

July 2011 *Issue 7*

Employment Law Newsletter

INTRODUCTION

Welcome to the Summer 2011 issue of Field Court Chambers' Employment Law Newsletter.

Chambers' Employment Team has strengthened in the last few months with the addition of Francis Hoar (formerly of Clarendon Chambers) and the return of Victoria Flowers from her stint working for the Lord Chief Justice at the Court of Appeal. Profiles of both new members of our team can be found below.

The employment team has also announced the date of its next employment seminar – a mock tribunal focusing on redundancy – to be held on 22 September 2011, which will doubtless provide for a fun and informative event, and an excellent opportunity for solicitors old and new to acquaint or reacquaint themselves with Tribunal procedure and some of the intricacies of redundancy law.

Also in this issue of the newsletter, we have articles on the new public sector equality duty and the Agency Worker Regulations 2011, as well as case summaries on cases including Sue Shoemith's successful appeal against her on-air dismissal by Ed Balls, and *Allen v Houna*, which the ET described as "probably one of the saddest cases that has come before this Tribunal".

As always, we hope you find this quarter's newsletter informative and we welcome your feedback.

Jason Braier
Chairman
Employment Group

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EMPLOYMENT TEAM

Franklin Evans (1981)	John Crosfill (1995)	Miriam Shalom (2003)
Miles Croally (1987)	Max Thorowgood (1995)	Christine Cooper (2006)
Bernard Lo (1991)	Sami Rahman (1996)	Rhys Hadden (2006)
Christopher Stirling(1993)	Jason Braier (2002)	Steven Fuller (2008)
	Francis Hoar (2001)	Victoria Flowers (2009)

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

sabina.smith@fieldcourt.co.uk

Tel: 020 7405 6114

CASE UPDATES

Limit of ET's role in considering redundancy scores

Dabson v David Cover & Sons UKEAT 0374/10/SM

C had been employed by R as a transport manager having worked his way up from a yard boy when he joined R in 1981. In February 2009 R announced that redundancies would have to occur, 80 employees were at risk and 22 would have to be let go. R's proposals included redistributing the work carried out by the operations manager, the transport manager and the transport assistant. C was considered for both the role of transport manager and transport assistant.

C, when being considered for the role of transport manager, was given a score of 2 out of 2 for the criterion "ability to plan routes", but when considered for the more junior role he was awarded 1 out of 2 for a criterion entitled "ability to assist with Route planning". C scored one point less than his competitor for the more junior role and was dismissed.

The ET considered a number of issues relating to C's dismissal including the scoring. It was argued by C that the lower score on the planning routes criterion for the lesser role was illogical. The ET found the dismissal to be fair. C appealed to the EAT.

The EAT observed that there was no reason why the criterion "ability to plan routes" should be assumed to be identical to one of "ability to assist with route planning". The EAT emphasised that an employment tribunal should not go beyond seeing whether the selection including the marking was fair and should only investigate the marking where there was an absence of good faith or error.

Miriam Shalom
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Differential effect of illegality on unfair dismissal and discrimination claims

Allen v Houna (UKEAT/0326-0329/10/LA)

Ms Houna was a Nigerian girl who entered the UK under a false name on dishonest grounds at the instigation and on the instruction of Mr and Mrs Allen. She entered under a visitor's visa granted due to a false assertion that she had been invited by Ms Allen's mother (who Ms Houna falsely stated to be her own grandmother) for a holiday, but was coming to work, in effect, as au pair/domestic servant for Mr and Mrs Allen.

Ms Houna lived with Mr and Mrs Allen for 18 months but was subjected during that time to serious physical

abuse. She was thrown out of the house and thereby dismissed following a beating after the Allens' children would not eat some dinner cooked by Ms Houna.

The ET found the contract tainted with illegality and therefore found Ms Houna precluded from bringing an unfair dismissal claim or any claim arising under the contract of employment.

The EAT categorised the illegality in the third *Enfield Technical Services v Payne* [2008] ICR 30 category where the jurisdiction of the ET is precluded, namely in respect of a contract lawful when made but illegally performed, where the party seeking the court's assistance knowingly participated in the illegal performance. The EAT held it irrelevant that the consequence of this would enable the Allens to benefit from the illegality they instigated.

