May 2010 *Issue 3*

Employment Law Newsletter

INTRODUCTION

Welcome to Field Court Chambers' third Employment Law Newsletter.

Following the dramatic results of the general election and the coalition government now in place, it will be fascinating to see what employment legislation finds its way into the forthcoming Queen's Speech.

A number of Acts were passed in the pre-election sweep-up, including the long-awaited Equality Act 2010. The newest member of our employment team, Sami Rahman, an experienced employment barrister for the past 14 years, summarises this historic consolidating Act in an article on page 5 of this newsletter.

Most provisions come into force on 1 October 2010, and Field Court Chambers will be hosting an explanatory seminar on the Act just four days later.

Places are also filling up fast for "The Law of Unfair Dismissal - an essential guide" seminar on 15 June 2010, so if you have not yet booked your places for this, be sure to do so.

We hope you continue to find this newsletter informative, and as always, we welcome your feedback.

Jason Braier

Employment Team

CONTENT

EMPLOYMENT TEAM

Franklin Evans (1981) Christopher Stirling(1993) Jason Braier (2002)
Miles Croally (1987) John Crosfill (1995) Miriam Shalom (2003)
Joshua Swirsky (1987) Max Thorowgood (1995) Christine Cooper (2006)
Bernard Lo (1991) Sami Rahman (1996) 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

Archdiocese is vicariously liable for sexual abuse by priest

Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2010] EWCA Civ 256

Mr Maga claimed damages against the Archdiocese for sexual abuse he was subjected to by its employee Father Clonan in 1975-6 when he was 12-13 years old.

Mr Justice Jack found that Mr Maga had been sexually abused by Father Clonan, but that the Archdiocese was not vicariously liable. Mr Maga appealed to the Court of Appeal, and the Archdiocese cross-appealed.

Held: Lord Neuberger MR gave the lead judgment and could not fault Mr Justice Jack's analysis and conclusion on the sexual abuse.

He applied the test of vicarious liability in *Lister v Hesley Hall* [2002] 1 AC 215: whether the employee's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. The following factors persuaded him the test was satisfied in this case:

(1) Father Clonan's employment enabled him to hold himself out as having general moral authority;
(2) Father Clonan's functions included a duty to evangelise;
(3) Father Clonan was given a special responsibility for youth work at the Church;
(4) Mr Maga was drawn into the relationship through Church-organised functions on Church premises;
(5) Father Clonan's role gave him the status and opportunity to draw Mr Maga into his sexually abusive orbit;
(6) Mr Maga carried out work at Father Clonan's request on Church premises, adjoining where Father Clonan worked and lived;
(7) The first incident of sexual abuse occurred on Church premises.

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Repudiatory breaches are incapable of unilateral cure by employer

Buckland v Bournemouth University [2010] EWCA Civ 121

This is a significant ruling both for employment law and contract law generally in a case previously reported in *Employment Law Newsletter* Issue 1.

It concerned the constructive dismissal of a professor who considered his academic integrity undermined by a decision to have certain exam scripts remarked even though the results had been endorsed by a second marker and accepted by the exam board. An inquiry into the matter had vindicated the claimant, but he considered the report inadequate and resigned.

The EAT had held that there was no role for the "range of reasonable responses" test at the first stage of determining whether there had been a repudiatory breach: the test was the simple, objective contract law test as identified in *Mahmud* (see *Employment Law Newsletter* Issue 1 for more detail). However, it had held that an employer could unilaterally cure a repudiatory breach and that this was to be assessed objectively.

Held: the EAT's analysis of when a repudiatory breach has occurred was entirely correct. However, the law of contract did not permit unilateral curing of repudiatory breaches.

The choice to elect or affirm was entirely in the wronged party's hands once a repudiatory breach occurred.

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Steven Fuller

To claim damages for injury to feelings, knowledge of the fact of discrimination is not essential

Taylor v XLN Telecom Ltd and Others UKEAT/0385/09/ZT

The EAT, Underhill J presiding, clarify in this case that damages for injury to feelings may be awarded to a claimant even though the claimant did not know that the unlawful act complained of was motivated by discrimination and does not ascribe the injury to his feelings to discriminatory acts. In doing so, the EAT explains the ratio in ***Skyrail Oceanic Ltd v Coleman*** [1981] ICR 864.

Mr Taylor was on probation as a team leader for a telecoms company. His probationary period was extended. He filed a grievance against that extension. During the grievance meeting, he complained of racially offensive conduct by one of his managers. The grievance was not upheld and Mr Taylor was soon suspended and then dismissed for poor performance. He brought a claim for unfair dismissal and victimisation under the Race Relations Act 1976. In written and oral evidence, he emphasised that his upset was caused by the failure of the employer to properly follow the statutory dismissal and disciplinary procedures in dismissing him.

The ET held he could not be awarded damages for injury to feelings in those circumstances, as he did not know of the discriminatory motivation and this therefore had no causative effect on the injury to his feelings. The EAT overturned the decision.

