February 2010 *Issue 2*

Employment Law Newsletter

INTRODUCTION

Welcome to Field Court Chambers' second Employment Law Newsletter. In this issue the employment team cover a number of important discrimination law decisions, especially those concerning the Disability Discrimination Act (DDA) and religious discrimination, as well as an important case on stigma damages in discrimination cases.

We also cover caselaw on employee status, the application of the Protection from Harassment Act to employment situations and employees' rights to take their full holiday entitlement before the year-end.

In our legislation update section, we cover this year's changes in compensation caps and the Damages Based Agreements Regulations 2010, prescribing the maximum percentage of contingency fees and the information that must be provided to a client for such agreements to be valid.

We hope you find this issue useful and informative. Thank you to those who provided feedback on the first issue. All feedback on this issue is welcome. Finally, please note our forthcoming seminars. We look forward to seeing many of you on 15 June and 5 October.

Jason Braier

Employment Team

CONTENT

EMPLOYMENT TEAM

Franklin Evans (1981)
Miles Croally (1987)
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Jason Braier (2002)
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Christine Cooper (2006)
Rhys Hadden (2006)
Steven Fuller (2008)

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

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CASE UPDATES

When the right to take extended holiday leave may be lost

Lyons v Mitie Security Ltd (18 January 2010) (UKEAT/0081/09/CEA)

This case focuses on whether an employer is legally obliged to permit an employee to take all of his paid leave within the leave year even if requested by the employee towards the end of the leave year at a time when it may not fit in with the business' staffing patterns or requirements.

Mr Lyons was employed as a security guard. His employment contract contained a holiday entitlement clause which specified he was entitled to four weeks' paid holiday, but could not carry over holiday time from one leave year to the next, and should wherever possible submit a holiday request form at least four weeks prior to the requested holiday time, with any shorter notice only being considered subject to staffing requirements.

Mr Lyons' leave year ended on 31 March. On 6th March he asked to take nine days' paid holiday, the remainder of his entitlement in that leave year. The employer refused this request, noting that it was made less than four weeks before the year end. Mr Lyons resigned, claiming constructive unfair dismissal.

The EAT held that the right to statutory leave under Regulation 13 of the Working Time Regulations 1998 is not inalienable. This is made clear by the notice provisions of Regulation 15, under which employees are required to provide notice of leave twice as many days in advance of the proposed holiday as the length of the holiday itself. The operation of that mechanism (or any variation of it under a collective agreement or other contract enforceable between employer and worker) could legitimately result in the loss of the right at the end of the leave year in respect of leave not taken.

To content

Jason Braier

Volunteer workers without employment contract are not entitled to pursue disability discrimination claims

X v (1) Mid Sussex Citizens Advice Bureau; (2) LinChallis UKEAT/0220/08/SM&UKEAT /0511/08/SM

The claimant, "X", was an HIV-infected, part-time unpaid volunteer advisor with Mid Sussex CAB. X frequently did not attend on the days she was expected to and was subsequently asked to cease to attend as a volunteer.

X brought a claim in the ET on the grounds of disability discrimination. The ET dismissed her claim on the basis that the DDA 1995 did not apply to individuals without a legally binding contract. Furthermore, voluntary work was beyond the scope of the Council Directive (EC) 2000/78 ("the Framework Directive"). The ET concluded it did not have jurisdiction to consider X's complaint.

The matter went all the way up to the Court of Appeal and was then remitted a second time to the EAT. In the second EAT hearing, Burton J held that the Framework Directive did not give rise to an obligation upon a national government to implement provisions to include within the DDA those voluntary workers not protected by the provision for a contract in s.68 thereof. Accordingly, the government had not been in breach of the Framework Directive. Moreover, ss. 4(2)(d) and 68 of the DDA could not be read down or rewritten so as to extend protection to voluntary workers without a contract. As such, X's appeal was dismissed and her application to refer the matter to the European Court of Justice for a preliminary ruling was also refused.