As to the effect of illegality on Ms Houna's race discrimination claim, the EAT noted that in *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, the Court of Appeal considered a discrimination claim a statutory tort rather than being based on the employment contract itself, so that a claim will only be refused on illegality grounds if there is an inextricable link between the facts giving rise to the claim and the illegality. In this case, as the Claimant's being in the UK unlawfully was more at the behest of her employer than herself, and as her position as a servant working and living in the UK was not inextricably linked with the acts of eviction and dismissal, it was held that her discrimination claim was not prevented by any taint of illegality. However, as regards quantum, Ms Houna was not entitled to an award for loss of wages under the RRA because she was never lawfully entitled to work in the UK and there was no suggestion she would have been working abroad.

Jason Braier
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Compensation: the correct approach to career long loss and the statutory uplift

Wardle v Credit Agricole [2011] EWCA Civ 545

The ET found Mr Wardle to have been refused promotion by reason of his nationality, and subsequently unfairly dismissed (an act of victimisation by the employer because Mr Wardle took proceedings for race discrimination).

The appeal concerned whether the ET had properly assessed the compensation flowing from the unlawful acts.

The matter was appealed to the EAT, and subsequently to the Court of Appeal (the Master of the Rolls, Smith

and Elias LJ). Elias LJ gave the lead judgment.

As to statutory uplift (the case was decided under s 31(3) EA 2002 which is no longer in force – for the current statutory uplift of no more than 25%, see s 3 EA 2008, it was held that:

- The size of the compensation awarded is a potentially relevant factor when exercising the discretion to increase the award.
- An increase to the maximum of 50% (under the previous law) should be very rare indeed, and should be given only in the most egregious of cases. The ET should fix the appropriate uplift by focusing on the nature and gravity of the breach, and then translate this to money terms and reconsider it. The sum must not be disproportionate, and the sums that are awarded for injury to feelings and aggravated damages are of some relevance to this.
- The statutory uplift must relate to the particular claim in respect of which the statutory procedures were infringed (in this case the failure to comply with the statutory grievance procedures related solely to the dismissal rather than the discriminatory failure to promote).

As to future loss, the Court of Appeal held that it will be a rare case where it is appropriate for a court to assess compensation over a career lifetime. This is not because the exercise is in principle too speculative, nor due to floodgates, but because the usual approach of assessing loss up to the point the employee would be likely to obtain an equivalent job fairly assesses the loss in the vast majority of cases where it is at least possible to conclude that the employee will in time find such a job.

Victoria Flowers
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When breakdown in trust and confidence between employees can be ‘some other substantial reason’ for dismissal

Ezsias v North Glamorgan NHS Trust (UKEAT/0399-0401/09/CEA)

Mr Ezsias was a surgeon employed by the Trust from 1998 until his dismissal in 2005. Following the petition of senior staff asserting that their relationship with Mr Ezsias had irretrievably broken down, the Trust ordered an independent investigation. The investigator found that Mr Ezsias's behaviour had led to a fundamental breakdown of trust and confidence, leading to his dismissal without a disciplinary hearing. The unsuccessful appeal to the Tribunal was on the grounds that the dismissal was in fact due to protected disclosures made by Mr Ezsias under s 103A of the

Employment Rights Act 1996 (or ‘whistle-blowing’) and thus unlawful. The EAT found that none of the disclosures were protected as they were made in order to undermine his colleagues, not in good faith (applying *Street v Derbyshire Unemployed Workers Centre* [2004] 4 All ER 839).

Mr Ezsias's remaining related grounds of appeal concerned the question of whether or not he had been dismissed due to his conduct, in which case the Trust would have been in breach of contract by failing to institute a disciplinary hearing. The EAT relied upon *Perkin v St George's Healthcare NHS Trust* ([2005] IRLR 934, CA) in finding that the breakdown in relationships with Mr Ezsias's colleagues was itself ‘some other substantial reason’ for his dismissal (s 98 (1) (b) of the ERA). The fact that Mr Ezsias's conduct had caused the breakdown did not mean that his dismissal was due to his conduct; rather, his dismissal would have been justified regardless of the cause of the breakdown.

