November 2009 *Issue 1*

Employment Law Newsletter

INTRODUCTION

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

Advances in employment law move apace. Major new legislation is brought into force on at least an annual basis. The Employment Appeal Tribunal and higher appeal courts constantly push or change the boundaries of legislative interpretation and the expectations placed upon employers. To do the very best for our clients, we must all do our very best to keep abreast of this constant downpour of new information.

With a thriving employment law group advising and representing claimants and respondents across the full range of claims, the employment law specialists at Field Court Chambers are well placed to sift through this deluge and to distil the most important and interesting parts for your ease of reference.

In our new regular newsletter, we aim to keep you updated on the law and on interesting employment law goings-on at Field Court Chambers (cases, seminars, articles, etc.) to provide an easy to read, useful and essential guide to the employment law continuum.

We hope you enjoy.

By Jason Braier
Employment Team

CONTENT

EMPLOYMENT TEAM

Franklin Evans (1981)
Miles Croally (1987)
Joshua Swirsky (1987)
Bernard Lo (1991)
Christopher Stirling(1993)
John Crosfill (1995)
Max Thorowgood (1995)
Jason Braier (2002)
Miriam Shalom (2003)
Christine Cooper (2006)
Rhys Hadden (2006)
Steven Fuller (2008)

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

Motive irrelevant in race discrimination

Amnesty International v Ahmed (EAT)
(Appeal No: UKEAT/0447/08/ZT)

Miss Ahmed was born in Sudan and employed by Amnesty. She was considered for promotion to the position of researcher for Sudan but in the end she was not appointed.

Amnesty's decision was based on:

(1) concerns over an increased danger to Miss Ahmed's safety, arising from her ethnicity, were she to travel to the region; and

(2) the possibility that her background might result in the organisation being perceived as biased. She resigned as a consequence and brought proceedings claiming unlawful discrimination contrary to s.4 of the Race Relations Act 1976.

Amnesty argued its decision not to appoint Ms Ahmed was not direct discrimination, nor was it unlawful as the defence under s.41 1976 Act being "an act done pursuant to any enactment" was applicable. The relevant legislation relied on was the Health and Safety at Work Act 1974.

Held: that there were two kinds of discriminatory treatment. One where the ground or reason for the treatment was inherent in the act itself and a second were the act complained of is not itself discriminatory but is rendered so by a discriminatory motive.

In the first case the motive for the discriminatory treatment, even if benign, was irrelevant.

The EAT concluded that in the absence of a perversity challenge it was not open to reconsider the tribunal's finding that Amnesty's decision not to appoint Miss Ahmed did not satisfy the test of being reasonably necessary in order to comply with the Health and Safety legislation and hence could not be justified under s.41.

More importantly it also considered that the effect of s.41 (1A) of the 1976 Act was to disapply s.41 in the case of all discrimination direct or indirect within the scope of the Race Directive (Council Directive EC 2000/43).

By Miriam Shalom

Back to content

Summary dismissal of alleged rapist - not discriminatory

B & C v A UKEAT 0503/08/DA

In this somewhat unusual case, a senior female employee ("X") complained to her manager ("C") that she had been violently raped by a colleague ("A"). The matter was reported to the police who believed X's account but took no further action (presumably because she would not give evidence). After consulting his employer's legal advisors, C summarily dismissed A without instigating the usual disciplinary process.

A did not have the requisite qualifying service to claim unfair dismissal and instead brought a claim for sex discrimination, arguing that the decision to dismiss him had been motivated by an automatic assumption (whether conscious or unconscious) that an accusation of rape by a woman against a man must be well founded.

The tribunal at first instance did not accept this proposition, instead finding that there were good reasons why C believed that the allegations were true (not least because the police believed them). However, the Tribunal held that C's decision to deny A due process was because of a fear of further violence and that he would not have had that fear if the aggressor had been a woman. Accordingly it found that the dismissal was on the grounds of A's sex. The employer appealed.

Whilst the EAT made it very clear that it considered A to have been treated unfairly, it did not accept that there was any evidence that C would not have feared further violence from a female aggressor and acted in the same way. The appeal was allowed.

By Christine Cooper

Back to content

Employee to give credit for earnings during notice period following constructive dismissal

Stuart Peters Ltd v Bell [2009] EWCA Civ 938

An Employment Tribunal found in favour of Ms Bell that her resignation from employment with Stuart Peters Ltd amounted to constructive unfair dismissal. Ms Bell was entitled to a six-month contractual notice period.

During the notice period Ms Bell had found temporary work, for a different employer, for a period of three months.

