November 2011 *Issue 8*

Employment Law Newsletter

INTRODUCTION

Welcome to the 8th edition of Field Court Chambers' Employment Law Newsletter.

Since the last issue of our e-bulletin, we are delighted to say that 11 new members (formerly from Lamb Building) have joined Field Court Chambers. Four of our new members practice in employment law and we have included their profiles in this issue.

In addition to our usual summaries of recent important cases, this edition includes a new section called 'Members' Cases' which features articles on selected interesting cases that our members have been involved with in the last few months.

We hope this section is informative and, over time, provides some insight into the array of employment cases in which members are instructed.

As always, we hope you enjoy the e-bulletin and we welcome any comments and suggestions for improvement.

Editor
Employment Law Newsletter
Field Court Chambers Employment Group

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For further information on the topics covered and ideas for future issues please contact:

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CASE UPDATES

Determining employee status through actuality of working relationship rather than contractual terms

Autoclenz v Belcher [2011] IRLR 820 (SC)

This is a case about a car-cleaning company and its relationship with individual valeters who carried out car-cleaning services at showrooms and auctioneers for it. The company had been very careful to describe the valeters in their contractual documentation as sub-contractors, to draft the other contractual clauses to reflect that nomenclature (including substitution clauses) and to make expressly clear that it was the intention of the parties the sub-contractors should not become employees of Autoclenz. The real issue for the Supreme Court was set out succinctly by Lord Clarke at paragraph 17, as involving:

> *…consideration of whether and in what circumstances the ET may disregard terms which were included in a written agreement between the parties and instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties or the true intentions or expectations of the parties.*

The Supreme Court expressed wholesale agreement with the position taken by the Court of Appeal in this case and in ***Protectacoat Firthglow Ltd v. Szilagyi*** [2009] IRLR 365, where it had been held that the relevant question was *'whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by'*. The courts recognised the reality of the drafting of employment contracts, that employees are very often presented with them on a 'take it or leave it' basis, and that a company's clever drafting to get circumnavigate the perils and duties of an employment relationship may not be a matter of common intention.

The Supreme Court thus held it open for tribunals to adopt a substantive approach to contractual construction that relies upon the actualities of the relationship to define the contract, rather than merely the restrictive reading of the contractual document itself.

(A longer version of this article appears in the September edition of the ELA Briefing)

Jason Braier
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Effective date of termination and summary dismissal during notice period

M-Choice UK Ltd v Aalders, UKEAT/0227/11/DA

Ms Aalders' employment with M-Choice UK Ltd commenced on 1 February 2010. She was given notice terminating her employment. The notice was to expire on 1 February 2011, at which point she would have had sufficient qualifying service to present a complaint of unfair dismissal. She brought a claim on 11 January 2011 (the "ordinary" unfair dismissal claim). By letter dated 21 January 2011 she was dismissed summarily (at that date not having sufficient qualifying service). Ms Aalders amended her ET1 to add a second complaint of "automatic" unfair dismissal asserting that the principal reason for her dismissal was that she had lodged a complaint of unfair dismissal, amounting to the assertion by her of a statutory right (section 104(1) ERA 1996).

At a pre-hearing review, the Employment Judge proceeded on the basis that Ms Aalders was bringing two separate claims of unfair dismissal. He found that the effective date of termination ("EDT") was 1 February 2011, and that she therefore had the requisite period of service for the "ordinary" unfair dismissal claim. He did not consider at all the effect of the letter of 21 January 2011 on the EDT nor the authorities cited to him on this point.

On appeal to the EAT, Mr Justice Keith found that Ms Aalders had brought just one claim of unfair dismissal, but that her claim was being advanced in two alternative ways. He held that when an employee is dismissed whilst they are working out their notice, the date of the ending of their employment is brought forward from the date on which their notice would have expired to the date on which they were summarily dismissed, even if the effect of that is to leave the employee without the necessary period of continuous service to present a complaint of unfair dismissal (the Court of Appeal decision of *Stapp v The Shaftesbury Society* [1982] IRLR 326 could not be distinguished).

Victoria Flowers
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Constructive dismissal and affirmation of the employment contract by prolonged delay

Fereday v South Staffordshire NHS Primary Care Trust UKEAT/0513/10/ZT

C considered that her employers had treated her in a way which was in fundamental breach of her contract of employment as a result of matters which occurred during the last months of 2007. She went on sick leave in December 2007 and never returned to work. On 24th March 2008 she submitted a formal letter of complaint. As C was dissatisfied with the way R responded to her complaint she asked for her complaint to be dealt with as a formal appeal under R's grievance procedure.