The EAT's conclusion is problematic as the Court of Appeal in *Perkin* appeared to hold (*obiter*, at para [60]) that only where the employee was responsible for the breakdown in relations would this ground be an SOSR, thus envisaging at least some findings related to an employee's conduct. Moreover, the EAT's finding would allow employers to dismiss employees even where they were not responsible for such a breakdown (one of the EAT's findings was that the Trust was entitled to take account of the unwillingness of other employees to work with Mr Ezsias, a state of affairs that need not always be caused by the employee in a minority of one). It seems unlikely that this case will be the last word on SOSR.

Francis Hoar
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No direct discrimination if non-disabled person treated the same

JP Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648

The Court of Appeal found that there was no permissible basis for an employment tribunal's finding of direct disability discrimination where the tribunal had expressly found that a non-disabled employee would have been treated in a similar manner, in respect of the alternative, disability-related discrimination claim.

The former employee in this case suffered injuries as result of a skiing incident. As a result he had a disability under the Discrimination Act 1995. He received a bonus for 2007 (the year following the accident) that was considerably smaller than it had been for 2006. This was said to amount to direct disability discrimination or alternatively disability-related discrimination.

The employer maintained that the smaller bonus was due to the company's worse overall performance. The former employee then lost his job as a result of a claimed redundancy, leading to claims that his dismissal was directly discriminatory and/or disability related.

The employment tribunal found for the former employee in respect of both bonus and redundancy claims on the ground of direct discrimination. The employer had not been able to show that the relevant decisions were unconnected to the disability. The alternative claim of disability-related discrimination was rejected as the tribunal found that a non-disabled person would have been treated in the similar manner. The Tribunal accepted the employer's contention that the smaller bonus arose as a result of the former employee being over-reliant on one key.

On appeal, the EAT held that the tribunal's reasoning on direct discrimination could not stand given that it had accepted in respect of disability related discrimination that any employee with a narrow client base would have been treated similarly or the same. The EAT did, however, think that there might be sufficient evidence from which it was possible to conclude that the employer's actions were directly discriminatory and the case was remitted.

There was then an appeal to the Court of Appeal. Lord Justice Elias pointed out that the employment tribunal had found that disability played a part in the former employee's dismissal on the basis that the disability prevented him working the hours necessary to increase his client base. This conclusion was not open to it given its finding that any other non-disabled employee unable to work the necessary hours would have been similarly treated.

Sami Rahman
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Even 'accountable' office holder entitled to fair procedure

Shoesmith v Secretary of State for Children, Schools and Families and others [2011] EWCA Civ 642

This case arose out of the sacking of Sharon Shoesmith, Director of Children's Services (DCS) in Haringey, following the death of "Baby P". The court was dealing with the judicial review applications relating to (i) the decision of the then Secretary of State for Children, Schools and Families, Ed Balls, in effect to direct Haringey to remove Ms Shoesmith from her statutory office (DCS) in light of an OFSTED report critical of children's services in Haringey and (ii) Haringey's subsequent decision to remove her from that office. Ms

Shoesmith alleged that Ed Balls had failed to adopt a fair procedure in that he had not given her any opportunity to comment on her personal involvement in the situation.

She alleged in relation to Haringey that the authority's decision to rely on the direction of the Secretary of State was unlawful since that direction itself had been unlawful. This was not therefore strictly an employment law case and did not deal with the question of whether Ms Shoesmith had been unfairly dismissed under ERA 1996.

The Court of Appeal held that the Secretary of State's direction had been unlawful because of a failure to provide any procedural safeguards. The mere fact that the DCS was "accountable" for the provision of children's services in Haringey did not mean it was acceptable simply to direct her removal because of an unsatisfactory state of affairs in Haringey. She was entitled to an opportunity to comment. Further, the removal of a public office holder from their post (by Haringey) was amenable to judicial review and in the circumstances of the case it was appropriate to grant a declaration of unlawfulness. Haringey's decision had been unlawful because of the appearance of a pre-determined decision and the reliance on the Secretary of State's unlawful direction.

