 2006, please see the Disability Rights Commission website at www.drc-gb.org/documents/guidance.pdf

Dismissal for a reason connected with a disability may be fair

The Claimant was employed as a staff nurse providing one to one care for critically ill children. There was a period of repeated absences which created severe operational difficulties in the Unit, with 38% sickness absence for a variety of reasons which included a disability. The employer dismissed on grounds of the unreasonable attendance record and there followed a claim including disability discrimination. It was found that the absences were due to the disability and concluded that there had been less favourable treatment. The decision was appealed and the EAT confirmed, as we have previously stated in these Update Bulletins, that the Disability Discrimination Act 1995 does not impose an absolute obligation on an employer to refrain from dismissing an employee who is absent on grounds of ill health due to a disability. The law requires that such a dismissal is justified. An employer can take into account disability related absences in determining whether to dismiss. Whether it was fair to do so would depend upon whether or not that decision was justified. The Tribunal had failed to consider that issue

and accordingly the employer's appeal was allowed. - **Dunsby -v- Royal Liverpool Children's NHS Trust [2006] All ER (D) 244 (Jan)**

Race Discrimination

The new statutory Code of Practice on Racial Equality in Employment took effect on 6th April replacing the original code first issued in 1984. Employment Tribunals are required to take account of the Codes recommendations in any proceedings, with employers required to explain any non-compliance in claims brought under the Race Relations Act 1976. The Code provides recommendations and guidance on how to avoid unlawful racial discrimination and harassment in employment and outlines employers' legal obligations under the Race Relations Act. A copy of the Code and further guidance can be found on the Commission for Racial Equality website at www.cre.org.uk/gdpract/employmentcode2005.html.

In **Redfearne -v- Cerco Limited (trading as West Yorkshire Transport Service) 2005 All ER (D) (September)**, the Claimant was dismissed after being identified as a British National Party candidate, leading to a claim for direct racial discrimination. The Tribunal held that the dismissal was on Health & Safety grounds on the basis of the high proportion of ethnic minority work colleagues and customers that the employee would be in contact with and accordingly was not on grounds of race and was not unfair. That decision was overturned on appeal on the basis that the meaning of "racial grounds" within the Race Relations Act was wider than the Tribunal had allowed and may allow the Claimant to succeed with a direct race discrimination claim where he has been treated less favourably on the grounds of another persons race i.e. the race of his work colleagues or customers.

On 25th May this year the Court of Appeal overturned the EAT's decision and held that Mr Redfearne's claim did not fall within the Race Relations Act. The Court held that it was wrong to say that he had been dismissed 'on racial grounds', simply because race issues had been in the employer's mind when deciding to dismiss, and that the decision could not be said to be referable to race. The Court said that Mr Redfearn was no more dismissed 'on racial grounds' than an employee who is dismissed for racially abusing his employer, a fellow employee or a valued customer.

Whilst restoring some sense of sanity I am not convinced that this is the end of the matter. We have made a comment on similar cases to the effect that it does not matter what beliefs an individual holds and whether those beliefs arise through cultural, racial or religious influences. An employer who dismisses on the grounds of an employee's views (where those views are capable of falling within one of the various strands of equality legislation) runs a risk of an unfair dismissal award. It would have been an entirely different matter had the employee in the Redfearne case actively promoted violence or discriminatory treatment in line with the views of the British National Party, or in the case of religious extremist promoted or engaged in violent actions. There the issue is the

individual's own conduct.

The difficult issue which Tribunals will in cases of this kind need to deal with is that where one employee discriminates against another (the victim) on the grounds of their race and is subsequently disciplined, perhaps dismissed, then in line with the Redfearne argument any such disciplinary action is potentially itself discriminatory on the basis that race (of the victim) was the motivating factor. Whilst it may be convenient to suggest the likelihood that a Tribunal would in such circumstances award no compensation as the circumstances would not justify any award; from a technical point it is perhaps relevant for an employer to consider and make clear that disciplining someone for discrimination against another is not based upon racial grounds but rather conduct in violating the victim's dignity or creating an intimidating, humiliating or offensive environment which applies regardless of race. Alternatively the Courts should look at the question of justification.

Sex Discrimination

Civil Partnership Act 2004

With effect from December 2005 the new Act amended s.3 Sex Discrimination Act 1975 so that protection from discrimination on the grounds that a person is married will be extended to include civil partnerships.

