



Keeping You In The Know

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In This Month's Edition

- The Government have published 'The Governance of Britain – The Government's Draft Legislative Programme', setting out the pieces of legislation it intends to propose to Parliament in the next session. Among the 23 bills proposed, is the Employment Simplification Bill which will implement the outcome of the Gibbons review of workplace dispute resolution, including the repeal of the statutory dispute resolution procedures.
- Acas has announced that it is extending its services by providing conciliation in selected cases referred to it by the Employment Appeal Tribunal. This extension of Acas's sphere of activity will initially be in the form of a pilot scheme which will be reviewed after one year.
- The CIPD have published their eighth national survey of absence management policy and practice, 'Absence Management 2007'. The results reveal that while an increasing number of employers are focusing on promoting employee well-being in the work place, absence has increased by 0.2% to 3.7% of working time and the cost has increased to £659 per employee per year.
- As part of his programme of 'new broom sweeps clean' measures, the new Prime Minister, Gordon Brown, has replaced the Department of Trade and Industry (DTI) with a new Department for Business, Enterprise and Regulatory Reform (DBERR).
- In *Morrish v NTL Group*, the Inner House of the Court of Session held that PILON clauses cannot be implied into contracts of employment. If an employer wants to pay money in lieu of notice without being in breach of contract, there must be an express term allowing it to be able to do so.
- In *Optare Group Ltd v TGWU*, the EAT held that where an employer made 17 compulsory redundancies and agreed to 3 requests for voluntary redundancy, the collective consultation requirements were engaged, as the employer proposed to make 20 people redundant. The fact that 3 people had volunteered to be dismissed made no difference to the 'total' amount of employees the employer was 'proposing' to dismiss in the first place.
- As August approaches we thought we would get everyone into 'happy holiday mode' by reviewing some of the more colourful, and sometimes humorous, UK employment disputes that have hit the headlines in the past few years as compiled by the Times, in recognition of the Employment Appeal Tribunal celebrating its 30th anniversary this month.



Employment Simplification Bill To Abolish Dispute Resolution Procedures

As part of a scheme to open up Government wider to those to whom it is accountable, the Prime Minister has announced that an annual statement will be made on the pieces of legislation the Government intends to propose to Parliament in the next session so as to make details known before the Queen's speech at the official opening of Parliament. The first such paper, 'The Governance of Britain – The Government's Draft Legislative Programme' has just been published.

Among the 23 bills proposed is the Employment Simplification Bill. The purpose of the bill is to simplify, clarify and build a stronger enforcement regime for key aspects of employment law. The main elements of the bill are:

- Implementation of the outcome of the Gibbons review of workplace dispute resolution, including repeal of the statutory dispute resolution procedures and implementation of a package of replacement measures to encourage early/informal resolution, plus changes to the employment tribunal system.
- Clarification and strengthening of the enforcement framework for the NMW, specifically through the introduction of a straightforward penalty that can be levied against all non-compliant businesses and a fairer method of calculating arrears.
- Strengthening the employment agency standards enforcement regime by making offences under the Employment Agencies Act each way offences and clarifying investigative powers.
- An amendment to trade union membership law in light of the ECHR's judgment in *Aslef v UK*, i.e. that trade unions can expel members on the basis of their membership of a political party.

You can view a copy of the draft legislative programme at:

<http://www.cabinetoffice.gov.uk/publications/reports/governance/governance.pdf>

Acas To Conciliate In Some EAT Cases

Acas has announced that it is extending its services by providing conciliation in selected cases referred to it by the Employment Appeal Tribunal (EAT). The extension of Acas's sphere of activity will initially be in the form of a pilot scheme which will be reviewed after one year.

In 2005/06 the EAT accepted 836 cases for appeal. The types of cases which are expected to be referred to Acas by the EAT include;

- where the parties employment relationship is ongoing;
- where a case could be referred back to the employment tribunal;
- appeals relating to monetary awards.

Acas have indicated that the procedure for referring EAT cases will be set out in an EAT Conciliation Protocol. Where an EAT judge, after reviewing the appeal, considers that there is potential for some or all of the matters at issue between the parties to be resolved by means of conciliation, the case will be referred to Acas. Both sides will then be asked to respond promptly to any invitation made by Acas and to give proper consideration to any offer of conciliation.

