

# Labor and Employment *Update*

ALFA International's Labor and Employment Practice Group reports on legislation, regulations and decisions affecting Labor and Employment Law.

## Editor's Notepad

This is our second ALFA Labor and Employment Law newsletter which we are sending to organizations such as yours that have been "friends" of ALFA over the years. We strive to provide timely and informative articles to our ALFA friends. We hope you find our newsletter useful, but if at any time you want to stop receiving our newsletters, just let us know.

Our section held a great seminar in New Orleans on November 10-12. We were fortunate to have presentations by two federal judges and experienced in house counsel, in addition to our ALFA attorneys. We think that this format is a great one. It allows in house and outside counsel to share their problems and discuss practical solutions to the issues that employers face. I think all who attended learned a great deal and also had a good time in a city known for its good times. Our section is now actively planning the March, 2006 ALFA International Client Seminar in Tuscon, Arizona. Please mark your calendar for this event.



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## Supporting Our Troops: New Regulations Define Rights of Re-employment for Military Reservists Called to Active Duty

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**M**ilitary reservists and National Guard members have been called to active duty by the tens of thousands, and thousands more are expected to be called. Employers will soon have detailed guidance about their obligations to employees on leave for military service. The Department of Labor (DOL), through its Veterans' Employment and Training Service, has issued new proposed regulations designed to address the most frequent concerns about military leave under the Uniformed Services Employment and Re-employment Rights Act of 1994, 38 U.S.C. §§ 4301-4333, ("USERRA"). Currently, there are no regulations interpreting USERRA. The public comment period for the proposed regulations closed in November 2004 with final regulations

expected early in 2005. Additionally, beginning on March 10, 2005, employers will be required to post a new USERRA poster informing employees of their rights under the Act. The poster will be available from the DOL website at <http://www.dol.gov/vets/>.

This article provides a brief overview of USERRA. The new proposed regulations (to be codified at 20 C.F.R. part 1002) will implement many of the USERRA principles explained below.

### WHO IS COVERED?

All employers, regardless of size, are covered by the USERRA. Foreign work sites are also covered, if the employing entity is organized in the U.S. or is controlled by an entity that is organized in the United States. USERRA also covers virtually all employees, including part-time, temporary, seasonal, and probationary employees.

Employees need only show that they are performing military service as members of the "uniformed services," which includes the Army, Navy, Marine Corps., Air Force, Coast Guard, the commissioned corps of the Public Health Service, as well as the reserve components of each of these branches, the Army National Guard and Air National Guard performing services under Federal authority. National Guard service under the authority of State law is not protected by USERRA. In addition, certain categories of persons designated by the President in time of war or national emergency and disaster response, and workers appointed by the National Disaster Medical System are also covered. "Periods of service" in the uniformed services includes periods of time for which military members are absent for military fitness exams and authorized funeral honors duties.

### WHAT RIGHTS ARE PROTECTED?

USERRA provides three primary protections for employees called to military service: (1) benefit protection and continuation while on duty, (2) a right of re-employment or prompt reinstatement upon return from duty, and (3) protection from discrimination and retaliation based on military service. Additionally, an often overlooked USERRA provision involves protection

against discharge which means employers may not terminate returning service members, except for cause, for up to one year (or less, depending on the length of service) after they return to work.

### PROHIBITION AGAINST DISCRIMINATION AND RETALIATION

USERRA contains prohibitions against both discrimination and retaliation. The new regulations provide that an employer may not deny initial employment, re-employment, retention in employment, promotion, or any benefit of employment to an applicant or employee on the basis of membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Retaliation is also prohibited against any person who has taken an action to enforce USERRA protections, testified or otherwise made a statement in or in connection with a proceeding under USERRA, assisted or participated in a USERRA investigation, or, exercised a right provided for by USERRA.

The discrimination and retaliation prohibitions apply to all employers (including hiring halls and potential employers) and all employment positions, including those that are for a brief, non-recurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period.

A significant change under the new regulations is a clarification of the burden of proof in cases of discrimination or retaliation. Employees will have the burden of proving discrimination or retaliation by establishing that membership in the uniformed services was a "motivating factor" in the employer's discriminatory actions or conduct.

### NOTICE TO THE EMPLOYER

Employees leaving their jobs to report to duty are required to give advance notice of pending military service to employers, unless giving notice is prevented by military necessity, or is otherwise impossible or unreasonable under the circumstances. The notice can be written or oral. There is no specific time period for providing notice,

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## Supporting Our Troops: New Regulations Define Rights of Re-employment for Military Reservists Called to Active Duty (continued from page 2)

only that the notice should be provided as far in advance as is reasonable under the circumstances. Employees are not required to ask for or receive permission to leave from the employer.

Employees departing for military service may defer their decision to return to work until after their service ends, and employers may not pressure employees for assurances about job intentions.

### CONTINUATION OF BENEFITS

Employees on military leave are considered to be on a leave of absence from their employer and are entitled to non-seniority rights and a continuation of certain benefits provided to other similarly situated employees on leave.

With regard to health plan coverage benefits, the employer's obligation is determined by the length of the employee's military service. For periods of military service of 1-30 days, the employer is required to continue health benefits, paying the employer's regular contribution toward those benefits. For longer periods of military duty, the employee is entitled to purchase continued coverage for up to 18 months and may be required to pay no more than 102% of the full premium under a plan (representing the employer's and the employee's share plus 2% for administrative costs). USERRA does not require the employer to permit an employee to initiate new coverage at the beginning of a period of service if the employee did not previously have such coverage. Health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of a plan and USERRA provisions.

USERRA's health plan provisions are similar but not identical to the continuation of health coverage provisions added to Federal law by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). As with COBRA, USERRA permits the continuation of employment-based coverage. Unlike COBRA, however, USERRA's

continuation coverage is available without regard to either the size of the employer's workforce or to whether the employer is a governmental entity.

The regulations also contain specific provisions for pension plan benefits. Returning employees are treated as if there was no break in service with respect to participation, vesting or accrual of benefits. The regulations provide special rules for multi-employer plans. Other seniority-based benefits are treated as if the employee never left work. The employee's rights continue to accrue and progress as if there were no break in service. For other nonseniority based benefits, employees are treated the same as employees on other types of leave.

### VACATION AND FMLA

Employees do not continue to accrue vacation while on leave, unless they would normally due so under the employer's policies. Employees cannot be forced to use vacation while on leave. On the other hand, employees must, upon request, be allowed to use vacation pay during military leave.

The proposed regulations also address the interaction between USERRA and the Family and Medical Leave Act ("FMLA"). A re-employed service member would be eligible for FMLA leave if the number of months and the number of hours of work for which the service member was employed by the employer, together with the number of months and the number of hours of work for which the employee would have been employed by the civilian employer during the period of military leave, meet the FMLA's eligibility requirements.