C's complaint progressed through R's grievance procedure and on 5th February 2009 a final stage appeal meeting was held. On 13th February 2009 a detailed letter setting out the R's response to the appeal was sent to C. On 24th February 2009 C was offered by R an alternative role matching her skill and abilities. C did not reply and a reminder letter was sent on 12th March 2009. C resigned on 24th March 2009.

The EAT upheld the ET's finding that C had affirmed the contract and thus was not able to mount a claim for constructive dismissal. The EAT made clear that mere delay is not of it itself enough amount to affirmation of the contract. However, affirmation can be implied from prolonged delay and/or if the innocent party also calls for performance of the contract from the guilty party. C's delay of six weeks in resigning was found to be a prolonged delay by the EAT. Interestingly the EAT also considered C had acted in accordance with the continued existence of the contract of employment by "requiring and accepting sick pay".

Miriam Shalom
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Whether an employer's considerations were legitimate before deciding to dismiss an employee for refusing to accept lower pay

Garside & Laycock Ltd v TG Booth – case summary
(Unreported. Appeal No. UKEAT/0003/11/CEA, EAT, *per* Langstaff J)
The Respondent is a building maintenance company that was suffering from trading difficulties and a reduced profit margin. It asked all its employees whether they would accept a five per cent reduction in pay. Almost all voted to accept the reduction and only the Claimant ultimately refused to accept a new contract on lower pay. He was dismissed.

The Tribunal's first finding – that dismissal for failing to accept a reduction in pay could form 'some other substantial reason' under s 98 (1) of the ERA – was undisturbed by the EAT. The Tribunal had gone on to find that the Claimant was unfairly dismissed on the grounds that the employer's financial circumstances were not so severe that pay reduction was the only way of saving the business; and that it was 'reasonable' for the Claimant to refuse the offer of new contractual terms.

The EAT criticised the Tribunal for misapplying *Catamaran Cruisers Ltd v Williams and Others* [1994] IRLR 386 so gravely that it reversed its meaning. The question is not whether an employee's decision is reasonable but whether an employer, having regard to all the circumstances and to equity, made a reasonable offer to its employees. It need not follow from a finding that an employee reasonably refused such an offer that the offer was itself unreasonable: both parties may act reasonably but the Tribunal should concern itself only with the employer's decision.

After having subjected the Tribunal decision to particularly robust judicial criticism, the EAT found that it could not rely on its findings of fact and remitted the case to a differently constituted panel for a re-hearing.

Francis Hoar
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A refusal to pay a bonus when there was no legal right to payment cannot amount to a deduction from wages

Hellewell v AXA Services UKEAT/0084/2011

The EAT considered claims that the refusal to pay bonuses to two employees who had been dismissed for gross misconduct constituted unlawful deductions from their wages. The Claimants had been dismissed in April 2010. Other employees who met the qualifying criteria had been paid their 2009 bonuses at the end of February 2010 but the Claimants, who were suspended at that time, were not paid any bonus. The 2009 and 2010 bonus schemes both contained provisions that no bonus was payable if the member of staff left the company as a result of gross misconduct. The Claimants argued that as they had not left the company by the time the 2009 bonus payments were made, they should have been paid that the company's failure to do so amounted to an unlawful deduction from their wages, contrary to s. 13(3) of the Employment Rights Act 1996. The Claimants also argued that they ought to have been paid sums under the 2010 scheme.

The EAT upheld the decision below, finding that before considering whether the failure to pay a bonus was an unlawful deduction, it was first necessary to determine the *total amount of wages properly payable*. The Claimants had to show that they had a legal right to payment of the bonuses. The fact that other employees had been paid their bonuses on a particular date did not entitle the Claimants to payment on that date. The employer was not obliged to pay before their dismissal and no bonus was payable once they had been dismissed for gross misconduct.

Christine Cooper
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Circumstances in which an employee is entitled to overtime payments

Driver v Air India [2011] EWCA Civ 830

Mr Driver worked for Air India at Heathrow as a catering manager. The principal issue which arose in the case was a question of contractual construction as to whether or not Mr Driver was entitled to overtime payments. His first employment contract at Heathrow stated that he would be "required" to work overtime "from time to time…both on a rostered basis and ad hoc basis". The employer resisted the claims for overtime payments under this first contract since a different term of the contract made provision for "current notices and circulars" relating to overtime to be "available for inspection on request". Air India stated that there were no notices or circulars and therefore submitted that there was simply an agreement to agree and no contractual entitlement to overtime pay.