Gender Recognition Act 2004

The purpose of the Gender Recognition Act is to provide transsexual people with legal recognition in their acquired gender. Legal recognition will follow from the issue of a full gender recognition certificate by a Gender Recognition Panel. Amendments to the Sex Discrimination Act 1975 will remove the genuine occupational qualification which limited the protection afforded to those who had undergone gender reassignment.

In practical terms, legal recognition will have the effect that, for example, a male-to-female transsexual person will be legally recognised as a woman in English law. On the issue of a full gender recognition certificate, the person will be entitled to a new birth certificate reflecting the acquired gender (provided a UK birth register entry already exists for the person) and will be able to marry someone of the opposite gender to his or her acquired gender. The Act also deals with issues relating to parenthood, benefits and pensions, discrimination, inheritance, sport, gender-specific offences and foreign gender change

Under the previous law, transsexuals were not recognised in their acquired gender. Although transsexual people could obtain some official documents in their new name and gender, they could not obtain new birth certificates or enjoy gender specific rights

relating to their acquired, rather than their birth, gender.

Employment Equality (Sex Discrimination) Regulations 2005

These regulations give effect to the Amended Equal Treatment Directive (No 2002/73), and amends the Sex Discrimination Act to bring the definition of indirect discrimination into line with the Race Relations Act and the sexual orientation and religion or belief regulations. A definition of harassment that incorporates both sexual harassment (such as unwanted sexual advances) and harassment related to a person's sex (but which need not be sexual in its nature) is also be introduced.

Transfer of Undertakings (Protection of Employment) Regulations 2006.

The key features of the amendments are:

- a review of the rules about when TUPE applies, particularly in relation to service provision and labour intensive services;
- an obligation on transferors to provide information relating to the rights and obligations which will transfer;
- flexibility in relation to insolvency to attract buyers;
- clarification of the economic, technical or organisational (ETO) defence; and
- variation of contracts for an ETO reason.

The Transfer of Employment (Pension Protection) Regulations 2005

A reminder that the pension transfer rules came in separately last April 2005 and provide that where a TUPE transfer occurs from an employer who provides a pension scheme, the new employer will be obliged to make arrangements to provide for the continuation of pension benefits. However there is no obligation to match the type or value of any scheme and the new scheme can be a defined benefit (final salary), defined contribution (money purchase) or stakeholder arrangement. The new arrangements need have no reference to the pre-transfer benefits and the Regulations establish a minimum standard for an employer to match an employee's contributions to a maximum of 6% of basic pay.

Working Time Regulations

An Update on the Opt Out

There have been a number of proposals made to amend the 1993 Working Time Directive 104/EC of 23 November 1993, and specifically an end to the individual Opt Out and clarification on the inclusion in calculating working time of 'on-call' time where the worker is at the employer's disposal but not actually working.

This issue hit stalemate last year and remains unlikely to return to the reform agenda for some time. However in the meantime the courts continue to refresh the parts that politicians cannot reach with further clarification that on call working does count for the purposes of the working time regulations.

Rolled Up Holiday Pay

The European Court of Justice (ECJ) has now (March 2006) delivered its decision on the long outstanding issue over whether it is permissible to roll up holiday pay into an hourly rate. What is this all about? Well for those of you who only employ staff on an annual salary paid monthly, whether staff are on holiday or not, it won't mean too much. However the decision provides a difficult conundrum for those who employ temps, casual staff, contractors and anyone else where you may have sought to include in their hourly rate an element of holiday pay in order to satisfy your obligations to provide paid statutory holiday for your workers. As a reminder, the Working Time Regulations provide the right to four weeks paid statutory holiday for all workers, using the wider definition of worker which extends beyond employee.

For some time it has been common practice for employers, mostly for administrative convenience, to calculate and roll up an individual's holiday entitlement into an hourly rate and pay it as part of a weekly or monthly wage. However this has the effect that when that individual takes holiday they receive nothing and this led to a different legal position being taken north and south of the border. In Scotland, rolled up holiday was held to be unlawful. Part of the argument was that it encouraged workers not to take holiday and therefore undermined the health and safety purposes of the legislation. In England it was held that rolled up holiday was permissible provided that it had been clearly set out and identified; in particular an employer could not simply carve out any element of wages that has been historically paid and claim it was on account of holiday, the holiday element had to be something new.