**Example:** Joe normally works a 40-hour week. On November 5, 2004, Joe leaves to serve a tour of duty in Iraq. Prior to his departure, Joe had worked 18 weeks (720 hrs). Thirty-one weeks later, Joe returns and is re-employed on June 10, 2005. He works for 3 weeks (120 hrs). On July 1, 2005, Joe requests FMLA leave, at which time, Joe has only 840

hours of actual work for his employer (720 hours before + 120 hours since his return). If Joe is otherwise eligible for FMLA leave, the 1240 hours Joe would have worked but for his service in Iraq (31 weeks at 40 hrs/week) should be added to the 840 hours Joe actually worked for his employer.

Thus, under USERRA, Joe is deemed to have worked a total of 2080 hours (840 hrs + 1240 hrs) and would certainly meet the 1250 hours requirement for FMLA leave.

### RIGHT OF RE-EMPLOYMENT

Upon returning from military service of 5 years or less, an employee must be reinstated by his employer if he: (1) gave notice that he was leaving for military service, unless notice was precluded by military necessity or otherwise impossible or unreasonable; (2) the cumulative period of military service did not exceed five years; (3) the returning employee must not have been released under dishonorable or other punitive conditions from service; and (4) the returning employee must have reported back to his employer in a timely manner or have submitted a timely application for re-employment.

Employees are generally not entitled to re-employment after more than five years of military leave. However, the regulations propose an exception for employees who rejoin the service to mitigate economic losses caused by their employers' unlawful refusal to re-employ them.

If the employee's leave was 90 days or less, the employer must reinstate the employee to: (1) the position the employee would have attained if the employee had remained continuously employed and not taken the leave (known as the "escalator position"); or (2) the position the employee last held (if the employee is not qualified to perform the duties of the escalator position, after training by the employer).

If the leave was more than 90 days long, the employer must reinstate the employee to: (1) the position the employee would have attained if the employee had remained con-

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## Supporting Our Troops: New Regulations Define Rights of Re-employment for Military Reservists Called to Active Duty (continued from page 3)

tinuously employed or status, and pay; or (2) the position the employee last held or a position of like seniority, status, and pay (if the employee is not qualified to perform the duties of the escalator position, after training by the employer). USERRA also requires the employer to give the employee all promotions and pay increases that the employee would have received had the employee remained continuously employed.

### AFFIRMATIVE DEFENSES

The right of reinstatement is not without limitation. An employer is not required to reinstate the employee when: (1) the employer's circumstances have so changed that reinstatement would be impossible or unreasonable (i.e. an intervening reduction in force that would have included the employee); (2) reinstatement and assisting an employee in becoming qualified for a position would impose an undue hardship on the employer; and (3) the job that the employee left was for a brief, non-recurrent period and there was no reasonable expectation that the job would continue indefinitely or for a significant period. Significantly, the need to fill service members' positions while out on military leave is not a defense to re-employing them after they return from duty. Re-employment may require employers to reassign or terminate replacement employees.

### "ESCALATOR POSITION"

If an employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events "but for" a call to active duty, the escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that the employee would have attained if not for the period of service. Depending upon the specific circumstances, employers may have the option, or be required, to re-employ the reservist in a position other than the escalator position.

### RETURNING TO WORK

To be entitled to reinstatement, the employee must return to work within a certain period of time after completing military service. Whether an employee is required to report to work or submit an application for reemployment (written or verbal) depends on the length of military service. If the employee's period of service was 1-30 days, the employee is required to report to the employer on the first regularly scheduled work day beginning eight hours after returning home from service.

If the employee's period of service was 31-180 days, the employee must apply for reemployment within 14 days of completing service. For periods of duty more than 180 days long, the application for reemployment must be made within 90 days after completing service. If the employee is wounded or injured during the military service, the employee may reapply at the end of the recovery period not to exceed two years from the date of completion of service.

### PROMPT RE-EMPLOYMENT

Employers must promptly re-employ eligible service members returning from duty. The regulations propose to define "prompt" as "as soon as practicable under the circumstances." However, in most cases, re-employment must occur within two weeks of receiving a service member's application for re-employment, absent unusual circumstances. When employers are reinstating service members who have been on duty for several years, the DOL expects some delays, given that employers may have to reassign or give advance notice to other employees temporarily occupying the positions.

### PROTECTION AGAINST DISCHARGE

Once re-employed, some employees enjoy additional protection and can only be terminated "for cause," even if the employment relationship is at will. That protection may last for up to a year, depending on the length of the military service. Employees returning to work after a period military service of 31 to

180 days may only be terminated "for cause" during the 180 days after the employee returns to work. Employees returning after service of more than 180 days can only be terminated "for cause" for the one year period following their return to work.

A reinstated service member whose duration of service lasted 30 days or less has no similar protection from discharge; however, the individual is still protected by USERRA's anti-discrimination provisions. The protection against discharge ensures that the service member has a reasonable amount of time to get accustomed to the employment position after a significant absence. A period of readjustment may be especially warranted if the service member has assumed a new employment position after the military service. The discharge protection also guards against an employer's bad faith or pro forma reinstatement followed by an unjustified termination of the re-employed service member.

### REMEDIES FOR VIOLATION

An employer that violates the discrimination, reinstatement, or retaliation provisions of the Act can be held liable for damages. A successful plaintiff is entitled to recover legal and equitable relief in the form of reinstatement, lost wages and benefits, liquidated damages for a willful violation, attorneys' fees, expert witness fees, and litigation expenses. Significantly, the regulations provide that there is no statute of limitations in an action under USERRA. However, an unreasonable delay in asserting a USERRA cause of action which causes prejudice to the employer may bar a claim.

### STATE LAW

Employers should remember to consider state law when dealing with military leave issues. USERRA preempts state law, to the extent that state law reduces, limits, or eliminates any right or benefit provided by the Act. States, however, are free to enact laws that provide greater protections for employees. The Federal Office of Personnel Management has issued a separate body of regulations that govern the USERRA rights of Federal employees. See 5 C.F.R. part 353. ■

## Employment Contracts In Pennsylvania Cannot Be Assigned Absent Protective Contract Language

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**R**estrictive covenants are essential employment tools used to protect an employer's assets, trade secrets, client information, competition in the marketplace and to negotiate the terms of an employee's separation at the outset of the employment relationship. Covenants appear in employment contracts and address many of the following topics: non-competition, customer non-solicitation, employee non-solicitation, confidentiality/ non-disclosure, and assignment of intellectual property rights. There are great benefits to using these employment contracts, but if not properly drafted they can be quickly become unenforceable particularly when businesses are bought and sold.