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Rhys Hadden

Associative discrimination read into the DDA

EBR Attridge Law & Another v Coleman (EAT)
(Appeal No. UKEAT/0071/09/JOJ)

Ms Coleman was a legal secretary. She brought a claim against her employer firm of solicitors and an individual solicitor that associative disability discrimination led to her resignation, in that she was discriminated against due to her son's disability. The ET referred the question of whether the effect of **Council Directive 2000/78/EC** (the "Framework Directive") was to outlaw associative discrimination. The ECJ decided that it did. As a consequence, the ET interpreted the provisions of the **Disability Discrimination Act 1995** as including such discrimination by reading in words to the statute and concluded it had jurisdiction to hear the claim. The Respondents appealed this decision, *inter alia*, on the ground that the ET's act of reading in words so as to outlaw associative discrimination distorted and rewrote the DDA.

The EAT considered the nature of statutory interpretation in the light of the requirement to interpret domestic legislation to give effect to obligations under EU law so far as possible. It considered the approach to statutory interpretation used under s.3 of the Human Rights Act 1998, as this approach had been held analogous to the approach to be adopted under Community Law based interpretation. The power of a court or tribunal to interpret a piece of legislation in such circumstances went beyond the traditional and strict limits of statutory construction and included the power to read words into a statute. The EAT held the addition of words to the DDA to cover associative discrimination would change the meaning of the Act but would not do so in a manner incompatible with the underlying thrust of the legislation. The proscription of associative discrimination was an extension of the scope of the legislation as enacted, but was in no sense repugnant to it.

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Miriam Shalom

Guidance on risk assessment for new and expectant mothers

O'Neill v. Buckinghamshire County Council
(5 January 2010) UKEAT/0020/09/JO

This case concerned, *inter alia*, a claim by a pregnant school teacher of sex discrimination for the school's failure to carry out a risk assessment pursuant to regulation 16 of the Management of Health & Safety at Work Regulations 1999.

The EAT confirmed that failure to carry out a risk assessment ***may*** constitute sex discrimination, but only where the work is of a kind which ***could*** involve risk of a kind defined in regulation 16 of the 1999 Regulations to the health or safety of a new or expectant mother or her baby. The EAT followed ***Hardman v Mallon t/a Orchard Lodge Nursing Home*** [2002] IRLR 516 and ***Madarassy v Nomura International plc*** [2007] IRLR 246 on these points.

The EAT agreed with Buckinghamshire's submissions that the following preconditions should be met before there is an obligation to carry out a risk assessment of a pregnant worker:

(a) The employee notifies the employer in writing that she is pregnant.
(b) The work is of a kind which could involve risk of harm or danger to the health and safety of a new or expectant mother or her baby.
(c) The risk arises from either processes or working conditions or physical, biological or chemical agents in the workplace of the types specified in the non-exhaustive lists set out at Annex I and II of Council Directive 92/85/EEC (the Pregnant Workers Directive).

The EAT clarified further that where a risk assessment is required, the employer must provide comprehensive information on any risks to the employee but does not need to meet with the employee to do this.

Finally, the EAT confirmed that when there is a requirement to carry out a risk assessment and

the employer fails to do so, automatic unlawful sex discrimination is the result. There is no need to prove detriment.

To content *Jason Braier*

Not discriminatory to insist Christian registrar conduct civil partnership ceremony

Ladele v London Borough of Islington; *Liberty (Intervening)* [2009] EWCA Civ 1357

Ladele, a devout Christian employed by Islington as a registrar, resigned when she was required to conduct civil partnership ceremonies. The Employment Tribunal found she had suffered direct and indirect discrimination, as well as harassment, at the hands of Islington on the grounds of her religious beliefs. Islington successfully appealed to the EAT, whereupon Ladele appealed to the Court of Appeal.

Held: The appeal would be dismissed. It could not constitute direct discrimination to treat all employees in the same way. The correct comparator was another registrar who disapproved of and refused to conduct civil partnerships for non-religious reasons. Islington was motivated by Ladele's conduct, not her beliefs.

The ET's findings of harassment were wrong for similar reasons. Likewise, there was no indirect discrimination. Islington's actions were a proportionate means of achieving a legitimate aim, namely, the promotion of equal opportunities and non-discrimination. Permitting Ladele to opt out would undermine this aim, whereas requiring her compliance did not impinge upon her religious beliefs: she remained free to hold them and to worship as she wished.