Steven Fuller
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No ETO reason for Administrators to dismiss CEO

Spaceright Europe Ltd v Baillavoin (UKEAT/0339/10/SM)

B was employed as the CEO of UH Ltd, a holding company of two subsidiaries. The group supplied school furniture and other educational products. The group encountered financial difficulties, and its bankers put UH Ltd and a subsidiary into administration. The administrators dismissed B on the same day. The business continued to operate and about a month later the administrators sold the business and assets of UH Ltd, to SE Ltd a newly formed company.

B claimed unfair dismissal alleging that the administrators had been working in collusion with two of SE Ltd's directors, who had previously been working for the UH Ltd group. It was agreed that the sale of the group amounted to a transfer of an undertaking. Pursuant to Reg 4(2) TUPE, as all of the transferor's liabilities in connection with a contract of an employee assigned to the undertaking are transferred, it must follow that so must the liability.

The employment tribunal decided that B's dismissal was unfair. It found that the sole or principal reason for it was connected with the transfer, because B was dismissed

so as to enable a purchaser to acquire the business and assets of the undertaking without his continued employment. Further, the tribunal considered that although the reason for B's dismissal may have been economic or organisational, it did not entail changes in UH Ltd's workforce. B's dismissal was automatically unfair under Reg 7(1) TUPE.

There was an appeal to the EAT, where it was noted that there are conflicting authorities at EAT level as to whether a reason for dismissal is connected with the transfer where, at the time of dismissal, the specific transfer is not yet within the contemplation of the parties.

The EAT held that the tribunal had been right to prefer the EAT's conclusion in *Harrison Bowden Ltd v Bowden*: that it is not necessary for the specific transferee to be identified at or before the moment of dismissal. The EAT also came to the conclusion that it was plain that the administrators' reason for dismissing B was not an 'economic technical or organisational' (ETO) reason.

The reason did not relate to the conduct of the business as a going concern; it related to the sale of the business. The business was always going to need a CEO. B's dismissal was not intended to reduce the number of employees in the ongoing business, for it was contemplated that B would be replaced, as indeed he was.

Sami Rahman
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Time limit for s49 protected disclosure claims runs from act, not its consequences

Vivian v Bournemouth BC UKEAT/0254/10/JOJ

V was an administrator working for the local authority B. She fell out with her line managers. In February 2008 she went on sick leave, as it turns out, never to return.

After an unsuccessful attempt to mediate the dispute on 2 June 2008 V sent B a grievance in which she complained about the way her managers treated her. B commissioned an investigation of V's complaint which concluded that there was insufficient evidence of any bullying. V appealed that decision and to a degree that appeal succeeded as a review was undertaken of the original investigation. That review concluded that the original investigation was impartial and fair.

It was by then November 2008 and B took steps under its Bullying and Harassment Policy to reintegrate V into the workplace. It appears to have been common ground that V could no longer work with her line managers. B informed her that she would be placed in the redeployment pool but if no alternative role was found in

four weeks she could be dismissed.

V protested and brought further grievances complaining about the manner in which her earlier complaints had been investigated, the shortness of the redeployment period and that her requests for an extension of sick pay had been refused.

Those grievances were not upheld and V was dismissed when no alternative role was found for her. V brought proceedings in the employment tribunal in which she claimed that:

- (1) her letter of 2 June was a protected disclosure;
- (2) B's handling of her complaint amounted to unlawful detriment; and
- (3) her dismissal was unfair by reason of s103A of the ERA 1996 (i.e. that her protected disclosure was the reason for her dismissal).

Whilst the employment tribunal accepted (generously one might think) that the letter of 2 June 2008 was a protected disclosure they dismissed all of her claims. In particular deciding that:

- (a) the unlawful detriment claim was out of time; and
- (b) the reason for the dismissal was not the making of the protected disclosure.

V appealed.

Held:

1. That the time limit for bringing a "detriment" claim by reason of a protected disclosure runs not from the time that the detriment was suffered but from the time that the "act" that led to the detriment took place.
2. That an "act" is on the grounds that an employee has made a protected disclosure if either it is done by reason of the disclosure OR the act was inherently for such a reason – on the facts nobody was motivated by V's protected disclosure nor was being placed in the redeployment pool an inherent result of bringing the complaints
3. That the question of whether an "act" led to a "detriment" was a question of causation.