The Advocate General supported the practical approach adopted by the English Courts and it is usual for the ECJ to follow. However in this case the ECJ came down in favour of the Scottish position and held that rolled up holiday pay is unlawful. Curiously the ECJ then went on to say that provided that the employer has clearly set out the

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calculation of the holiday entitlement and identified it in the hourly rate that is paid (giving support for the English position) then for all practical purposes the worker has not suffered any loss.

The TUC has predictably heralded this decision (and the part of Unions in achieving it) as a major breakthrough in preventing bad practice by employers who have sought to avoid paying the extra holiday entitlement. However case law has never supported that practice and there is already advice circulating that the ECJ decision effectively means that employers can carry on as before and roll up their holiday pay.

However it is clear that such practice has been held unlawful and all employers must be aware that the purpose of the Working Time Regulations was to deal with the very real issue of the health and safety effect of not just long hours but also constant work pressures which annual holiday can, in part, help to alleviate.

The practical result is that as employers you need to find some way of ensuring that holiday pay is paid when holiday is taken. For temp, casual and other such workers the answer is to carry on making the weekly calculation of accrued holiday entitlement and rather than pay this you should hold it to the individual's credit until they actually take the relevant holiday or the particular contract comes to an end and the individual moves onto their next place of work where holiday pay can properly (in accordance with the Working Time Regulations) be paid in lieu.

The DTI has already updated its guidance as follows "Following an ECJ Judgement on 16 March 2006, Rolled Up Holiday Pay (RHP) is considered unlawful and employers should renegotiate contracts involving RHP for existing employees/workers as soon as possible so that payment for statutory annual leave is made at the time when the leave is taken. Where an employer has already given RHP in relation to work undertaken, and the payments have been made in a transparent and comprehensible manner, they can be set off against any future leave payments made at the proper time."

Calculating Working Time

The Claimant was employed as a resident manager. She worked a four day week and was required to remain on call 24 hours a day whilst residing in the free accommodation provided. Following dismissal claims were brought in connection with breach of the rest period requirements under the Working Time Regulations and under the Minimum Wage Regulations 1999. Following recent cases the EAT confirmed that time on call did count as work for the purposes of the Working Time Regulations even though the Claimant was "at home" and able to rest and sleep in the accommodation provided. Accordingly being on 24 hour call breached the rest period entitlement. It also meant that the employee was entitled to be paid minimum wage based upon her 24 a day seven day a week working period - **MacCartney -v- Oversley House Management EAT Jan 2006 [0500/05]**.

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The Advocate General has also given an opinion to the European Court of Justice in two claims of alleged breaches of the implementation of the Working Time Directive by the UK. The first relates to the exception for "unmeasured time" which was already being dealt with by the **Working Time (Amendment) Regulations 2006 (SI2006/99)** which came into effect in April making it clear that where an individual has a degree of discretion over their working hours the hours they work still count for the purposes of average working hours and cannot simply be ignored.

The second matter refers to the DTI "Your Guide to the Working Time Regulations" which confirms that employers are not required to make sure that employees do take the rest to which they are entitled. Whilst stopping short of stating that there is any obligation to ensure staff take rest breaks the Attorney General has taken the view that an employer cannot simply take a passive role and that the DTI guidance is misleading to the extent that the UK has failed to fulfil its obligations under the Directive. The Attorney General has stated that employers must be active in ensuring that the working conditions are such that minimum rest periods exist not only as a right but as a practical reality with the individual rights being recognised and rest periods observed.

This is an important distinction and one which we have highlighted before. The Tribunals already take account of any breach of the Working Time Regulations by employers when considering unfair treatment, a breach of the employer's duty of trust and confidence and claims in relation of stress or personal injury.

While it is generally the case that the ECJ will follow the Advocate General's opinion, the Advocate General recently gave support for the practice of rolled-up holiday pay which the ECJ has held to be unlawful.

Stress claims are on the increase and Tribunals are looking closer at working practices which promote or encourage long hours. As a matter of course you will find employment lawyers asking employers about their statutory holiday policies and procedures in any claim of stress related disability or personal injury. Tribunals are also looking closely at detrimental treatment which may arise where individuals seek to rely upon their statutory rights to opt out and seek, for them, a better work life balance.

