

# Employment Law Update

March 2005

**With discrimination and equal opportunities issues likely to be at the forefront of the employment agenda in 2005, this first part of this update focuses on recent harassment and dependant leave cases. We also look at a couple of cases which show that the courts will, where appropriate, help to protect business interests.**

## **Sex discrimination - harassment**

Two recent cases illustrate the confused state of the law in this area.

In *Brumfitt v Ministry of Defence and another*, the Employment Appeal Tribunal held that there had been no discrimination or harassment of a female employee when her supervisor used offensive 'gender specific' language when addressing a mixed group of men and women. It was accepted that, as a woman, Ms Brumfitt would be more likely to be offended by the language used but, because it was directed at women and men in the group, she was not treated less favourably because she was a woman.

By contrast, in *Moonsar v Fiveways Express Transport Ltd*, EAT 2005 IRLR 9, the EAT held that Mrs Moonsar was the victim of sex discrimination and harassment when male colleagues in her office downloaded pornography on their computers on three occasions. Mrs Moonsar was not asked to look at the pornography and she did not see it, but she was aware of what was going on. Even though she did not complain about it at the time, the EAT held that such activities clearly had the potential to cause affront to a woman, should be regarded as degrading or offensive to women and would constitute harassment.

### *Comment*

These cases cannot be reconciled. If *Moonsar* is correct, it controversially implies that women have a greater right to complain of the introduction of sexual images into the work place. Further, the logical extension of the argument to other areas of discrimination law is that Christians could complain of all downloading from Islamic websites and vice versa; just about anyone who found other peoples access to websites, or even reading materials, offensive could complain of harassment.

In our view, therefore, the *Brumfitt* case is more likely to be correct in law. Importantly, it allows the tribunal properly to consider whether the behaviour complained of is directed at someone because of their sex or other personal characteristics, rather than because of the job they hold.

Whatever case is correct, employers cannot afford to allow any employees to download or bring into the workplace material which others are likely to find offensive. From 1st October 2005, changes to the Sex Discrimination Act 1975 will introduce a free standing complaint of harassment which is likely to encourage further time-consuming and expensive litigation from offended employees.

## **Time off for dependant care**

Mr Truelove frequently had to work Saturdays. More than a week ahead, he asked for a particular Saturday off but was refused. At 4pm on the Friday before that Saturday, he told his manager he might have to look after his child the next day but did not give much more detail. In particular, he did not mention that his baby-sitting arrangements had fallen through at the last minute. His request for time off was again refused and accordingly, when he didn't show up for work the next day, he was disciplined.

The Employment Appeal Tribunal held that, to be entitled to take leave because of unexpected disruption to arrangements for the care of a dependant, the employee was required to communicate the reason for his absence (i.e. unexpectedly to have to care for his daughter) but was not necessarily required to explain why that circumstance had arisen (i.e. that baby-sitting arrangements had suddenly fallen through).

### *Comment*

It is not difficult to imagine many employers jumping to the conclusion that the employee who had not given a full explanation in advance of taking leave was not in any 'emergency' situation but was simply putting two fingers up to his employer's refusal to allow time off. This case illustrates the importance of conducting a full investigation into an employee's conduct before taking any disciplinary action.

*Truelove v Safeway Stores plc* EAT

## Directors' duties

The Court of Appeal has confirmed that directors, as part of their duty of fidelity and good faith, have a positive duty to disclose their own misconduct to their company.

In the case considered, a sales and marketing director encouraged his colleagues to take a hard line in the course of negotiations on a contract. What he didn't tell them, was that he had set up another company to compete for the contract and which was offering more generous terms.

### *Comment*

A point of importance is that the court declined to hold that there was duty for non-director employees to disclose their own misconduct. Where a company suffers losses, even substantial losses, because of an employee acting in this way, it is often not possible to recover those losses from the employee. It is therefore worth considering including a positive duty to disclose misconduct within contracts of employment.

*Item Software (UK) Ltd v Fassihi and others*  
2004 IRLR 928

## Contracts of employment - restrictive covenants

A restrictive covenant in an employment contract will only be enforceable if it is reasonable i.e. it does not interfere with an employee's ability to work for others any more than is necessary adequately to protect the employer's legitimate business interests.

In *Corporate Express Limited -v- Day*, Ms Day's contract contained two restrictions applying after the termination of her employment: a six month ban on solicitation and dealing with the employers customers and a six month ban on working for named major competitors. In breach of the second restriction, she commenced employment with one of the main competitors within a month of leaving.

Everyone accepted that Ms Day had not attempted to solicit any customers from her previous employer and had not taken and written confidential information with her. The question for the court was whether her previous employer was trying simply to protect itself from competition by an ex-employee or whether the restriction was *necessary* to protect a legitimate business interest.

The court agree that because Ms Day had had access to confidential information such as pricing discount, margins and customer specific requirements which could help in tendering for new customers and be of value to competitors, the protection of that confidential information was a legitimate business interest.

### *Comment*

The Court noted that for the period of restriction, if not able to work for a major competitor Miss Day would likely suffer financial loss and set back in her career, but would not suffer economic disaster. Had the restriction been longer than six months, or the information less valuable, the scales balancing the employer's interest and the employee's freedom may well have tipped the other way.

**For further advice on any employment or human resources matter, please contact any member of the employment team:**

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