Apart from a small sum paid to reflect loss of statutory rights, the compensatory loss was therefore limited to the loss suffered during the notice period itself. In assessing compensation in respect of the six-month notice period, the Tribunal declined to offset those earnings against the compensatory award, applying the principle in *Norton Tool Company Ltd v Tewson* [1972] ICR 501, namely that where an employer summarily terminated the employee's contract, the tribunal was entitled to award compensation for the notice period by ignoring any remuneration received by the employee for work done for third parties in that period. Stuart Peters Ltd lost on appeal to the EAT but have now won on subsequent appeal to the Court of Appeal.

The Court of Appeal pointed out that the general rule is that an unfairly dismissed employee should be compensated for loss actually suffered (s.123, ERA 1996). The principle in *Norton Tool* is a limited exception to that general rule and applies where an employee has been actually dismissed. Elias LJ held that this limited exception to the general rule requiring mitigation of loss does not apply where the dismissal was constructive dismissal. The reason being that it is simply not the case that it is good industrial practice to make a payment in lieu of notice in such a situation.

In the EAT it was suggested that a final ruling from the House of Lords would be welcome and it is strongly possible that there will be a further appeal to the Supreme Court.

By Rhys Hadden

Back to content

Proper approach to s.95 (1) (c) and curing breach in constructive dismissal

Buckland v Bournemouth University

Professor Buckland resigned after an academic dispute and claimed constructive dismissal. The ET found there had been a fundamental breach. It also found that a report into the matter carried out by another academic did not cure the breach.

The university submitted that the ET ought to have applied the "band of reasonable responses" test to the question at the s.95 (1) (c) stage of whether Professor Buckland was constructively dismissed.

The EAT dismissed this submission and found that it could not uphold the line of EAT authority, culminating in *Claridge*, which imported into the s.95(1)(c) test the s.98(4) 'range of reasonable responses' test. The EAT held that doing so either added nothing, in which case it was superfluous, or it altered the House of Lords test, in which case it would be impermissible.

In summary, the EAT stated:

1) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Mahmud* test should be applied;
2) if, applying the *Sharp* principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
3) it is open to the employer to show that such dismissal was for a potentially fair reason;
4) if he does so, it will then be for the ET to decide whether dismissal for that reason fell within the range of reasonable responses and was fair.

However, the ET was wrong in effectively applying a subjective test to curing the breach: the test was objective.

By Steven Fuller

Back to content

Entire agreement clauses treated as shams when not reflecting reality

Launahurst Ltd v Larner (UKEAT/0188/09/MAA)

The claimant worked installing double glazing for the respondent for 13 years. In 2004 he signed a "contract supply agreement", although the relationship continued as before. The agreement purported to define the claimant as a supplier of services, rather than an employee, and contained an "entire agreement" clause. The claimant claimed unfair dismissal when the respondent stopped using his services. The respondent sought to rely on the terms of the agreement, including the entire agreement clause.

Held: the judge had been entitled to conclude that the "entire agreement" clause was a sham and that the claimant was an employee since the operation of the relationship demonstrated that the parties did not realistically intend, or envisage, that the terms of the contract would be carried out as written.

This case is a further demonstration of the need for employers (and putative purchasers of services) and their advisers to consider the true factual nature of the relationship they create, rather than assuming that a contract, even one with an entire agreement clause, will be treated as definitive as to the intentions of the parties.

By Steven Fuller

Back to content

Sick leave does not count towards annual leave

Pereda v Madrid Movilidad SA (ECJ) (Case C-277/08)

Mr Pereda worked as a specialist driver of a tow truck for a company that removed cars wrongly parked on public highways. He was allocated a period of annual leave but was off on sick leave during all but two days of that period.

In finding Mr Pereda entitled to further annual leave to make up for the coincidence with it of sick leave, the ECJ stressed that the purpose of annual leave is to enable a worker to rest and to enjoy a period of relaxation and leisure. That purpose is not fulfilled during sick leave.

The ECJ further ruled that its position as to the health and safety need for annual leave still applies if, due to sickness, the worker is unable to take annual leave during the year in which the annual leave should have been taken. In those circumstances the period should be carried over.

This ruling will no doubt cause concern for businesses, especially small businesses. It provides temptation to employees to claim some days of sickness during annual leave in order to accrue further leave. It also raises the spectre of long term sick employees being entitled to a vast period of accumulated annual leave upon their return from sickness.

By Jason Braier

Back to content

Default retirement age 65 lawful - for now

R (on the application of Age UK) v Secretary of State for Business Innovation and Skills

Judicial review proceedings were brought by Age UK (formerly Age Concern) alleging that the Employment Quality (Age) Regulations 2006 failed to lawfully implement European Council Directive 2000/78/EC in that:

1) regulation 3 permitted an employer to justify direct discrimination; and
2) a default retirement age of 65 was provided in r. 30 after which the employer did not have to justify a dismissal on the grounds of retirement.