The Supreme Court of Pennsylvania in *W. Lawrence Hess v. Gebhard & Co. Inc.*, 808 A.2d 912 (Pa. 2002) held that restrictive covenants were not assignable from one employer to another without express language set forth in the document. The Court focused on the personal nature of

the employment agreements, reasoning that either employee consent or express language was necessary to bind the employee to a new employer due to the potential for preventing an employee from earning a living. The Court also applied a crucial prerequisite balancing test to determine whether the restrictive covenants were enforceable at all and weighed the interests the employer sought to protect against employee's ability to earn a living with a new employer. The result in *Hess* was two fold. The employment contract could not be assigned to a new employer and the agreement, as a whole, was unenforceable by the old employer since it did not seek to protect a legitimate business interest.

### I. Employment Contract Not Assignable in Pennsylvania

#### A. *Hess v. Gebhard*—Issue of First Impression in Pennsylvania

Lawrence Hess was employed as an insurance agent for Eugene Hoaster Company ("Hoaster") and had signed an employment agreement whereby he consented not to disclose proprietary information and not to compete within a 25-mile radius of the City of Lebanon for a period of five years. Hoaster later agreed to sell the insurance portion of his business to Gebhard Company ("Gebhard") effective January 1, 1997, but Hoaster retained the real estate portion of that business. As part of the sale, Hoaster received certain future commissions and fees earned from the insurance business for three years after the sale to Gebhard. Never was the assignment of Hess' employment contract to the Gebhard discussed with Hess.

Prior to the sale of the business, Gebhard told Hess that his position was to be eliminated as of January 1, 1997. Hess was offered alternative lesser paying positions, but he rejected those jobs and continued to work for the company until December 31, 1996. In the interim, Hess commenced negotiations with a new employer, a direct competitor, in Lebanon County. Five days after leaving Gebhard on

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## Employment Contracts In Pennsylvania Cannot Be Assigned Absent Protective Contract Language (continued from page 5)

January 5, 1997, Hess solicited the County of Lebanon, one of the Hoaster-Gebhard's major clients, as a new client. Hoaster and Gebhard learned of this contact and sent a letter to Hess with a copy to the new employer reminding him of the covenant not to compete and threatening legal action. As a result, the new employer decided not to hire Hess and he then filed a lawsuit against Hoaster and Gebhard. The suit alleged: intentional interference with prospective contractual relations; sought to enjoin Hoaster and Gebhard from contacting Hess' prospective employers; asked the Court to void the employment agreement; and void the covenant not to compete and seeking monetary damages. Hoaster and Gebhard independently sought to enforce the employment agreement against Hess.

The Supreme Court of Pennsylvania reversed the lower courts and held that the contract was (a) not assignable to Gebhard, and (b) not enforceable by Hoaster. In performing its analysis, the Court reviewed the historical interpretation of employment contracts citing English common law dating back to the year 1414. The Court found that Pennsylvania law both had paralleled and deviated from the development of laws within other jurisdictions but that the overwhelming majority of jurisdictions, including Pennsylvania, required that such contracts be reasonably related to the protection of a legitimate business interest. *Hess*, 808 A.2d at p. 918.

"Generally, American Courts insist that an employer may not enforce a post-employment restriction on a former employee simply to eliminate competition per se; employer must establish a legitimate business interest to be protected." *Id.* The Supreme Court identified that the courts throughout the United States are generally split when viewing employment contracts as regular business contracts and assets versus contracts that are personal to the parties and cannot be assigned. *Hess*, 808 A.2d at n3, n4, n5.

### B. Employment Contracts Are Personal Between the Parties—Contract Not Assignable To New Employer

The Supreme Court of Pennsylvania established a "better rule" to decide whether restrictive covenants were assignable as part of an employment contract. It wrote in broad terms concluding that restrictive covenants are personal to the performance of both the employer and the employee, "the touchstone of which is the trust that each has in each other. The fact that an individual may have confidence in the character and the personality of one employer does not mean that the employee would be willing to suffer a restraint on his employment for the benefit of a stranger for the original undertaking." *Hess*, 808A.2d at 922. The Court held that a restrictive covenant not to compete contained in an employment agreement was not assignable to the purchasing business entity, in the absence of a specific assignability provision. The personal characteristics of the employment contract and relationship permeate the entire transaction and an employee must consent to be bound by these terms with a stranger. *Hess*, 808A.2d at 922.

Once the Court determined that employment contracts were personal in nature, it followed that the employment agreement was not assignable without consent or express language in the contract authorizing assignment. Since the contract before the Court did not contain that express language and all the parties agreed that there was no consent from Hess, the contract was not assignable to Gebhard and not enforceable by Gebhard.

### C. Hoaster Company Did Not Have Reasonable Business Interest To Protect

The Supreme Court of Pennsylvania next addressed whether Hess' former employer, Hoaster, maintained a reasonable business interest to protect and the ability to enforce the employment agreement. Hoaster argued that it continued to possess an interest in Gebhard's retention of Hoaster's former insurance clients, therefore the covenant not

to compete was still valid as long as it was reasonable. Hess countered by arguing that Hoaster's interest did not stem from any recognizable protectable business interest because Hoaster was no longer in the insurance business and his only interest was in the stream of cash. The Supreme Court of Pennsylvania agreed.

The Court applied a balancing test as discussed above, weighing the employer's legitimate business interest against the oppressive effect on the employee's ability to earn a living in his or her chosen profession, trade or occupation. *Hess*, 808 A.2d at 923. The Court concluded that Hoaster's sole business interest was pure financial gain at the expense of restricted competition. Thus, the contract was not enforceable.

The result from *Hess*, is that the Pennsylvania courts will only enforce restrictive covenants when there is a legitimate business interest at risk. Cash, competitive advantage and financial gain are all interests that the Supreme Court of Pennsylvania deemed insufficient to satisfy this threshold. However, when interests such as trade secrets, confidential information, goodwill of value, and unique or extraordinary skills are at issue the enforcement is more likely.

## II. Other Jurisdictions Rely on *Hess v. Gebhard*

After *Hess* was published, other courts have cited, relied upon, followed and distinguished *Hess* as part of their analysis of employment contracts. Therefore, the impact of *Hess* is not limited to Pennsylvania.