As employers you do need to monitor staff holidays and breaks and raise questions where staff are not taking their statutory entitlement. You can't force staff to take breaks or holidays, but you need to be able to demonstrate that you have taken steps to remind staff of their entitlement.

Public Holidays

Part-time workers not unfairly treated when denied public holidays

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 require that part-time workers are treated no less favourably than comparable full-time

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workers on the grounds of their part-time work unless that treatment can be objectively justified.

The employment contract provided that employees were only entitled to take public holidays if they fell on a normal working day. There were no additional days off in lieu granted. However, the employer operated a seven day a week business and in addition to part-timers who did not work on a Monday, when the majority of bank holidays fall, there were a number of full-timers, working five days a week, who similarly did not work Mondays and had no public holiday benefit. Some part-timers did work Mondays and they received the holiday and the EAT held that the treatment was not based on part-time status but on the basis of whether an individual worked on a Monday. The employer treated its part-time and full time workers in the same way.

This still leaves open the question whether there is unfair treatment when employers operate a five day a week business. **McMenemy -v- Capita Business Services Limited**

Minimum wage.

The adult rate (for workers aged 22 and over) is £5.05 with a further increase to £5.35 in October 2006.

The development rate (for workers aged 18-21 inclusive) is £4.25 and will increase to £4.45 in October 2006. The development rate also applies to those aged 22 and over doing accredited training in the first six months of employment.

The 16-17 year old rate (for those above the compulsory school leaving age) is £3 increasing to £3.30 from October.

In England and Wales a person is no longer of compulsory school age after the last Friday of June of the school year in which their 16th birthday occurs.

In Northern Ireland a person is no longer of compulsory school age after the 30th June of the school year in which their 16th birthday occurs.

In Scotland pupils whose 16th birthday falls between 1st March and 30th September may not leave before the 31st May of that year. Pupils aged 16 on or between 1st October and the last day of February may not leave until the start of the Christmas holidays in that school year.

The Employment Equality Age Regulations 2006

New Regulations are scheduled to come into force on the 1st October 2006 and will:

- set a default retirement age of 65 but create a right for employees to request to

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work beyond a compulsory retirement age which employers will have a duty to consider;

- ensure close monitoring of retirement age provisions so that evidence is available for a formal review of age discrimination five years from implementation; and
- allow employees to objectively justify earlier retirement ages if they can show it is appropriate and necessary.

Consequential amendments arising out of the age discrimination legislation would allow employers to continue to provide paid and non-paid benefits based on length of service or experience where it can be justified. The statutory calculations for redundancy and the basic award for unfair dismissal will be unchanged other than to permitting service below the age of 18 to be taken into account and remove the upper age limit on claims for unfair dismissal.

The Equality Act 2006 received Royal Assent in February. It establishes the Commission for Equality and Human Rights (CEHR) which will come into being in October 2007 bringing together the existing work of the Disability Rights Commission and the Equal Opportunities Commission (from October 2007) and the Commission for Racial Equality (from October 2009). It will also have responsibility for the new discrimination areas of age, religion or belief and sexual orientation. The Act also extends protection against discrimination on the grounds of religion or belief to the provision of goods and services and creates the Gender Duty, a duty on public authorities to promote gender equality and prevent sex discrimination in the exercise of public functions.

The Work and Families Act 2006 received Royal Assent in March. The Act includes provisions to extend maternity and adoption pay from 6 to 9 months and widens the scope of existing Flexible Working Rules to enable those who care for adults to request flexible working from April 2007. Maternity and Adoption leave will be extended to 12 months.

The Act includes powers to allow a transfer of maternity and adoption leave and pay to partners. This is currently proposed as allowing any unused maternity or adoption pay to be taken up by the partner (as an addition to the current two weeks paternity pay) if they take up any unused maternity or adoption leave as additional paternity leave, to a maximum of 26 weeks in the first year following birth or placement for adoption. There is a question whether a mother taking Parental Leave will allow the partner to take Additional Paternity Leave.

The DTI is currently consulting on how this will be applied in practice.

The consultation states that a partner is in the case of the birth of a child either the father of the child, or married to or the partner of (including civil partner) of the child's mother

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and who is responsible for the upbringing of the child. If the child is adopted the father must be married to or be the partner of the adopter or must be a member of a couple who have adopted jointly who has chosen not to take adoption leave.