Mr Justice Blake's long and careful judgment analyses the circumstances in which a national government can legitimately derogate from the principle of non-discrimination in order to advance social policy aims.

The Secretary of State argued that the social policy behind both the capacity of private employers to justify direct discrimination and the state's justification for the default retirement age was:

"preserving the confidence and integrity of the labour market and providing sufficient clarity to the work force and employers to prevent that confidence being damaged with detrimental consequences to employment and the terms on which employment is offered in the UK".

Held: the government had been entitled to take that view and that the default retirement age of 65, adopted in 2006, was proportionate at that time. However, Blake J went on to say that the position might have been different if the government had not announced the 2010 review and that he could not see how 65 could remain the default retirement age after that review.

By Christine Cooper

Back to content

Employers can avoid statutory uplift by last minute payments

Tim Arrow & Sons (a firm) v Onley (UKEAT/0527/08/RN)

Mr Onley was employed as a painter and decorator for six years. A redundancy situation arose and he was eventually summarily dismissed without notice pay, redundancy pay or any accrued holiday pay. His employer had also failed to follow any statutory procedures. Mr Onley brought a claim for unfair dismissal. A week prior to the ET hearing his employer paid Mr Onley the notice and redundancy pay due to him.

Held: that a statutory uplift on a sum awarded to an employee, due to the employer's failure to comply with the statutory grievance and dismissal procedures, should only be calculated on the outstanding sum due, rather than the total amount of the award. HHJ Reid QC was evidently unhappy in reaching this conclusion, noting its rebarbative effect:

'Certainly it goes against all instinct to allow a party to get away from the statutory uplift merely by paying the sum due at the last possible moment before the award is made. But we are stuck with the words of Section 31(3) [Employment Act 2002]: "It must, subject to subsection (4), increase any award which it makes to the employee by 10% and may, if it considers it just and equitable in all circumstances to do so, increase it by a further amount, not so as to make it a total increase of more than 50%."'

Despite the EAT's apparent displeasure, it remains that an employer can successfully avoid the uplift on the full award by paying sums due to the employee shortly before the hearing. Employers should consider this ruling when making strategic decisions on negotiating compromise agreements and defending claims.

By Rhys Hadden

Back to content

Vento guideline rates updated

Da'Bell v NSPCC (UKEAT/0044/08)

In this disability discrimination case, the EAT (HHJ McMullen QC presiding) updated the Vento guideline figures for the three injury to feelings bands for discrimination claims. The top end of the range of each of the bands is amended as follows:

- Lower band: from £5,000 to £6,000
- Middle band: from £15,000 to £18,000
- Upper band: from £25,000 to £30,000

The increases are to take account of inflation. Practitioners previously had to rely on the Court of Appeal's judgment in *Miles v Gilbank* [para 12] to take account of inflation since *Vento*.

There is no reason why, with the passage of time, reliance could not once again be placed on *Miles v Gilbank* to seek to persuade tribunals that

the *Da'Bell* rates should also be raised to take account of inflation since September 2009.

By Jason Braier

Back to content

CHAMBERS NEWS

Welcome to new team member: Steven Fuller

Steven recently joined chambers after the successful completion of his pupillage. Steven advises and represents employees and employers alike in case management discussions, pre-hearing reviews and final hearings.

He has experience of advising and representing clients in cases involving ordinary and constructive unfair dismissal, discrimination, unlawful deduction of wages, breach of contract and questions relating to parental leave.

One of Steven's supervisors during pupillage was John Crosfill, who he assisted in producing opinions and drafting documents across the range of employment work. He also assisted in the preparation of *Wooster v London Borough of Tower Hamlets* UKEAT/0441/08 (appeal to Court of Appeal pending) (whether dismissal of an employee prior to his entitlement to enhanced pension rights was discriminatory on the grounds of age).

Back to content

Paperboy EAT case poised to challenge employment law for child workers

Team member, John Crosfill, has been granted permission to appeal to the EAT on a pro bono case representing M, a 15 year old paperboy claiming to have been unfairly dismissed by his newsagents.

Following a hearing where M was represented by his father and the Respondent by Counsel, the Ashford Employment Tribunal found M not to have been an employee at all, despite the fact that every morning he delivered newspapers on behalf of the newsagents, with the consequence that he cannot have been dismissed unfairly or wrongly.

The Employment Tribunal found M not to have been an employee at all, despite the fact that every morning he delivered newspapers on behalf of the newsagents...

A surprising conclusion given that the Respondent was obliged to and did obtain an employment permit for M setting out his regular hours of work.

John is appealing on the basis that the Tribunal erred in law on its approach to mutuality of obligations, and whether M was under an obligation to do any work at all. This is a case that could have far-reaching implications for child employees and is listed for January 2010 hearing.