In *Wolf v. Barrie*, 858 So. 2d 1983 (Fla. App. 2003), the Court of Appeal of Florida, Second District cited *Hess v. Gebhard* as support to the Florida Statute governing non-compete agreements. *Section 542.33(2)(a) Florida Statutes* (1991). According to Florida law, the existence of a legitimate business interest requiring protection is a condition precedent to the enforcement of a non-compete agreement. In this case, the owner of a veterinary clinic ("Barrie") sold its assets to Florida Veterinary Specialists ("FVS") and retired from the veterinary business. One of Barrie's former employees

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## Employment Contracts Cannot Be Assigned Absent Protective

### Contract Language (continued from page 5)

(“Wolf”) had signed a non-compete agreement while employed by Barrie and years later opened his own practice. Barrie then sought to enforce the old employment agreement against Wolf. The Court relied upon *Hess* such that the old employer (Barrie) no longer had a legitimate business interest to protect by preventing competition when it no longer was engaged in the same business. *Wolf*, 858 So. 2d at 1085.

In *Inter-Tel v. CA Communications*, 2003 U.S. Dist. Lexis 23467, the United States District Court of Minnesota cited *Hess v. Gebbard* for support in reaching the conclusion that employment contracts and covenants not to compete were not assignable, absent the proper language in Minnesota or Iowa. *Id.*, citing *Hess v. Gebbard*, 808 A.2d 912 (Pa. 2002). The Supreme Court of Nevada followed *Hess v. Gebbard* in *Traffic*

*Control Services v. United Rentals Northwest, Inc.*, 87 P.3d 1054 (2004). The court reasoned that when an employee signs an employment agreement, consideration is given to the character and personality of the employer. However, the employee does not have that same ability to examine a new employer when the when the agreement is assigned without consent. The Court held that non-compete covenants are personal in nature and unassignable as a matter of law.

### III. Conclusion—Protect Yourself With Simple Language In Your Agreements

The impact of *Hess* can be significant for all employers in Pennsylvania and other jurisdictions in light of rapid corporate acquisitions and the global economy. On a basic level employment contracts must be reasonable in time and place, but the

Supreme Court of Pennsylvania added that a balancing test such that the contracts must seek to protect legitimate business interests to be enforceable.

Further, if an employer is willing to devote the time, effort and expense to properly introducing employment contracts to their employees, then its logical that these restrictions on the employees are an asset to the company in the context of a sale. In order for these contracts or assets to be protected when a business sale occurs, the agreement must contain an express assignment provision or direct consent from the employee. The contract must clearly express the understanding between the employer and employee, acknowledging that the employee agrees to be bound by those same terms with a new employer. Without this language, the employees are free to leave the new employer unencumbered by the noncompete or confidentiality covenants and your business interests unprotected. ■

## California Adopts New Sexual Harassment Training Requirements for Large Employers

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For California employers with 50 or more employees, sexual harassment training requirements have been increased and codified. On September 29, 2004, Assembly Bill (AB) 1825 was signed by Governor Schwarzenegger and codified in the Fair Employment and Housing Act at California Government Code §12950.1. The statute was introduced by Assembly Member Sarah Reyes (31st Assembly District), on January 20, 2004, “to help California workplaces ensure they were free of sexual harassment by requiring certain additional minimal training of supervisory employees”.

Existing law requires every employer to take certain action to ensure a workplace free of sexual harassment by implementing certain minimum requirements, including posting sexual harassment information posters at the workplace and obtaining and making available an information sheet on sexual harassment.

The new law, which goes into effect on January 1, 2005, requires employers of 50 or more employees to provide two (2) hours of training and education to all supervisory employees, by January 1, 2006, unless the employer has provided sexual harassment training and education to employees after January 1, 2003. Following initial compliance by January 1, 2006, the code requires each employer to provide sexual harassment training and education to each supervisory employee once every two (2) years, after January 1, 2006. In addition this new statute requires the state to incorporate this training into the 80 hours of training provided to all new supervisory employees, using existing

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## California Adopts New Sexual Harassment Training

### Requirements for Large Employers (continued from page 8)

resources. Simply stated, employers of 50 or more employees must provide, or have provided, at least two hours of sexual harassment training to supervisory employees between January 1, 2003 and January 1, 2006. At that point, continuing sexual harassment education and training must take place in the form of at least two hours of training for supervisory employees, once every two years.

#### Who is a Supervisor?

The California Fair Employment and Housing Act defines a supervisor as anyone having authority from the employer to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment”. Cal. Govt. Code Section 12926(r).

#### Who is an Employee?

The new law defines an “employer” as any person regularly employing 50 or more persons or “regularly receiving the services of 50 or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly.” Thus, when analyzing the 50 “employee” threshold, you should consider independent contractors, temporary workers or other service providers.

#### What Specific Training Must Be Provided?

The training required by this section should be conducted by trainers/instructors with expertise in the prevention of harass-

ment, discrimination, and retaliation, and must include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment as well as the remedies available to victims of sexual harassment in employment. The training and education must be interactive and should include practical examples (i.e. role playing) aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation.

#### What is the Effect of Compliance or Non-Compliance?

Although this code section provides a minimum requirement for sexual harassment training, lack of compliance, and the fact that the training does not reach a particular individual does not automatically result in liability on the part of the employer for sexual harassment claims. At the same time, an employer’s compliance with these provisions does not insulate the employer from liability for sexual harassment claims. From a practical perspective the presence or absence of training will be a significant factor in the evaluation of employer liability for sexual harassment. Existing law already makes the employer liable for harassment by supervisors, subject to some limited defenses. The fact that a statute expresses certain minimum training requirements creates per se negligence considerations.

“Per Se Negligence” is a presumption of negligence from the violation of a statute. And although an entity’s negligence can be predicated by the violation of a statute, negligence of a defendant is *not presumed* from the violation of a statute itself. In order for the violation of a statute to rise to

a presumption of negligence, four (4) key elements must all be met. Negligence will be presumed if (1) the defendant violated a statute; (2) the violation legally caused injury; (3) the occurrence resulting in the injury was of a nature that the statute was designed to prevent; and (4) the victim was among the class of persons for whose protection the statute was adopted. Therefore, although a violation of the new sexual harassment code section would appear to be a significant factor in showing liability on the part of an employer, that alone will not result in a presumption of negligence, and it will not result in an automatic imposition of liability.

That being said, if an employer violates the requirements of this code section, the initial penalty is simply that the commission will issue an order requiring the employer to comply with the minimum requirements expressed in the section. The ultimate penalty may be a large settlement or jury verdict.

