

Welcome to the August 2010 edition of Fife Law News. This newsletter has been sent to you as a supporter of Fife Law Centre.

### **Proposal to abolish 800 year old "double jeopardy" rule for serious crimes**

Proposals are afoot to scrap the 800 year old so-called 'double jeopardy' rule in Scotland for serious crimes. This rule prohibits criminal proceedings being brought against a person for the same crime more than once. It is a long established legal principle which aims to curb the state's power and prevent it from repeatedly prosecuting individuals for the same offence.



However, in recent years, developments such as DNA technology have led to calls for changes to be made to the rule especially where new evidence emerges which casts doubt on an accused's acquittal at an earlier trial.

The Scottish Law Commission (SLC) considered the issue in 2009. It recommended that the rule be abolished for murder and rape cases although not on a retrospective basis. Following on from this, the Scottish Government ran a consultation in March 2010. The government's proposals to change the rule however are thought to go much further than the recommendations made by the SLC. It is expected that the government's bill will extend the abolishment of the rule beyond just murder and rape to other offences such as serious sexual crimes and culpable homicide and that it *would* operate retrospectively.

The Criminal Justice Act 2003 ended the double jeopardy rule applicable in England and Wales. Several successful prosecutions have since been brought against previously cleared suspects under the new rules which are retrospective and apply to a range of serious offences.

The Scottish government has made it clear that it is not proposing the complete abolition of the rule (such a move would clearly call its human rights obligations into question) and it is only being looked at for serious criminal offences, although a definitive list is yet to be finalised.



The details of the Bill have yet to be officially published but are expected to be released this Autumn by Justice Secretary Kenny MacAskill. There will then only be a limited time to get the Bill passed before Parliament is dissolved prior to the May 2011 elections although it is thought that there is good cross-party support for the move provided clear safeguards are put in place.

For the Scottish Government's consultation paper on double jeopardy please see <http://www.scotland.gov.uk/Publications/2010/03/22113128/3>.

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### **Right-to-buy homes sold back to Councils by owners facing repossession**

A recent trend has seen more and more people selling homes which they bought as Council tenants under the right-to-buy scheme back to the Council and other social landlords as they find themselves unable to keep up with their mortgage payments.

Scottish Government figures show that 303 homes were sold back to social landlords in 2009-2010 under the Mortgage to Rent scheme (an increase from 233 homes in the previous year). According to the Scottish Federation of Housing Associations the majority of these were homes previously bought under right-to-buy powers.



The Scottish Government introduced the Mortgage to Rent scheme in 2003 with the aim of assisting homeowners facing the threat of repossession. By selling their property back to the local authority or a housing association a person can remain in their home as a tenant and avoid the upsetting process of potentially being evicted and having their home repossessed.

The Scottish Government pays a grant to the housing association/local authority which allows them to participate in the scheme. The new landlord can then carry out any necessary repairs requiring to be done at the property and will charge the tenants rent. There is the potential for tenants to buy their home back after a period of 5 years but restrictions may apply on this right.

Since it began in 2003 it is thought around 1200 homes have been bought under the scheme. However, there are restrictions on who is eligible to apply and, even if someone meets the initial criteria, there is no guarantee that a landlord will be found who is willing to purchase the property under the scheme.

According to the Council of Mortgage Lenders the number of properties taken back by lenders fell again in the second quarter of 2010 to 9,400 repossessions nationwide. Many homeowners though are still facing the threat of repossession.

The recent Home Owner and Debtor Protection (Scotland) Act 2010 sets out to provide enhanced protections and guidelines on procedures that must be followed where homeowners are facing repossession.

To view the Act in full please go to:-

[http://www.legislation.gov.uk/asp/2010/6/pdfs/asp\\_20100006\\_en.pdf](http://www.legislation.gov.uk/asp/2010/6/pdfs/asp_20100006_en.pdf).

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### **Use of ASBOs in Scotland**

Recent requests made under Freedom of Information laws have revealed that out of 219,689 complaints made in Scotland last year about anti-social behaviour only 249 resulted in anti-social behaviour orders (ASBOs) being approved by the courts.

Following this information coming to light Scottish Labour has announced that it is calling for the government to allow community groups to request such orders by applying to their local council or police force who would then make a decision on whether or not to grant the request.

South of the border, in contrast to this move, Home Secretary Theresa May suggested last month that it may be “time to move beyond” such orders in England and Wales. The UK government figures suggest that half of all ASBOs granted in England and Wales are breached. Although an ASBO is a civil order the breach of such an order is a criminal offence and can lead to a custodial sentence.