There was no breach of Ladele's rights under Article 9 and following the coming into force of the Equality Act (Sexual Orientation) Regulations 2007, it was simply unlawful for Ladele to refuse to perform civil partnerships and Islington had no alternative but to insist that she did.

To content *Rory Mulchrone*

Stigma losses recoverable in career loss

Chagger v Abbey National PLC & Another [2009] EWCA Civ 1202

The Court of Appeal was concerned with the correct approach to the award of damages following Mr Chagger's unfair and discriminatory selection for redundancy. Despite his diligent efforts, Mr Chagger had been unable to find another job in the financial services industry in large part because potential employers refused to employ him when they learned that he had brought proceedings against his former employer.

Abbey's contention that such unlawful victimisation by third parties was too remote to be the subject of compensation had been successful in the EAT.

The Court of Appeal rejected that argument holding that the mere fact that third party employers contribute to, or are the immediate cause of, the loss resulting from their refusal to employ could not of itself break the chain of causation.

In the Court's judgment stigma losses were recoverable in principle as it was one of the difficulties facing an employee on the labour market.

In Mr Chagger's case, it was accepted that he would not now find employment in his chosen field and his decision to retrain as a teacher was reasonable. Compensation therefore was rightly awarded on the basis that he had lost his career.

To content *Christine Cooper*

Written contracts do not clarify employee status

Autoclenz Limited v Belcher and Others
[2009] EWCA Civ 1046

Twenty car valeters sought declarations that they were workers or employees. The valeters had signed written agreements stating that they were self-employed, and containing substitution and "right to refuse work" clauses.

The ET held that they were employees, and if wrong, they were workers because the written agreements did not reflect the actual relationship. They had no control over their work, were required to provide personal service, and were obliged to attend for work.

The EAT allowed an appeal against the finding that they were employees, but held that they were workers and that "sham" contracts required a joint intention by both parties to mislead.

The Court of Appeal dismissed an appeal that they were not workers, and allowed a cross appeal that they were employees.

Held: The focus must be on discovering the actual legal obligations of the parties, irrespective of the written contractual position. Following ***Protectacoat v Szilagyi***, one considers whether a written contract reflects the true intentions of the parties both at inception or, following express or implied variation, as time goes by. Such true intentions may be inferred from the parties' conduct, although it does not follow that a right is not genuine merely because it was never exercised. Further, the Court of Appeal clarified that employees are not estopped from contending they are employees merely because they accepted self-employed status for some time.

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Victoria Flowers

See article on 'sham contracts' by Jason Braier

"Philosophical Belief" explained

Grainger plc v Nicholson (3 November 2009) (UKEAT/0219/09/ZT)

This is an interesting case concerning the ambit of the definition of *"philosophical belief"* under paragraphs 2(1) and 3 of the Employment Equality (Religion or Belief) Regulations 2003.

Mr Nicholson was made redundant. He relied on the 2003 Regulations to argue that his redundancy decision was discriminatorily made due to his philosophical belief that mankind is heading towards catastrophic climate change and that all have a moral duty to amend our ways of life to mitigate and avoid this catastrophe.

The question for the EAT was whether this did, in fact, amount to a philosophical belief. Burton J held it could. After reviewing the caselaw, he found the definition limited to the extent that it must:

- Be genuinely held.
- Be a belief as opposed to an opinion or viewpoint based on currently available information.
- Concern a weighty and substantial aspect of human life and behaviour.
- Attain a level of cogency, seriousness, cohesion and importance, with a similar status or cogency to a religious belief.
- Be worthy or respect in a democratic society, be not incompatible with human dignity and not conflict with others' fundamental rights.

He further held that it can be a one-off belief (i.e. one that does not govern the entirety of a person's life), it need not be shared by others, and is not disqualified from the 2003. Regulations if a belief based on a political philosophy (so Marxism, Socialism, Communism and free-market Capitalism would all be covered).