Higgs, Fletcher & Mack LLP has experts available to assist in providing training or in establishing your own training program. Please contact Jim Peterson, (the Chair of our Labor and Employment Practice Group) for further assistance or information. Jim Peterson chair’s and Shaka Johnson is a member of the Labor & Employment Practice Group at Higgs, Fletcher & Mack LLP. ■

# Communications Between Pharmacy Benefit Manager's Counsel And Ex-Employee Subject To Limited Privilege

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Today's workforce is mobile. Whether because of retirement, preferable job opportunities, reductions in force or otherwise, attorneys seeking information in order to provide corporate clients with legal advice or to prepare for litigation must often interview both current and former employees. Are counsel's communications with former employees discoverable or privileged? That issue was

addressed in a recent decision in the U.S. District Court for the Eastern District of Pennsylvania.

## THE LAWSUIT

In *United States v. Merck-Medco Managed Care, LLC*, the court considered the applicability of the attorney-client privilege to corporate counsel's communications with former corporate employees. The decision arose out of a lawsuit by the United States and others (collectively, the "United States") under the False Claim Act and the Public Contracts Anti-Kickback Act.

The defendants were a pharmacy benefit manager and related entities and individuals (the "Medco Defendants"). Pharmacy benefit managers manage prescription drug benefits for health plans. In the lawsuit, the government alleged that the Medco Defendants had defrauded the federal government while managing prescription drug benefits for Blue Cross Blue Shield Association, which provided healthcare to federal employees. The government also alleged that the defendants had made and received payments for favorable treatment with other companies and health plans.

## THE DISCOVERY DISPUTE

During discovery, government counsel took the deposition of a former employee of the Medco Defendants, Susan Elliott. At the deposition, Elliott testified that she did not have an attorney and was not represented by counsel for the Medco Defendants. Counsel for the Medco Defendants confirmed that they did not represent her.

Nonetheless, during Elliott's deposition, counsel for the Medco Defendants asserted the attorney-client privilege and instructed Elliott not to answer questions regarding communications that she had had with the Medco Defendants in preparation for her deposition or during breaks in the deposition. Elliott followed these instructions and refused to answer such questions.

Arguing that aspects of Elliott's deposition testimony were inconsistent with her previous statements regarding activities that were material to the case, the government

filed a motion to compel additional testimony from Elliott concerning four subjects:

1. Statements that the Medco Defendants' counsel made to Elliott regarding the nature of the case;
2. Statements that Elliott made to the Medco Defendants' counsel regarding her discussions with government investigators;
3. Descriptions and summaries of witness testimony that the Medco Defendants' counsel provided to Elliott; and
4. Discussions during Elliott's deposition between Elliott and the Medco Defendants' counsel.

The government argued that it should be permitted to question Elliott on these subjects because her discussions with the Medco Defendants' counsel may have influenced her testimony. The Medco Defendants opposed the motion on the ground that communications between Elliott and the Medco Defendants' counsel were protected from disclosure by the attorney-client privilege. According to the Medco Defendants, the privilege applied to discussions between their counsel and former employees, just as the privilege applied to discussions between their counsel and current employees.

## THE COURT'S ANALYSIS

In deciding the motion, the court first considered the U.S. Supreme Court's decision in *Upjohn Co. v. United States*. In *Upjohn*, the Court held that discussions between corporate counsel and current employees are privileged when: (1) the discussions were with the corporate counsel, acting as such; (2) the discussions occurred at the direction of corporate supervisors in order to secure legal advice; (3) the discussions concerned matters within the scope of the employees' duties; and (4) the employees were aware that the purpose of the discussion was so that the corporation could obtain legal advice.

The Merck-Medco court noted that Chief Justice Berger, in his concurring opinion in *Upjohn*, had suggested that the attorney-client privilege should extend to

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## Fabricated EEO Charges—What’s A Business To Do?

### Burdens of Proof in Title VII Retaliation Claims (continued from page 9)

communications between corporate counsel and former employees. The Merck-Medco court explained, however, that the majority in *Upjohn* did not address the question.

Because of the absence of binding precedent from the Supreme Court or the Third Circuit, the Merck-Medco court looked to other federal court decisions on the issue. First, the court considered *Infosystems, Inc. v. Ceridian Corp.*, in which a federal court in the Eastern District of Michigan held that the attorney-client privilege applies to former employees, but only for otherwise privileged communications with corporate counsel that occurred during their employment. The Infosystems court reasoned that communications between corporate counsel and a former employee are not privileged because the willingness of former employees to provide information is typically unrelated to directions from corporate superiors and, therefore, such communications should be treated the same as communications with any third-party fact witness.

The second case the Merck-Medco court considered was *City of New York v. Coastal Oil New York, Inc.*, in which a federal court in the Southern District of New York addressed whether the plaintiff’s counsel should be permitted to question a former employee of the defendant corporation regarding discussions with corporate

defense counsel in preparation for and during a recess in the deposition. The Coastal Oil court concluded that there was no attorney-client privilege because corporate counsel did not represent the former employee and there was no evidence that the purpose of the discussion was to provide legal advice.

In a third case, *Peralta v. Cendant Corp.*, a federal court in the District of Connecticut denied a corporate defendant’s effort to use the attorney-client privilege to block questions about communications between corporate counsel and a former employee. The Peralta court held that the privilege only applied to communications: (1) concerning knowledge obtained or conduct that occurred during the former employee’s employment; or (2) relating to communications that were themselves privileged and that occurred during the employment. The Peralta court stated that the privilege would not apply to communications between corporate counsel and the former employee regarding the testimony of other witnesses or during breaks in the deposition. The Peralta court explained that allowing discovery regarding such communications was necessary because they could influence a witness to adjust or conform his or her testimony.

The Merck-Medco court adopted the reasoning of these decisions and held that

“if the communication sought to be elicited relates to Ms. Elliott’s conduct or knowledge during her employment with Medco Defendants, or if it concerns conversations with corporate counsel that occurred during her employment, the communication is privileged; if not, the attorney-client privilege does not apply.” (Emphasis in original). Thus, the court permitted the government to obtain additional testimony from Elliott in the four specified subject areas.

### CONCLUSION

Although the Second and Third Circuits have not yet addressed the issue, other Courts of Appeals, such as the Fourth and Ninth Circuits, have held that *Upjohn* applies to communications with former employees. Even if such communications are deemed to be privileged, however, corporate counsel should expect that their communications with former employees in preparation for deposition and otherwise litigating the case may be discoverable. Thus, counsel should proceed with caution. ■

# Resolving Employment Disputes In The U.K.

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## 1 INTRODUCTION

In the UK, there are four primary ways of resolving employment disputes:

- ▶ Employment Tribunals—these Tribunals have jurisdiction to deal with almost all employment disputes including unfair dismissal, breach of contract (with limitations) and discrimination issues (see 4 below).
- ▶ High Court/County Court—these Courts deal with high value breach of contract claims and breach of confidentiality and restrictive covenant issues (see 4.3 below).
- ▶ Mediation (see 2 below).
- ▶ ACAS arbitration (see 3 below).