The consultation suggests a minimum period of Additional Paternity Leave which can only be taken as a single continuous block. A right to return should reflect the right at the end of either Ordinary or Additional Maternity or Adoption Leave. It is likely to be the latter.

There will also be a requirement for employers to share information where the parents have different employers.

One of the areas employers should start to look at is where they provide for additional benefits over and above the statutory maternity and adoption requirements as it remains to be seen whether there will be a potential claim by partners that they are treated unfairly if they only receive part of a benefit payable by their employer. Also it remains to be seen if the partner will be protected from dismissal in the period leading up to Additional Paternity Leave.

Information and Consultation of Employees Regulations 2004 (SI 2004/3426)

The Regulations, obliging employers to institute a formal information and consultation procedure, will apply to all businesses employing at least 100 employees from April 2007.

Smoking Ban

It is important that employers start to give consideration now as to how they will implement the ban on smoking in the workplace. This should include a review of and amendments to existing policies and procedures which allow smoking, for example in designated areas, although we do await further clarification from the government on what will satisfy the definition of a "substantially enclosed" public space. At present the proposal will be determined by whether "the opening has an area of less than half the area that constitutes the perimeter" and we await details of other designated "additional smoke free places". As a rough guide, any shelter with three fixed sides will be included.

Measures employers should consider will be to clarify and ensure awareness of a zero tolerance on smoking whilst providing information on the help available for giving up and educating about the health risks inherent in smoking. Giving as much lead time to the new regulations (yet to be released) proposed to come into effect in April 2007 will also allow consideration of the health risks implicit in staff giving up smoking. Employers face a spot fine of £200 through failure to display no smoking signs with fines of up to £2,500 where an employer has failed to ensure that all reasonable precautions have been taken to prevent smoking in the workplace.

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Employers may wish to take advantage of the (currently) free service provided by the NHS Together Programme which can provide support and counselling to staff looking to give up smoking. Call 0800 169 0169 to obtain details of your local NHS Stop Smoking Service or go to www.givingupsmoking.co.uk. Specialist advisors hold clinics and this can include at your workplaces.

Some Cases of Note

Percy v Church of Scotland

The House of Lords confirmed that a former minister could proceed with a claim for sex discrimination. The case may however cause more interest than it is actually worth although that is not to say that it highlights an important point for all employers to consider.

Ms Percy claimed discrimination on the grounds that she was asked to resign following an affair. Male ministers in similar circumstances had not been treated in the same way. The courts originally rejected Ms Percy's claim on the basis that as a minister she was an office holder and therefore not an employee. The House of Lords overturned this.

What is clear from the House of Lords judgement is that the case does not suggest that the age old position of clergy as office holders, i.e. not as employees, is wrong. Instead the House of Lords made it clear that there was nothing that prevented a minister from being both an office holder and an employee, in much the same way as executive directors can hold office as a director and be an employee. The case, as always turning on its particular facts, confirms that in discrimination legislation protection is afforded to a wider category than simply employees. Ms Percy was able to demonstrate that she was personally employed under a contract to perform services and with other factors such as control and correspondence which indicated a binding contract there was sufficient evidence to bring Ms Percy within the wider definition of employment for the purposes of the sex discrimination legislation. This case is a useful reminder to employers that discrimination legislation imposes obligations beyond the employee and any employer operating equal opportunities for all its staff regardless of their particular status, will have policies and procedures in place to seek to limit such claims arising in the first place. The case does not open any floodgates, of biblical or other proportion, with regard to clergy's rights. Also the appeal to the House of Lords did not raise any complaint over the definition of employee for the purposes of unfair dismissal.

Dyke v Rickman Queens Bench Division 22 November 2005

Mr Dyke was offered a job subject to satisfactory references. The reference received stated that Mr Dyke was "a very difficult person with whom to work. We shall not be

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sorry to lose his services". Unsurprisingly the offer of employment was withdrawn and Mr Dyke sued his previous employers.

The claims were dismissed when the Tribunal accepted the employer's claim that the reference was true and justified.