Whilst Burton J's definition provides helpful guidance and suggests a potentially wide ambit, it also places in the Judge's hands a lot of discretion over an area of undoubted controversy. Whilst undoubtedly necessary, this reinforces the definitional difficulties that concerned practitioners and legislators alike when religious discrimination laws were first mooted

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Jason Braier

When no duty for employers to make reasonable adjustments

Alam v Secretary of State for Work and Pensions UKEAT/0242/09

Mr Alam was disciplined for leaving work early without asking for or obtaining permission. He suffered from depression and claimed that his employer had failed to make a reasonable adjustment, in accordance with s.4A (1) DDA 1995, to its alleged practice of imposing a 12-month written warning for leaving without permission. His case was that the employer ought to have known that he was disabled and that his disability made it more difficult for him to ask for permission. The ET had upheld the claim and found that the employer could not rely on the s.4A (3) defence.

The EAT held: Contrary to what appeared to have been the effect of certain passages in *Eastern and Coastal Kent PCT v Grey* [2009] IRLR 429, the s.4(A)3 defence required consideration of two separate questions. First, did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in s.4 (A) 1?

If the answer to that question is "no", then the second question arises: ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in s.4(A)1? Even though in the present case the employer ought to have known the employee was disabled, there was no basis in the evidence for holding that the employer ought to have known that the disability would affect Mr Alam's ability to ask for permission. Accordingly there was no duty to make reasonable adjustments.

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Steven Fuller

Protection from Harassment Act not suitable remedy for stress at work claims

Veakins v Kier Islington Ltd (CA) [2009] EWCA Civ 1288

A was employed as an electrician by R. She brought a claim in the county court where she claimed she was harassed by her supervisor for whom R was vicariously liable. Her evidence was not challenged by R. The trial judge found that the proven acts did not amount to harassment as they would not be sufficient for prosecution under s. 2 of the ***Protection from Harassment Act 1979***.

The Court of Appeal allowed A's appeal and stated that courts are required to consider whether the conduct complained of was oppressive and unacceptable as opposed to merely unattractive, unreasonable or regrettable. The primary focus is on whether the conduct was oppressive and unacceptable albeit the court must keep in mind that it must be of an order which would sustain criminal liability.

The court noted that it was doubtful that when passing the 1997 Act the legislature had the workplace in mind but there was nothing in the language of the Act which excluded workplace harassment.

The court cautioned that it should not be thought from this "unusually one sided" and "extraordinary" case that stress at work will often give rise to liability for harassment. In the great majority of cases the remedy for high handed or discriminatory conduct by or on behalf of an employer will be found more fittingly in the Employment Tribunal.

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Miriam Shalom

LEGISLATION UPDATES

Compensatory award drops but week's pay stays the same

Employment Rights (Revision of Limits) Order 2009 (2009 No 3274)

For the very first time, the maximum compensation limit has been reduced rather than increased. From 1 February 2010, the cap will drop from £66,200 to £65,300.

The Order has left untouched the maximum week's pay for statutory redundancy and unfair dismissal purposes at £380.

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Reining in Contingency Fee Agreements

Damages-Based Agreements Regulations 2010 2010 No 000)

Following the publication of a consultation paper in July 2009 and the publication of responses in September 2009, and draft regulations in January 2010, the final version of the Damages Based Agreements Regulations 2010 have been enacted. They shall come into force on 6 April 2010.

The Regulations provide for the formalities of DBAs and the information which a client is to be given before the agreement is entered into. Perhaps of greatest interest, they limit the amount of the payment, including VAT, to 35% of the amount recovered in the claim or proceedings by the client.

The draft regulations had set a figure of 25% excluding VAT, but this was thankfully increased following responses to the consultation process, where respondents explained that 25% was too low a figure to make many claims economically viable.

CHAMBERS NEWS

CPD-SEMINARS

Unfair Dismissal- essential practice and procedures

Date: 15th June 2010

Venue: The Oak Room & Terrace, The Bar Council, 289-293 High Holborn, London WC1V 7HZ

Time: 18.00

CPD points: **2**

Discrimination Claims- how to present a strong case

Date: 5th October 2010

Venue: The Oak Room & Terrace, The Bar Council, 289-293 High Holborn, London WC1V 7HZ

Time: 18.00

CPD points: **2**

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