In this paper, I will deal primarily with the alternative dispute methods of mediation and ACAS arbitration. I will also touch upon the Employment Tribunal system to give context.

## 2 MEDIATION

### 2.1 Introduction

As you will be aware, mediation is the process whereby parties who are involved in a dispute agree to appoint a neutral third party mediator to help them resolve their dispute in a quick and cost effective manner by negotiating an agreement. The process is confidential, non-adversarial and involves less paperwork and preparation than formal litigation. The mediator has no power to evaluate the claims or give a binding decision on the dispute. His role is to act as a facilitator and try to find a solution to the dispute. This involves clarifying and prioritising issues, testing assumptions, exploring possible solutions and keeping the momentum going. Importantly, the resolution is ultimately under the control of the parties. If agreement cannot be reached then the parties remain free to continue with litigation.

There has been a continuing growth in the UK in the use of mediation as a means of settling disputes. This can be seen by the fact that the Civil Procedure Rules which govern the formal Court system encourage the use of mediation. Also the report by the Employment Tribunal System Taskforce on Tribunal Reform in 2002 included recommendations that Tribunals should promote mediation.

There is also a fixed period of conciliation by ACAS built into the reforms set out in the Employment Act 2002 which come into force in October this year. There will be 2 defined periods, a “short conciliation period” of seven weeks and a “standard conciliation” of 13 weeks. The short period is designed for claims relating to unauthorised deductions of wages, breach of contract, statutory redundancy payments, unpaid guarantee pay and unpaid medical suspension pay. If such a claim is particularly complex, a Tribunal Chairman will be able to assign a standard conciliation period to it. Mediation can be particularly useful in the employment context where disputes are often very personal, positions have become entrenched and communication has broken down but the individual is still employed and there is the need to reach a solution which will enable the parties to continue working together.

### 2.2 Procedure

Unlike the ACAS Arbitration Scheme and the Employment Tribunal system there is no set procedure to be followed in mediation.

The main features of mediation are:-

- ▶ It is without prejudice and confidential.
- ▶ The parties can agree the terms and procedures to be employed.
- ▶ The procedure is informal and usually takes a fixed amount of time.
- ▶ Either party can withdraw from the mediation at any time.

A typical procedure once the parties have agreed to mediation would involve:

- ▶ The mediator having some initial contact with the parties before formal mediation.
- ▶ An opening phase involving presentations or statements made by each party or their representative.
- ▶ A more formal phase involving identifying key issues which would then be clarified and explored in joint or separate meetings or a combination of both. Any possible solutions can be aired and tested either jointly or privately. The mediator can move between the parties, passing on information and using information to negotiate a “win-win” settlement. The use of separate meetings helps put both parties at their ease.
- ▶ If an agreement is reached this can then be recorded and will be legally binding.
- ▶ If an agreement is not reached, then further assistance can be offered by the mediator and if unsuccessful the parties can proceed to or continue with litigation.

### 2.3 Advantages

- ▶ Settlements can include creative solutions not obtainable through the tribunal system e.g. an unreserved apology
- ▶ The process is flexible and informal—which may be more likely to encourage settlement
- ▶ Mediation can sit alongside any other formal procedures

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## Resolving Employment Disputes In The U.K. (continued from page 11)

- ▶ It is likely to be seen as neutral and free from bias as it involves a neutral third party
- ▶ The control of the outcome is down to the parties
- ▶ Cost—it is cheaper than a lengthy tribunal hearing
- ▶ It is confidential which is likely to be attractive to both parties
- ▶ Speed—the process is much quicker than the tribunal which can take months depending on how busy the tribunal is
- ▶ It may be an effective method of resolving a dispute with those still in employment

### 2.4 Disadvantages

- ▶ Cost—if the parties do not reach agreement and end up litigating anyway this option is more expensive.
- ▶ A mediator does not have the power to make binding decisions.
- ▶ Parties cannot be forced to mediate.
- ▶ It cannot be used to determine a point of law and it cannot provide injunctive relief.

## 3 ACAS ARBITRATION SCHEME

### 3.1 Introduction

The ACAS Arbitration Scheme (“the Scheme”) was introduced on 21 May 2001 and was intended to provide a simple and cost effective alternative to the Employment Tribunal System.

The Scheme is entirely voluntary so a case can only be submitted for arbitration with the consent of both parties.

The Scheme is intended to be non-legalistic and more flexible than the Tribunal system and avoids formal pleadings, formal witness and documentary procedures and strict rules of evidence do not apply. Instead of applying strict law or legal precedent “*general principles of fairness and good conduct in employment relations*” will be taken into account. Arbitral decisions are final with very limited opportunities for parties to appeal or otherwise challenge the result.

### 3.2 Jurisdiction

The Scheme *only applies to cases of alleged unfair dismissal and for flexible working disputes*. If an individual’s claim also includes an element of e.g. discrimination, this must be dealt with separately.

The Scheme is not designed for disputes raising jurisdictional issues such as:

- ▶ Whether or not the employee was employed by the employer;
- ▶ Whether or not the employee had the necessary period of continuous service to bring a claim;
- ▶ Whether or not time limits have expired and/or should be extended.

Therefore, if an Arbitration Agreement is reached to refer the dispute to arbitration under the Scheme, both parties will be taken to have accepted that *no* jurisdictional issue is in dispute between them.

### 3.3 Procedure—Unfair Dismissal

#### 3.3.1 The Agreement

In order to submit to the Scheme, an Arbitration Agreement (“Agreement”) must be reached and notified to ACAS within 6 weeks. ACAS then appoint an arbitrator who will fix a hearing within 2 months.

Once an Agreement has been reached, the party bringing the claim may withdraw (this will constitute a dismissal of the claim) but the party against whom the claim is made cannot withdraw unilaterally.

At least 14 days before the hearing date, each party must submit one copy of a “written statement of case” together with any supporting documentation and the names of those who will accompany each party to the hearing.

#### 3.3.2 Documents

The arbitrator has no power to compel a party to provide documents requested, but may draw an adverse inference from a party’s failure to comply with a reasonable request for documentation.

### 3.3.3 Witnesses

The arbitrator has no power to compel the attendance of any witnesses, but again, may draw an adverse inference if an employer who is party to the arbitration fails or refuses to allow current employees or other workers time off from work to attend the hearing.

### 3.3.4 The Hearing

The hearing is held in private. The conduct of the hearing is determined by the arbitrator whose general duty is to adopt suitable procedures to deal with the case and to act fairly and impartially giving each party a reasonable opportunity to put their case and deal with the other party’s case. Evidence is not given on oath or affirmation and no party or witness may be cross-examined by a party or representative. The arbitrator has the right to address questions directly to either party or anyone else attending the hearing.