Generally an employer is not required to give a reference but a refusal may in certain circumstances give rise to a claim of post-employment discrimination, harassment or victimisation. Where a reference is given it must be true and accurate and must not give an unfair or misleading impression. It is not right to say that the truth will always be fair. If allegations of misconduct (however genuinely held) were never identified in any discussions with an employee it is unwise for an employer to include them in a reference as the allegation may well be unfounded or the employee has a satisfactory answer. Including an allegation that has not been put to the employee is likely to be unfair and misleading

In **Kawol -v- Caring Homes Limited [2005] All ER (D) 107 (September)** the Claimant was dismissed from his post as a nurse when an undisclosed conviction for assault came to light through a criminal record search. The Claimant was held to have contributed 100% to his dismissal. Notwithstanding that the disciplinary proceedings were acknowledged as unfair because of the lack of a preliminary investigation, the tribunal held that the employee had been dismissed, not because he had a conviction, but because he had failed to disclose the conviction which amounted to a breach of trust and confidence.

This case highlights the need to be, and the benefit of being, clear of your grounds for disciplining staff.

You cannot rely upon disciplinary warnings that have expired

The employee had been disciplined for a breach of procedure which had given rise to an issue of Health & Safety. The warning was valid for 12 months but after that period had expired there was a further incident, this time far more serious, which was in part as a result of the employee's failure on the same point. The employer dismissed the employee for gross misconduct and claimed that although the disciplinary warning had expired the issue was so severe and directly related to the previous warnings that they were justified in their action. The Court of Session made it clear that as the prior warning had expired it could not be taken into account and accordingly dismissal was unfair. Employers may wish to consider their disciplinary procedures, particularly as to how long a final written warning may remain live on an employee's record. This would also apply in situations such as redundancy where an employer may wish to take account of expired disciplinary warnings in the selection process. **Thompson -v- Diosynth Limited [2006] All ER (D) 165 (Feb)**

Different warnings for similar offences can be fair

In this case the EAT has confirmed that a dismissal may be fair even where the dismissed employee has been treated differently from other staff. Two employees were dismissed after it had been discovered that they had been moonlighting and using their employer's equipment to do a job on the side during their normal working hours. The employees claimed unfair dismissal on the grounds that a previous employee had done the same thing but had only received a final written warning.

The EAT confirmed that the employer had been entitled to take into account the different service records and previous warnings as well as the conduct of the employees during the investigation where they had sought to deny any wrongdoing whereas their comparator case had immediately acknowledged their wrongdoing. - **Enterprise Liverpool -v- Bauress**

The Court of Appeal has upheld the concept that an agency worker can be a direct employee of the company who uses their services even though no direct contractual link may exist.

This is a familiar argument but the facts were slightly different in that Muscat had set-up his own service company through which he contracted out his services to Cable & Wireless. This is a common feature in the IT sector and is also often used where a senior employee takes up a consultancy role following termination of their employment where parties seek to avoid any direct contractual link which in the past has led to the employment relationship being held to continue. Mr Muscat was employed by his service company although he was the sole director and shareholder and the service company then contracted with Cable & Wireless to provide a service which, not unsurprisingly, was performed by Mr Muscat. The Court, following earlier decisions (the case of **Dacas -v- Brook Street Bureau 2004**) confirmed that it is possible to imply a contract of employment.

The Muscat case confirms that employers who use this arrangement are at an even greater risk than those who contract directly with the service provider. Where there is a direct contract it is possible to agree express terms which can define that relationship as one which is inconsistent with an employment relationship i.e. remove mutuality of obligation and limit control factors which would otherwise point to an employment relationship. Where there is no direct express contractual link between the service user (the employer) and the service provider (the temporary worker), the situation which allow Court to imply a contract, it clearly is not possible to have express terms (which will override any implied terms) to assist.

With Europe stalled over introducing temporary worker rights the Courts have themselves acted in a way which will soon bring temporary workers on a par with their employed colleagues and it is increasingly difficult for employers who want to use agencies or engage temporary workers to avoid the realistic risk where the individual will

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be held to be an employee, particularly where the temporary worker has worked with the service user for some period of time. No doubt we will start to see relevant exclusions in the contracts between the service user and the agency and between the agency and the service provider trying to defeat the suggestion of an implied contract. - **Muscat -v- Cable & Wireless [2006] EWCACIV220**

Chris Billington
Wrigleys Solicitors LLP
9 Cookridge Street, Leeds LS2 3AG
chris.billington@wrigleys.co.uk
Telephone 0113 244 6100

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