4. That there was no error of law in the ET's conclusions:
- a. that the dismissal was not by reason of the protected disclosure and
 - b. that the reason for the dismissal was "some other substantial reason" namely the irretrievable breakdown in relations and was fair.

Comment:

It seems that this is another protected disclosure case that received a cold reception. The competing arguments in this case mirror the difference in limitation periods for contract and tort. The former running from breach and the latter from damage.

This is a point that advisors will wish to keep under review. It is worth noting the suggestion that if there is a long gap between the "act" and the "detriment" then it might be possible for a claimant to avail themselves of the "not reasonably practicable" extension of time as no claim can be brought until the detriment has been suffered.

John Crosfill
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ARTICLES

New public sector equality duty

Local authorities and other public bodies were subject to a number of duties under the previous anti-discrimination legislation in respect of race, gender and disability. Each Act had its own general duty to promote equality which was supplemented by specific actions that had to be taken in pursuit of that general duty. On 5th April 2011, these existing duties were replaced by the new duties contained in Chapter 1 of Part 11 of the Equality Act 2010.

The general duty set out in s.149 of the Act requires public bodies to have due regard to the need to:

- (1) eliminate unlawful discrimination;
- (2) advance equality of opportunity;
- (3) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Having *due regard* means that each of these needs must be consciously considered when decisions are taken. Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:

- (1) remove or minimise disadvantages;
- (2) suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (3) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (4) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

- (1) tackle prejudice; and
- (2) promote understanding.

Compliance with the equality duty may involve treating some persons more favourably than others to the extent permitted by the Act.

It should be noted that the equality duty encompasses all of the protected characteristics in the 2010 Act and so is considerably wider than under the previous regime. The duty also bites on anyone who exercises a public function (but only in respect of those functions). Clearly, this includes other organisations contracted by a local authority to provide services on its behalf.

The equality duty applies to decisions that affect a public body's own employees just as much as it applies to the services delivered or public function carried out. Where decisions are to be taken which will affect the workforce, this means that: (i) the decision maker(s) must be aware of the equality duty and what it entails; and (ii) real and effective consideration must be given to the three limbs before making a decision. Although not required by the Act, it would also be prudent to keep a careful record to demonstrate compliance with the equality duty.

Christine Cooper
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Do Agency Workers Regulations 2010 mark the end of second class workers?

The 1st of October sees the right for qualifying agency workers to receive equal treatment, for the first time. This is in respect of the same basic contractual terms they would ordinarily have received had they been recruited by the hirer, as an employee or a worker from the start of the assignment. The key terms affected that relate to pay are: duration of working time, rest periods/rest breaks, entitlement to annual leave (& public holidays) and information on vacancies.

The guidance published on 6 May 2011 explains the extent and nature of the right through the use of some well-worked illustrations.

There will be a 12 week qualification for most of the key rights but some rights will be available to agency workers from day 1 (this qualification period can only run from the 1st October 2011). The agency worker qualifies as long as he or she is in the same role or another role that is not substantively different.

The regulations allow for a six weeks' absence, or being assigned to a substantively different role with the hirer, acts as a break in service. In order to preserve continuity certain absences (including maternity and paternity leave) will continue to count towards qualifying service. Other absences (as a result sickness absence up to 28 weeks) will not result in a break in continuity.

The regulations forbid intentional avoidance. Any breach may result in a £5,000 additional award.

The self-employed (whether direct or via personal service companies) are excluded, as are 'managed service contracts'.

There is provision under the regulation for an agency worker to compare himself with employees of the hirer. The roles must be the same or broadly the same.

There is only a right to equality to 'basic terms'. There a number of excluded payments including occupational sick pay, pension, compensation for loss of office, maternity pay, redundancy and notice pay, expenses, financial participation schemes (shares, options or profit share) and most benefits in kind. Pay reflecting the longer term relationship between employer and employee and/or performance of the company or organisation, rather than pay for the quality or amount of work done, is unlikely to be pay for the purposes of equal treatment.

Where there is non-compliance with the regulations any claims will primarily be against the agency but there is a 'reasonable steps' defence where the agency has sought and acted upon appropriate information from the hirer.

Failure to provide equal treatment attracts a minimum tribunal award of two weeks' pay (subject to a residual discretion).