Legal representatives can attend, but no special status will be accorded to them and each party is liable for any fees or expenses incurred by any representative.

In deciding whether a dismissal is fair or unfair the arbitrator must consider “*the general principles of fairness and good conduct in employment relations*” e.g. principles in the ACAS code, instead of applying legal tests or rules.

### 3.3.5 Award

The arbitrator will make an award in writing which will set out the main considerations in reaching his/her decision and state the remedy. The arbitrator can award compensation, order reinstatement or re-engagement. An award of compensation will be made up in the same way as an Employment Tribunal award. If an employer provides procedures for appealing against dismissal but prevents the employee from appealing under the procedure, then a supplementary amount can be awarded. The amount cannot exceed 2 weeks pay (currently capped at £270 per week). The award can also be reduced by the same amount if there are internal procedures which an employee has failed to appeal under.

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## Resolving Employment Disputes In The U.K. (continued from page 12)

### 3.3.6 Challenging the award

An appeal will only be entertained where there is a challenge based on:

- ▶ The substantive jurisdiction of the arbitration itself (i.e. the matter can or should not be heard using the Scheme); or
- ▶ A serious irregularity regarding the conduct of the arbitrator or the proceedings; or
- ▶ A point of law under EC law or the Human Rights Act 1998

A general appeal on a point of law will not be allowed.

### 3.4 Procedure—Flexible Working

Where there is a complaint that an employer has failed to deal with a flexible working application, or that the decision was based on incorrect facts, the dispute can be dealt with by way of ACAS arbitration. The procedure is largely the same as that for unfair dismissal and the Arbitrator can make the same awards as an Employment Tribunal.

### 3.5 Advantages

- ▶ The Scheme is cheaper and quicker than Employment Tribunal proceedings, with ACAS aiming to try and limit hearings to half a day, and to hold the hearing within 2 months of the reference to arbitration.
- ▶ It is more informal and less stressful for the parties
- ▶ Confidentiality—the hearing is not public which may be attractive to both parties.

### 3.6 Disadvantages

- ▶ The Scheme is limited to unfair dismissal. Often multiple claims are brought within the same IT1 and it is difficult to imagine an individual agreeing to go through the stress and cost of two hearings
- ▶ The limited right of appeal makes it unattractive in the event that an arbitrator reaches an odd decision as to the facts or law

- ▶ An individual cannot change his/her mind and go back to tribunal proceedings
- ▶ With no evidence on oath and no right to cross-examine the evidence is unlikely to be tested in the same way that it would be in the Employment Tribunals.

*In 2001/2002 only 13 cases were referred to the ACAS arbitration scheme, in 2002/3 this increased to 23 and in 2003/4 this went down to 7 applications for unfair dismissal and 1 for the new flexible working provisions.*

## 4 EMPLOYMENT TRIBUNAL SYSTEM

### 4.1 Introduction

Employment Tribunals (formerly known as Industrial Tribunals) were set up as the main forum for dealing with employment disputes between employees and their employers. They were intended to be informal and not overly legalistic. However, as the jurisdiction of tribunals has widened considerably with increasingly complex legislation they have become correspondingly legalistic.

### 4.2 Jurisdiction

The Employment Tribunals have jurisdiction over nearly all types of employment claim. These include the following:-

- ▶ Sex discrimination
- ▶ Race discrimination
- ▶ Disability discrimination
- ▶ Religion or belief discrimination
- ▶ Sexual orientation discrimination
- ▶ Unfair dismissal
- ▶ Redundancy payments
- ▶ Equal pay
- ▶ Unlawful deduction from wages
- ▶ TUPE
- ▶ Working time
- ▶ Part-time workers
- ▶ Fixed-term employees
- ▶ Flexible working
- ▶ Maternity, paternity, adoption and parental leave issues

Employment Tribunals have no statutory provision giving them power to determine claims under EU law and therefore have no jurisdiction to hear “free-standing claims” under EU law. Employment Tribunals also cannot hear “free-standing claims” under the Human Rights Act 1998. However, as a public authority, Tribunals are required not to act in a way which is incompatible with *Convention* rights unless compelled to do so by legislation.

### 4.3 Choice of Jurisdiction

The only area where a claim may be presented either in the Employment Tribunal or in the High/County Court is a claim for breach of contract. An Employment Tribunal’s jurisdiction in this regard is, however, limited as an award for breach of contract can only be made up to £25,000 (as set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994) and the tribunal only has jurisdiction to deal with the claim if it arises out of, or is outstanding at the date of, the termination of the employment.

There are certain types of breach of contract claims that are excluded from the Employment Tribunal’s jurisdiction, namely, disputes in relation to the following:-

- ▶ A term requiring the employer to provide living accommodation to the employee.
- ▶ A term imposing an obligation on the employer or the employee in connection with the provision of living accommodation.
- ▶ A term relating to intellectual property.
- ▶ A term imposing an obligation of confidence.
- ▶ A term which is a covenant in restraint of trade.

### 4.4 Procedure

#### 4.4.1 The Rules

The Employment Tribunals are governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 in which there is an “overriding objective” for Tribunals to deal with cases “justly”. The Regulations set out what should be taken into

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## Resolving Employment Disputes In The U.K. (continued from page 14)

account in achieving this objective and this includes, so far as practicable:

- ▶ Ensuring that parties are on equal footing;
- ▶ Saving expense;
- ▶ Dealing with the case in ways which are proportionate to the complexity of the issue; and
- ▶ Ensuring that the case is dealt with expeditiously and fairly.

The general outline of the procedure to be followed in the Tribunal is as follows:

### 4.4.2 Claim Form

Tribunal proceedings start with a claim form in a prescribed form. This is lodged by the individual (the claimant) and must be presented within the time limits laid down by statute according to the type of claim. In general, this is usually within 3 months of the relevant date of the act or omission complained of or the date of dismissal, although this will be extended by a further 3 months in certain circumstances.

### 4.4.3 The Response form

This is the employer's defence and must be filed within 28 days of the claim form being sent to the Respondent setting out the grounds of resistance. Extensions of time are given in certain circumstances.

### 4.4.4 Questionnaires

In cases of sex, race, disability discrimination, sexual orientation, religion or belief or equal pay an individual can serve a questionnaire on the employer within specified time limits. There is no obligation to answer this but the failure to answer or the provision of evasive or insufficient replies may result in the tribunal drawing inferences against the employer.

### 4.4.5 Further Particulars

These may be requested by either party or the Tribunal if either the Claim or Response form does not disclose enough details to enable the other party to know the case he has to meet. Failure to comply with a Tribunal

order to provide these may result in a case being struck out by the Tribunal.