The Court of Appeal held that even in the absence of the notices and circulars the contract created a contractual right to be paid for overtime where overtime was 'required'. The first contract had clearly contemplated that overtime would be paid and the general principal of contract law that a reasonable sum for payment is implied was applicable here. Subject to any guidelines, which did not exist, payment for overtime was not said to be discretionary. In the circumstances, there had not been any formal condition precedent. With proof that overtime had been worked (a question of fact) and that it had been required, which for the employer involved an evaluative process and for the court a question of balance of probabilities, overtime had been a contractual entitlement.

Steven Fuller
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MEMBERS' CASES

A selection of recent members' cases is featured below. Details of members' cases can be found on their individual profiles.

The Potency of Re-engagement as a Remedy

C, represented by Max Thorowgood, was employed as the Hotel Services Manager and Catering Manager respectively of two private hospitals in the North West. Aged 50 at the date of dismissal C was paid £38,000.00 p.a. The hospitals were part of a nationwide chain of more than 60 private hospitals. C suffered a complete breakdown in his relations with a new line manager and within weeks was subject to disciplinary proceedings and then dismissed.

He appealed successfully against his dismissal but was not reinstated on the ground that he would have been dismissed in any event by reason of redundancy following a restructuring of his roles to create dedicated, "Support Services Manager," roles in each hospital. It was alleged that C was not well qualified for those roles and that he would not have been appointed anyway because he would have been required to work with the manager who had dismissed him. R proceeded to appoint permanently two SSM's, one internally the other externally.

Unfair dismissal was admitted but R maintained that C would have been dismissed fairly in any event upon the completion of the redundancy exercise. C, who had not found alternative employment in the 12 months following his dismissal, sought an order for reengagement.

Section 116 ERA provides that in determining whether to make an order for re-engagement the ET must consider whether it would be *practicable* for R to comply. It further provides that where "… *an employer has engaged a permanent replacement for a dismissed employee*," the ET must ignore that fact in determining the issue of practicability if R need not have engaged a replacement or had waited a reasonable period without hearing from C that he wished to be re-engaged before employing a permanent replacement.

The issue of law for the ET was whether the appointment of 2 independent SSM's, an admittedly slightly broader role than C's roles which had ceased to exist, could trigger the 'permanent replacement' exclusion so that R's absence of vacancies could be ignored in considering practicability. The ET held that the new roles were sufficiently similar for it to be said that the newly appointed SSM's had 'replaced' C.

An order for re-engagement was made upon C's former terms (more favourable than the replacements') together with orders for back pay since dismissal and pay up until re-engagement.

Reinstatement and re-engagement were originally conceived of as the primary remedies for Unfair Dismissal and this case offers a salutary reminder that in the current environment they may not be the fanciful prospect they once seemed. In the right case, an application for such an order could be extremely potent. First, there is the price tag for back pay. Re-engagement will be upon former terms. Then there is the disruption of the consequential dismissal of the replacement if the punitive orders for non-compliance are to be avoided. In the event of non-compliance, an additional award of between 26 and 52 weeks' pay (above the cap but statutorily limited) may be made.

Max Thorowgood
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A mediation conducted recently by Paul Randolph

Mrs A was the Manager of a clothing store situated in a London shopping centre. The store was part of a well-known retail chain, with stores on every high street. Mrs A had made allegations of bullying and harassment of a sexual and racial nature, against Mr B, her Area Manager.

Mr B had repeatedly confronted Mrs A about "performance issues" during his site visits. He complained about the store's poor sales figures, the apparent low morale and lack of motivation amongst staff, as well as the "sloppy" appearance of the shop floor and window displays. Mrs A on the other hand considered these observations to be a form of bullying and harassment, which she believed was because she was female and black. She had instituted a grievance procedure which she felt had not been dealt with satisfactorily. The dispute escalated, and Mrs A threatened Tribunal proceedings for Sexual and Racial Discrimination.

The company turned to mediation. Their preferred outcome was for the two parties to be able to work constructively together. Alternatively, it was hoped that the mediation might enable Mrs A to leave the company without rancour - and without making a claim!

After receiving a file of papers from the Company, I had separate pre-mediation meetings with both Mrs A and Mr B. A mutually convenient date for the mediation was set, and both parties were content for the Stock Room of the Chain's principal store in the West End, together with a small adjacent office to be used as the venue.

