

Juridical News

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Headlines

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European Court of
Justice Decision on
Rest Breaks

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Recent Decisions

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Mutuality of Obliga-
tion in Contracts of
Employment

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Employment Focus

Mutuality of Obligation in Employment Contracts

An EAT reviewed ABC News Intercontinental Inc v Gizbert where the original decision was that Gizbert, a foreign news correspondent, was unfairly dismissed for refusing to cover war zones as he was protected under UK health & safety legislation which the Tribunal determined applied to journalists employed in the UK but assigned to war zones abroad.

His contract was for 100 days work minimum p.a. at \$1000 per day. It included a clause which entitled Gizbert to decline any assignment. Also it offered ABC the right not to offer more than 100 days work per year.

The EAT within their consideration decided that where an employer is obliged to offer a minimum amount of work, but the employee is not obliged to accept that work, there is 'no mutuality of obligation'. Therefore there was no legally binding contract of employment and so Gizbert not entitled to claim unfair dismissal under that contract.



In the light of that statement it is strange then that their decision determined there was an implied obligation because ABC were obliged to provide 100 days of work and Gizbert was obliged to consider any such offer in 'good faith'. They stated his freedom to refuse assignments was limited and therefore he did have the necessary mutuality and continuity of employment to bring a claim of unfair dismissal.

Rest Breaks

The European Court of Justice ruled that the DTI Guidance on rest breaks is in breach of Working Time Regulations. The guidance said 'employers must make sure that workers can take their rest, but are not required to make sure they do take their rest'.

EJC said such guidelines rendered the rights of workers as meaningless because they impose no obligation on employers. Therefore employers will require to put in place policies that ensure workers take their breaks. Employers who do not inform workers of the right to break and who fail to put in place systems that make sure that breaks are taken will be in breach of the Working Time Regulations.

It is hard to know how far an employer has to go. Certainly they cannot be expected to police their workforce but if for example a worker is known to regularly skip breaks should an employer have a word? The revised DTI guidelines will hopefully offer some answers.

Recent Decisions

Vicarious Liability

In *Green v DB Groups Services (UK) Ltd*, the High Court determined that an employer was both vicariously liable in negligence for acts of bullying carried out by staff resulting in psychiatric injury to an employee, as well as being liable for harassment in respect of the same acts under the Protection from Harassment Act 1997.

Equal Pay

A company that ran an occupational pension scheme that levelled down pension benefits by adopting a common retirement age of 63 for men and women contravened the EC principle of equal pay. This related to the period known as the 'Barber window' (17th May 1990 to 7th September 1993) during which the disadvantaged male members of the pension scheme were entitled to have their benefits levelled up to match those of the advantaged female members and accrue benefits on the basis of a retirement age of 60. The High Court determined that pension benefits could not be levelled down. The case was *Harland and Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd*.

Payment in Lieu of Notice

The EAT of *Langley and Anor v Burlo* determined that an employee claiming unfair dismissal is not entitled to full compensation for the notice period. However it remains good practice to make full payment in lieu of notice to a summarily dismissed employee even where that employee will be on sick leave, but this decision means that the principle laid down in the *Norton Tool* case is no longer good law. This case is due to be heard at Court of Appeal 29-30 November.

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Disability Adjustments

An employer failed in its duty under the Disability Discrimination Act 1995 to make reasonable adjustments by not consulting the disabled employee about what adjustments were necessary. However in this EAT case, *Tarbuck v Sainsbury Supermarkets Ltd*, it clearly indicated that the employer is not under a separate and distinct duty to consult the employee, but that the issue is rather 'whether the employer has made the necessary adjustments to eliminate the disabled employee's disadvantage in the workplace'.

Working Time Regulations

Here an employee claimed damages for psychiatric injury caused by stress brought on by overwork. This was not upheld as in this instance not considered sufficiently foreseeable to impose liability on employer either at common law or through breach of contract. More importantly, he also claimed his employer failed to enforce the 48-hour maximum weekly working time. The High Court in, *Sayers v Cambridgeshire County Council*, determined there was no evidence that Parliament intended to create a cause of action which permitted an employee to claim breach of a statutory duty under the Working Time Regulations 1998.

On a different aspect, the decision of *HM Revenue and Customs v Stringer and others* is due in House of Lords on 30-31 October. The Court of Appeal held that a group of employees absent from work on long-term sick leave were not entitled to claim holiday pay under the working Time Regulations.

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