Benefits in kind are excluded from the equal treatment regime with one exception. This is any 'voucher or stamp' with a fixed monetary value and which can be exchanged for money, goods or services.

There is an ability to pay in lieu of untaken holiday, over and above the working time minimum and rolling up holiday pay in the hourly rate is allowed for the element above the working time minimum but only in respect of only the excess.

There are some rights that agency workers will have from day one, these are to:

1. collective facilities and amenities – canteen, transport, childcare;
2. Information about relevant vacancies, opportunity to apply.

Comments and conclusion:

The regulations do change the landscape, nature and perhaps may impact on the frequency and nature of use of agency workers, in the future.

One noteworthy exception to the pay equality duty that may be challenged applies in respect of those that have permanent employment contracts with the agency.

These agency workers will be entitled to a minimum 50% of pay or NMW if no work is available and the Agency must pay for at least 4 'non-assigned' weeks before the agency can terminate employment contract, but not equality in respect of pay with the hirer's permanent employees. It remains to be seen whether this will be used although several agencies do appear to have contract of employment with their agency workers.

There is no change in respect of the inability of an agency worker to claim unfair dismissal and limited ability to make a claim of discrimination against the hirer. (Please see *Muschett v HM Prison Service* [2010] EWCA Civ 25 and *James v London Borough of Greenwich* [2008] IRLR 302). The anti-avoidance provisions are perhaps the area where that is most to give rise to case law.

Sami Rahman
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CHAMBERS NEWS

Introducing Francis Hoar and Victoria Flowers

Two members who have recently joined the Employment group:

Francis Hoar (Called 2001) joined Field Court from Clarendon Chambers in May. Francis specialises in Employment, Commercial and Public Law, in addition to fraud and regulatory work. He recently acted for a senior property manager in a case of unfair dismissal and represents and advises employers and employees in cases of discrimination, redundancy and unfair dismissal at all levels. His considerable trial advocacy experience was developed in the criminal courts in his early years of practice and he is known as a robust and tenacious cross-examiner.

Francis recently published a webinar on 'Pursuing and Defending Claims under the Equality Act' for Local Government Lawyer. He lectures on all his practice areas and will be lecturing on 'Evidence' in Field Court's 'Preparation for Trial' lecture series in the autumn. Francis writes for the *Modern Law Review*, the *Local Government Lawyer* and *Counsel* and regularly appears to discuss current legal issues on the Victoria Derbyshire show on Radio 5 Live (not always an easy experience for lawyers, as Ken Clarke recently found).

Francis recently wrote a chapter arguing for a British Bill of Rights in *The State of Civil Liberties in Modern Britain* (Biteback Publications, 2011). Francis read Law at Bristol University, where he received the John Colston Award, and was a Hardwicke and Thomas More Scholar at Lincoln's Inn. His interests include running (including in the 2008 London Marathon where he raised £2,500 for cancer research), skiing, riding and singing.

Victoria Flowers joined the Employment Team on her return to Chambers in May 2011 having spent two terms as a Judicial Assistant in the Court of Appeal (Civil Division) assisting the Lord Chief Justice and Lord Justice Carnwath.

Victoria spent part of her pupillage supervised by John Crosfill, and gained exposure to numerous employment disputes, including the appeal to the Employment Appeal Tribunal in *Bebbington v Palmer (t/a Sturry News)* [2010] UKEAT 0371 (the employment status of a 15-year-old paperboy).

She has been instructed in both unfair dismissal and breach of contract cases. As a Judicial Assistant, Victoria assisted with various employment appeals, and she is keen to undertake work in the field of employment.

Field Court Chambers

SEMINARS

Mock Employment Tribunal

Date: Thursday 22nd Sept 2011

Venue: Quadrant House, 10 Fleet Street, London EC4 1AU

Time: 18.00 – 20.00 **CPD points:** 2

Preparation for Trial 2011

Date: Thursday 27th Oct 2011

Venue: Quadrant House, 10 Fleet Street, London EC4 1AU

Time: 18.00 – 20.00 **CPD points:** 2

Bookings:

To book a seminar call: 020 7405 6114, or
Email: clerks@fieldcourt.co.uk.

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