At the mediation, during an exploration of the underlying drivers of their conflict, the parties acknowledged that the issues between them were largely a result of mutual misunderstandings and misperceptions in their oral and written communications with each other. However, it quickly became clear that both parties were unable to accept any explanation or clarification of these misunderstandings and misperceptions, and consequently, they realised that their 'mis-communications' were likely to recur, however professionally they sought to conduct their relationship.

The parties readily accepted that the most beneficial way forward was for them not to have to work together so that the possibility of future misunderstandings was effectively eliminated.

Following several phone-calls to the company's HR Director, it was established that it would be feasible for another (female) Area Manager to bring Mrs A's store within her remit, so that Mr B would no longer need to be in contact with Mrs A.

Mrs A was delighted because:

i) Mr B was "no longer on her back!" and
ii) the company had 'at last taken her complaint seriously'.

Mr B was equally happy: he had one less shop to cover, and the 'thorn in his side' had been effectively removed. The other female Area Manager was flattered to be given added the responsibility of this retail outlet.

A written agreement, in 'full and final settlement" of Mrs A's existing claims, was drawn up, reflecting the above accord.

Paul Randolph
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CHAMBERS NEWS

Introducing Field Court Chambers' new Employment Team Members

Paul Randolph is an Accredited Mediator (CEDR June 1999 and SPC: May 2000), and a Barrister, called in 1971. He has been at Field Court Chambers since July.

Paul is an experienced mediator, trainer and author on mediation. He is on the Board of the Civil Mediation Council, a member of the Bar Council ADR Committee, and former Chair of the National Mediation Helpline Provider's Forum. He was External Examiner on Mediation for the Bar Vocational Course at Cardiff University Law School, and is on the Professional Standards Committee of the College of Mediators.

Paul has mediated in a very large number and wide variety of employment and workplace disputes, as well as commercial, contractual, professional negligence, property, and probate conflicts. His special area of expertise is in the psychology of conflict: conflict management and avoidance. He has lectured on these topics - which are of particular interest to HR personnel - throughout the UK, Europe, and Asia.

Since 1999 Paul has been the Course Leader on a Mediation Skills Course (written by him) at the School of Psychotherapy and Counselling Psychology (SPCP), Regent's College, London, training and accrediting mediators.

He has written numerous articles on mediation, and his book *Mediation - A Psychological Insight into Conflict Resolution* (Continuum 2004), co-written with the late Dr Freddie Strasser, with a Foreword by the late Lord Slynn of Hadley, was favourably reviewed in *The Times* by Sir Henry Brooke, former Vice President of the Court of Appeal, and current Chair of the Civil Mediation Council.

David Brounger undertakes a wide range of civil work both in terms of advice and drafting and of advocacy.

David's practice covers all areas of employment law for both employers and employees, including unfair dismissal, sex/race discrimination, Wages Act claims and wrongful dismissal.

He has long experience of conducting complicated cases in the High Court and the County Court as well as various other tribunals including the Employment Tribunal.

David is also an accredited mediator with experience of conducting mediations in a wide range of disputes.

Nikolas Clarke has a general civil practice, specialising in personal injury, employment, police and prison law. He is a very experienced advocate, having had a general common law practice, including crime, for eleven years.

Nikolas has particular strength in witness-handling and the analysis and presentation of complicated facts and legal argument.

In employment law, Nikolas advises and represents employees and employers in all aspects of employment claims.

Toby Bishop joined Chambers in July. He advises, represents and negotiates on behalf of employers and employees. Recent employment law instructions include breach of contract claims commenced in the High Court against an investment bank and a FTSE100 company; representing an engineering multinational in a TUPE related dispute brought by its former operations director; representing a care worker in a dispute about the safeguarding of vulnerable adults; and representing a telecoms company in a dispute about the status of its workforce.

Toby undertook pro-bono employment work with FRU, law centres and the CAB before being called to the bar. He is a Middle Temple Harmsworth scholar and received the Middle Temple prize for outstanding performance in the bar exams.

In the summer of 2011 Toby conducted a seminar titled '*Beliefs vs Characteristics*' discussing the conflict between discrimination on the grounds of religion or belief and other protected characteristics. He accepts instructions in matters relating to discrimination, with a particular interest in disability, age and religion or belief; dismissal, including redundancy; whistle-blowing; TUPE; and contractual disputes.

Toby's other work includes property and commercial litigation.

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