### 4.4.6 Documents

Each party should disclose all documents which are relevant to the proceedings. If they fail to do so the Tribunal can make an order for this and failure to comply may result in the claim or defence being struck out.

### 4.4.7 Witnesses

The Tribunal can make orders requiring the attendance of witnesses who have relevant knowledge or can give relevant information and who are not likely to attend voluntarily e.g. if they work for the employer and are needed as a witness for the employee.

### 4.4.8 Directions Hearing

A directions hearing will take place either at the request of either party or of the Tribunal's own motion to deal with interlocutory issues such as further particulars, amendments, documents, and witnesses together with a timetable for compliance with orders in respect of these. They will also consider requests for Pre-Hearing Reviews and Preliminary Hearings (see below). The Tribunal will also schedule the date of the main hearing.

### 4.4.9 Pre-Hearing Review (PHR)

This will be ordered by the tribunal of its own motion or on application of either party. The purpose is to decide whether the case (usually the applicant's) has "no reasonable prospect of success". If so, the tribunal may issue a costs warning and may order that the party pay a deposit as a condition of continuing in the proceedings. The maximum amount of the deposit is £500. Under the regime introduced in October 2004, the Tribunal is able to consider any oral or written representations or evidence which representations previously ordinarily allowed. The new regulations also enable a chairperson to hold a case management discussion to centre on matters of procedure and case management.

### 4.4.10 Preliminary Hearing

This covers jurisdictional issues including whether the application was submitted in time; whether the respondent has been correctly named; whether the applicant has sufficient service to bring a claim or whether she/he has jurisdiction to bring proceedings in the UK.

### 4.4.11 Preparation for the Hearing

This will involve the preparation of the bundle of documents to be relied on by both sides and the preparation of witness statements which may be exchanged in advance of the hearing depending on the practice of the particular tribunal.

### 4.4.12 Tribunal Hearing

The Tribunal is composed of 3 members, a legally qualified Chairman, a member with management experience and a member with trade union experience. Proceedings are formal but less so than in an ordinary court. Hearings are normally conducted in public (with a few exceptions). The Tribunal is not bound by the rules of evidence which apply in a court of law and should conduct the hearing "in such manner as it considers most appropriate for the clarification of the issues before it and generally to the just handling of the proceedings". The tribunal therefore has considerable discretion in relation to the conduct of the proceedings. However, it must observe basic rules of natural justice.

The usual procedure is:

- ▶ The party on whom the burden of proof rests starts—in cases of unfair dismissal this is the employer and in cases of discrimination it is usually the applicant. They present their case and call their evidence. This is subject to cross examination by the other party and re-examination
- ▶ The other party follows the same procedure and then makes a closing speech
- ▶ The first party makes a closing speech.

Witnesses give evidence on oath or affirmation usually in the form of a witness

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## Resolving Employment Disputes In The U.K. (continued from page 15)

statement. The tribunal can ask questions at any point.

The length of a hearing will depend on the type of case. A straightforward unfair dismissal case may take a day whereas a complex discrimination case may take a week or more.

### 4.4.13 Decision

This may be unanimous or by a majority. It may be given orally at the hearing or in writing. Where reasons for a judgement are given orally, written reasons will only be sent to the parties after the hearing if the parties make a request within 14 days. Decisions are public and entered into a register available for public scrutiny (except in cases of national security or where the tribunal has sat in private).

### 4.4.14 Remedies

If an applicant is successful a hearing on remedies is usually set for a later date.

### 4.4.15 Costs

The new Regulations enable Tribunals to make 3 types of costs order, provided an application is made during the proceedings or within 28 days of the Tribunal's Judgment.

#### Costs against a party

Costs may only be awarded under this category when the receiving party is legally represented. A costs order must be made where the employer's failure to reinstate the employee and adduce reasonable evidence of the availability of jobs resulted in a postponement or an adjournment of the hearing.

A costs order *may* be made where:

- ▶ A postponement or adjournment of any hearing or pre-hearing review on the application of a party becomes necessary;
- ▶ A party has failed to comply with a direction or a practice direction; or
- ▶ A party has in bringing the proceedings, or their representative has in conducting the proceedings acted vexatiously, abu-

sively, disruptively or otherwise unreasonably or the bringing or conducting of proceedings by that party has been misconceived.

The power to award costs remains capped at £10,000 unless costs awarded against a party are assessed by way of detailed assessment in the County Court or where the parties agree on a sum. The Tribunal can have regard to the paying parties ability to pay.

#### Preparation Time Orders

The new Regulations allow the Tribunals issue preparation time orders where a receiving party is not legally represented at the hearing or when the proceedings are determined without a hearing. To obtain a preparation time order, the litigant in person must satisfy certain grounds. The hourly rate for such an Order is capped at £25.

### 4.4.16 Wasted Costs Orders against Representatives

Under the new Regulations, a waster costs order may be awarded to a receiving party as a result of any improper unreasonable or negligent act or omission on the part of any representative, or where the Tribunal considers it unreasonable to expect the aggrieved party to pay. A wasted costs order can only be awarded against a representative who is acting for profit so voluntary advice sector and trade union representatives will be excluded.

### 4.4.17 Challenging the decision

This may be done by requesting a review on one of the five specified grounds within 14 days from the date the decision is sent or by appealing on a point of law to the Employment Appeal Tribunal within 42 days. Further appeals are to the Court of Appeal and then to the House of Lords. These can only be made on points of law and with permission.

### 4.5 Settlement

The parties can settle their dispute at any time leading up to, during and after the

hearing. If this is before the hearing this can be done either through an ACAS conciliation officer on a form COT3 or by reaching a compromise agreement. To be valid a compromise agreement must comply with the conditions set out in section 203 of the Employment Rights Act 1996. These include the need for the agreement to be in writing, it must relate to the particular complaint and the complainant must have received advice from a relevant independent adviser. If settlement is reached after the hearing it is usually recorded by the tribunal in the form of a consent order.

### 4.6 Advantages

- ▶ The Tribunal's decision is binding and enforceable
- ▶ If the parties cannot reach an agreement either through mediation, arbitration or conciliation this is only method of determining disputes

### 4.7 Disadvantages

- ▶ Cost—it is expensive particularly for lengthy hearings where legal representation is almost inevitably involved
- ▶ Time—it is time consuming in terms of the management time involved in preparation and attending the hearing.

This talk is of general application and of general guidance. It should not be relied upon without first seeking separate legal advice. Neither the author nor this firm can accept any responsibility for actions taken or omitted to be taken as a result of relying on this talk alone. ■

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