John is a civil practitioner specialising in employment law (with particular emphasis on discrimination law), public law and human rights.

Back to content

Whether rejection of proposals to protect early retirement benefits can amount to age discrimination

London Borough of Tower Hamlets v Wooster

UKEAT/0441/08 [2009] ALLER(D)160

Max Thorowgood will represent the Council before the Court of Appeal. The case concerns the ET's finding that the Council discriminated against Mr Wooster on the grounds of his age by rejecting proposals to keep him in employment until his right to early retirement benefits under the Local Government Pension Scheme accrued.

Background

Mr Wooster had been employed by the Council in various clerical positions since he was 17.

In 2001, aged 44, he lost his permanent position as a Consultation Officer in the Housing Directorate but was found temporary work with a view to retaining his skills for the benefit of the forthcoming Housing Choice transfer of Council Housing stock to registered social landlords.

In 2003 he was seconded to work for the Council as a Consultation Officer for East End Homes (an RSL created by the Council to compete with others for the transfer of Council housing stock).

In 2006, Mr Wooster, now aged 49 ½, received three months notice to terminate his employment on grounds of redundancy.

Mr Wooster, understandably horrified at the prospect of falling six months short of attaining the early retirement benefits which would accrue to him under the Local Government Pension Scheme at the age of 50, spoke to the Chief Executive of EEH who agreed to intercede with the Council on his behalf with an offer to the Director of Housing that EEH would pay the whole of Mr Wooster's salary for the 6 months until his 50th birthday whereupon Mr Wooster, who would remain a Council employee throughout, would be dismissed and become entitled to his early retirement pension.

EEH's offer was rejected in forthright terms to the effect, as the ET found that EEH could, "pay his bloody pension too," if its generosity was in such a high degree.

The dismissal was admittedly automatically unfair and the ET found that it was also unfair by reason, amongst other things, of the Council's failure in the exceptional circumstances of Mr Wooster's case to redeploy him.

EEH's offer was rejected in forthright terms to the effect, as the ET found that EEH could "pay his bloody pension too" if its generosity was in such a high degree...

The ET found that there was no discrimination until after the decision to give notice. However, the ET went on to find in an ill-reasoned 'portmanteau' paragraph that the Council had been guilty of unlawful discrimination on grounds of age. It was unclear whether that discrimination consisted exclusively in the Director of Housing's rejection of EEH's offer or whether it consisted also in some other unspecified failure to redeploy Mr Wooster.

The Council appealed to the EAT on the grounds that it would have been *ultra vires* (unlawful) for the Council to have accepted EEH's proposal and that the Director's rejection of it was, therefore, necessarily justified.

Held:

1) A refusal to accept such a proposal, even if it could be characterised as a distinct decision made on the grounds of the Claimant's age (which may be debatable), would plainly be justified. To keep the Council's actions within the bounds of its lawful powers is on any view "a legitimate aim"."

2) Even apart from the public law aspect, it is not the effect of the 2006 Regulations in a case where an employer no longer has work for an employee that he is obliged to postpone the dismissal for however long is necessary in order to entitle the employee to qualify for an age-related benefit which has not yet accrued. It is plainly a "legitimate aim" for an employer to dismiss employees who are genuinely redundant."

3) Pension entitlements are inherently associated with age – or, to put it another way, are necessarily consequent (depending on the facts of the particular case) on a claimant attaining a particular age. To suggest that it was the Director of Housing's concern to avoid exposure to substantial costs in funding an early retirement pension, not the Claimant's age as such that age was a mere trigger, was "sophistical".

4) The EAT took the opportunity to repeat the observation which it has made several time recently that: although written submissions are unquestionably always valuable in any complex case and will often reduce the time that it is necessary to spend on oral submissions, it is very unsatisfactory that the Tribunal should in such a case be deprived of the benefit of oral argument altogether.

Despite these findings, the EAT nevertheless found that the terms in which the Director of Housing rejected EEH's proposal evidenced a disinclination to redeploy Mr Wooster that went beyond her rejection of EEH's unlawful proposal and on that basis dismissed the Council's appeal. It has, however, given the Council permission to appeal to the Court of Appeal.

Max is a Chancery practitioner who also has interests and experience in employment law, professional negligence and costs.

Back to content

SEMINAR REVIEW

On 9 July 2009, Field Court put on a very successful and well-attended CPD accredited seminar entitled:

'Employment Law in Hard Times'

Max Thorowgood, Jason Braier and John Crosfill delivered informative talks about the abolition of the statutory procedures and s.98A ERA, maternity leave redundancies, and alternatives to redundancy respectively.

To purchase a copy of the seminar notes please contact us on 020 7405 6114.

2010 CPD-employment seminars will be listed in future Employment Law Newsletters.