The Employment Simplification Bill will implement the result of the Gibbons review of workplace dispute resolution, including repealing the statutory dispute resolution procedures

Cases which will be referred to Acas include where the employment relationship is ongoing; where a case could be referred back to the employment tribunal; appeals concerning monetary awards



Missing You Already

The CIPD have published their eighth national survey of absence management policy and practice, 'Absence Management 2007'. The results reveal that while an increasing number of employers are focusing on promoting employee well-being, absence has increased by 0.2% to 3.7% of working time and the cost has increased to £659 per employee per year.

The analysis is based on replies from 819 UK-based HR professionals in organisations employing a total of more than 1.6 million people. Key findings from the report are as follows:

- The average level of employee absence has increased by 0.2% to 3.7% of working time = 8.4 days per employee per year.
- The average annual absence level for manual workers was 4.3% and 9.8 days per employee per year, compared with 2.7% and 6.2 days per employee for non-manual workers.
- The average cost of absence increased to £659 per employee per year from last year's figure of £598.
- The most significant causes of short-term absence after 'minor illnesses' are stress, back pain, musculo-skeletal injuries, home and family responsibilities, and stress.
- Back pain is the leading cause of long-term absence for manual workers, while stress is the main cause of long-term absence for non-manual employees.
- Return-to-work interviews are rated as the most effective approach for managing short-term absence.
- An increasing number of employers are now focusing on promoting employee well-being as a means of reducing absence costs.
- The most commonly provided employee wellbeing benefits are access to counselling, employee assistance programmes, 'stop smoking' support, health screening, healthy canteen options and subsidised gym membership.

The report can be viewed at:

<http://www.cipd.co.uk/NR/rdonlyres/6D10534D-A175-4376-88A6-52153CDFB84C/0/4122AbMansurveyPROOF.pdf>

SMB have run a number of successful in-house training courses over the last 12 months on Managing Absence (including the 12 key steps to success) and Managing Stress focusing on the HSE and CIPD best practice management standards. For details, please contact makbool.javaidd@smab.co.uk

DTI Replaced By DBERR

As part of his 'new broom sweeps clean' programme, the new Prime Minister, Gordon Brown has replaced the Department of Trade and Industry (DTI) with a new Department for Business, Enterprise and Regulatory Reform (DBERR).

The DBERR has now taken over all the functions previously performed by the DTI, including responsibilities for enterprise, business relations, regional development, fair markets and energy policy. It has also assumed responsibility for the Better Regulation Executive (BRE), previously part of the Cabinet Office. The Department is headed by John Hutton, the Secretary of State for Business, Enterprise and Regulatory Reform.

DTI v DBERR – doesn't quite roll off the tongue does it? Anyway get those Internet browser favourites bookmarks changed to <http://www.berr.gov.uk/>

While an increasing number of employers are focusing on promoting employee well-being, absence has increased by 0.2% to 3.7% of working time and the cost has increased to £659 per employee per year

The DBERR has now taken over all the functions previously performed by the DTI, plus assuming responsibility for the Better Regulation Executive



Trying To Contain The Damages

In *Morrish v NTL Group* [2007] CSIH 56, the Inner House of the Court of Session (CS) held that PILON clauses cannot be implied into contracts of employment. If an employer wants to pay money in lieu of notice without being in breach of contract, there must be an express term allowing it to do so.

The contract required either party to give 12 months' written notice to bring employment to an end. There was no express provision for a payment to be made in lieu of notice (PILON). Mr Morris (M) was made redundant without being given 12 months' notice. He claimed breach of contract involving damages under a number of heads, including loss of bonus and share options.

The employer contended that there was no breach of contract because every contract is subject to an implied term giving the right to employers lawfully to terminate employment by making a PILON. Further, it could be shown by way of a letter to M that NTL had been willing to make a PILON to him, including payments to compensate for loss of contractual benefits.

The CS rejected the employer's argument stating that it had strong reservations as to whether, in the 21st century, there is any scope for the implication of such a term. The legal principle is that any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them.

The lesson from this case is that if an employer does want the right to make a PILON, then it has to be clearly stated in the contract. If not, then any payment made where employment is terminated without notice, when it was due, will be damages for breach of contract and not a PILON. Additionally, employers cannot benefit from their own wrongdoings, so if a dismissal is wrongful, any post-employment restrictive covenants will become void and unenforceable.

Three Steps Forward – One Big Step Back

In *Optare Group Ltd v TGWU* UKEAT/0143/07/RN, the EAT held that where an employer made 17 compulsory redundancies and agreed to 3 requests for voluntary redundancy, the collective consultation requirements were engaged, as the employer proposed to make 20 people redundant. The fact that 3 people had volunteered to be dismissed made no difference to the total number of employees the employer was 'proposing' to dismiss in the first place.