Anti-social behaviour is a devolved issue therefore any changes to the system here are a matter for the Scottish Government. ASBOs cannot be sought by individuals seeking protection against harassment or disturbances in their area; only councils and registered social landlords can apply to the courts for such orders and must consult with the police before doing so.

As the figures show the number of orders awarded in comparison to the number of anti-social behaviour complaints is relatively low. Sometimes other methods are sought to try and resolve such community problems because an ASBO is not deemed to be the best way forward to deal with such issues and even where applications are made to the courts it has been suggested that Sheriffs are often wary of granting such orders in the first place.

For information on Fife Council’s policy on anti-social behaviour see:-

<http://www.fifedirect.org.uk/topics/index.cfm?fuseaction=subject.display&subjectid=14F6CC47-1935-11D6-8DD600508BBD18A1>

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## Employee claims for "stigma damages" from former employer

### ***Brown v Baxter and another t/a Careham Hall UKEAT/0354/09/SM***

This recent Employment Appeal Tribunal case concerned a woman who worked as a manager for a residential care home for the elderly. Upon finding new employment the woman duly gave notice to her employer. During the notice period however the Claimant was dismissed for gross misconduct due to a complaint made to her employer about her and other carers. The employer gave the Claimant an unfavourable reference and reported her to the Commission for Social Care Inspection (CSCI). The Claimant then lost her new job and brought an Employment Tribunal claim for unfair dismissal.



The initial Tribunal found that the employer concerned had not correctly followed the statutory dismissal procedures. It also found that there had been no proper investigation into the complaint made about the Claimant to establish whether or not there was gross misconduct on her part. As a result of these findings the Tribunal made an award in the Claimant's favour on the grounds that there was unfair dismissal.

As part of her claim, however, the Claimant had also sought so-called 'stigma damages'. In doing so she relied on a recent case of *Chagger v Abbey National plc [2010] IRLR 47*. In the *Chagger* case the Employment Tribunal found that an award for unfair dismissal can include damages for the stigma the Claimant will face for raising a Tribunal action against their employer as well as damages for loss of reputation as a result of being dismissed. Employers can therefore potentially be held liable for so-called "loss" resulting from the unwillingness of prospective employers to hire an employee who has raised a claim against them. In the *Brown*

case however the Tribunal did not make any award to the Claimant on these grounds.

Upon Appeal the Claimant challenged the refusal of the initial Tribunal to make an award for such stigma damages. The Appeal Tribunal however agreed with the initial Tribunal's decision that stigma loss did not apply in Ms Brown's case because the reason she was dismissed was not the unfavourable reference as she had argued but rather the fact that she had failed to disclose she was under investigation by her former employer. Due to the nature of her work the employer would have had to report her to the CSCI in any case and evidence was also led to suggest that, even if she hadn't been dismissed, her former employer would still have given her an unfavourable reference.

The Appeal Tribunal also refused the Claimant's challenge regarding the amount of compensation awarded for unfair dismissal and ruled that the Tribunal had appropriately exercised its discretion in deciding to award Ms Brown a 30% uplift at the initial Tribunal rather than the 100% uplift she was seeking on appeal.

To view the case in full please see <http://www.employmentcasesupdate.co.uk/site.aspx?i=ed5714>

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### ***Office "banter" repercussions***

#### ***Growcott v Home Office NIFET/85/09***

Finally, a recent case highlighted how comments made as part of office banter may lead employers to be held liable for the comments made by their employees.



The Claimant here, Mr Growcott, worked for the Identity and Passport Service. He was on friendly terms with a senior colleague and the pair often engaged in humorous office “banter”. Mr Growcott applied for a new post within the IPS and upon confirming his attendance at an interview for the position he received an email back from his senior colleague which simply said “U r to old”. Another candidate was given the post.

Mr Growcott raised a grievance with his employer about the selection process and then, at a later stage, a claim with the Northern Ireland Fair Employment Tribunal (NIFET). One of the issues he raised in his claim for age discrimination (amongst other grounds) was the email from his colleague. The Tribunal found that, although jokes and humour were an accepted part of that particular workplace and the email was not meant to be malicious, that the context in which it was sent to Mr Growcott meant that it did constitute direct discrimination on the grounds of age. Mr Growcott was awarded £1,500 by his employer as a result.

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