Optare informed TGWU that there would be no more than 19 redundancies at its Leeds site. It then asked for volunteers for redundancy. It also carried out a selection process as a result of which 17 employees were notified they were at risk. Optare then accepted 3 voluntary applications for redundancy. The Union argued that collective consultation was required as $17+3 = 20$. "Not the case" said Optare: "You can't count the volunteers as we didn't propose to dismiss them – they decided to leave themselves".

Both the tribunal and the EAT rejected the employers argument. The key questions was: "What caused the dismissal of the three volunteers?" Answer: they had volunteered to be dismissed because they had been invited to do so by the employer. Therefore, when looking at the numbers involved the employer was proposing to dismiss $17+3=20$.

In the 21st century, there is no scope for implying a right to make a PILON into a contract. The legal principle is that any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them

The key question is what caused the dismissal of the three volunteers for redundancy? Where they volunteer to be dismissed at the invitation of the employer, they must be counted in the total number of employees the employer is proposing to dismiss



Who Said Work Was Dull?

The Employment Appeal Tribunal celebrated its 30th anniversary this month. The Times marked the occasion by trawling the archives and dusting off some of the more colourful UK employment disputes reported from the past few years.

Tony Price, the managing director of WStore UK, an IT company based in Surrey, demanded that his 80 staff submit to a DNA test after a piece of chewing gum got stuck to a directors' suit trousers. When his global e-mail pointing out the firm's chewing gum ban leaked to the media, Price said he would force staff to take lie detector tests to flush out the culprit.

A matter of evidence?

The claimant's representative asked his client: "How badly did the harassment affect you?". The claimant replied: "I was so distressed that I took an overdose of weed killer", to which the Chairman asked: "What is the correct dose of weed killer for an adult female?"

The claimant was doing superbly well under cross examination. The employer's solicitor said to him: "Well Mr Jones, you seem to know everything there is to know about everything", to which the claimant replied: "Thanks. I'd like to repay the compliment, but unfortunately I'm under Oath."

Memoirs of a tribunal member

A chaplain left the Navy declaring himself "horrified" by the amount of pornography below decks and issued a claim for sexual harassment and discrimination on the ground of his religious beliefs. At a tribunal the Navy admitted sexual harassment but denied the religious discrimination charge. Reverend Sharpe accepted an undisclosed sum in damages and is now a rural rector who keeps his Parish ship-shape.

Sariya Allen, a teaching assistant who quit her job after three years at Durand primary school in Stockwell, London, sued the school for allegedly discriminating against her Pentecostal Christian beliefs. Allen had been disciplined for refusing to let a child read Harry Potter, claiming it glorified witchcraft. She lost.

David Portman won his unfair dismissal against Royal Mail after he lost his job for taking time off to mourn the death of his dog. The postman had missed 137 days in five years for reasons including breaking his foot when pushing mail through a letter box, spraining his ankle when standing on a piece of wood and being injured in a car accident. Throughout, his faithful hound Brandy had provided unstinting companionship. When one morning he found her dead at the foot of his bed, Portman was inconsolable and failed to show up to work for a week. Upon his return, he was sacked. A tribunal found that "none of the claimant's absences were for other than wholly legitimate and genuine reasons".

Sue Storer, a 48-year-old teacher at Bedminster Down Secondary School in Bristol, sought damages of £1m for sex discrimination and constructive dismissal, claiming she had been forced to sit in a chair that made embarrassing sounds every time she moved. "It was a regular joke that my chair would make these farting sounds and I regularly had to apologise that it wasn't me, it was my chair," she said. Requests for a new chair had been repeatedly ignored while male colleagues were given sleek, executive-style chairs, she said. Her claim was thrown out.

Caroline Gardener, a lesbian shop worker at a Booker Cash and Carry, won her claim for unfair dismissal after she was fired following an altercation with a customer. Gardner, of Eastleigh, Hampshire, claimed a customer abused her because he couldn't find any lime cordial, telling her to "Get your sex life sorted out." She responded by throwing a bag of flour at him. "When he called me a filthy dyke I had a pack of flour in my hand and, although I regret it now, I threw it at the back of his head," she admitted. "He then turned round and said, 'You are a dyke and you're going to get the sack'."

Fred Raine was awarded £2,300 after a tribunal agreed that his former employer had underpaid him when he left the company due to illness in 2005. His former boss Malcolm Lee, took the news badly. The first £1,000 was paid by cheque; the remaining £1,300 turned up at Fred's door in the form of a crate full of coins weighing 11stone.