The EAT held discrimination claims followed the normal rules in tort, such that compensation for injury to feelings was recoverable because the complained of act was rendered unlawful as victimisation under the discrimination legislation. Knowledge that it constituted discrimination was irrelevant to the right to claim this head of damages.

However, quantum of compensation for injury to feelings will, of course, generally be greater where the discrimination is overt or where the victim at least at the time understands the motivation behind the act to be discriminatory.

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Jason Braier

When is a company liable for aiding race discrimination?

May & Baker Ltd v Mrs F Okerago UKEAT/0278/09/ZT

In this case the EAT clarified the test for aiding race discrimination under s.33 of the Race Relations Act 1976.

The Claimant was an employee of May & Baker. She was the victim of racist remarks made by a colleague, Ms Dower. Ms Dower was not an employee of May & Baker but an agency worker. After the racist remarks were made, May & Baker failed to investigate them. A claim for direct race discrimination was brought against May & Baker, relying on s.33, and was upheld by the ET.

The EAT allowed May & Baker's appeal. Liability under s.33 requires that a person knowingly aids another to do an unlawful act. One cannot aid another to do something which the other has already done. Thus the relevant point of focus was the employer's acts at or prior to the time that the unlawful act occurred. The evidence in this case showed May & Baker did not know about the racist incident until after it occurred. The subsequent failure to investigate the incident could not amount to aiding Ms Dower to commit it because the failure to investigate was subsequent to the making of the racist remarks.

Merely allowing an environment to exist where particular conduct could take place did not amount to knowingly aiding that conduct.

In any event, due to the remit of the RRA, Ms Dower's act was not "unlawful". The claim was

brought under s.4(2)(c) of the Act, which required a relationship of employment between claimant and respondent. Mrs Okerago could not bring a claim under s.4(2)(c) against Ms Dower as she was not employed by Ms Dower. Thus Ms Dower's act was not unlawful. It followed that May & Baker could not be liable for knowingly aiding that act.

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Clarification of *prima facie* indirect discrimination in equal pay

Gibson and others v Sheffield City Council [2010] EWCA Civ 63

This case is one of several large scale equal pay claims being brought against local authorities in the north of England.

Mrs Gibson and colleagues were local authority workers in "caring", predominantly female roles whose work was rated as equal to that of workers in predominantly male roles such as refuse collection.

The "male" roles received a performance related bonus, but the council did not pay an equivalent bonus to the "female" roles since these did not involve measurable, repetitive tasks.

The ET had held (and was upheld by the EAT) that since the council had put forward a genuine non-sex related reason for the difference in pay – the impossibility of applying the performance related bonus to the "female" jobs – there was no "sex taint" and no need for the difference to be objectively justified.

Held: The key question was whether, once a disparate adverse impact was demonstrated, the employer could show that there was no causal link whatsoever between the difference in sex and the difference in pay.

The statistical evidence demonstrated that the choice of bonus scheme negatively impacted on women as a result of their sex because of the gendered nature of the job roles. Objective justification was therefore required.

While ***Armstrong v Newcastle upon Tyne NHS Hospital Trust*** [2005] EWCA Civ 1608 was right that, in principle, it was possible for a disparate impact demonstrated by significant statistics to arise for reasons entirely unconnected to sex, it would be rare for a tribunal to be satisfied that this was the case. Simply because the employer could posit a genuine non-sex based explanation for its practice did not rule out indirect discrimination.

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Steven Fuller

Finding gross misconduct in respect of incidents already accepted as not serious enough for dismissal fell outside the range of reasonable responses

Sarkar v West London Mental Health Trust [2010] EWCA Civ 289

In *Sarkar*, the Court of Appeal held the ET was entitled to hold a dismissal decision outside the range of reasonable responses where the employer, having investigated disciplinary matters, initially adopted a procedure under which the highest sanction was a written warning but then dismissed the claimant for gross misconduct in respect of those same matters.

In this case, Dr Sarkar was subjected by his employer to disciplinary proceedings covering an array of alleged incidents. After an initial investigation of the incidents by the Trust, it was agreed between the Trust and Dr Sarkar's BMA representative that the principles of the Trust's "Fair Blame Policy" would apply. The use of that policy was open to the Trust in circumstances where there were fairly low level breaches of conduct or performance standards, not constituting potentially serious or gross offences. The most serious sanction under that policy was a written warning. Although it remained open to the Trust to move from use of the Fair Blame Policy to the Trust's standard disciplinary policy if it turned out that matters proved more serious than anticipated, there was no suggestion that was the case here.

The Court of Appeal found that the Trust's agreement to use the Fair Blame Policy indicated its view that the matters under investigation were minor and not serious enough to lead to dismissal.

In those circumstances, the Tribunal was entitled to find that to dismiss for gross misconduct on the strength of those incidents (and a couple of

subsequent incidents which the Trust accepted in evidence were themselves not more than minor) fell outside the range of reasonable responses, and Dr Sarkar's dismissal for gross misconduct was unfair.

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Jason Braier

LEGISLATION UPDATES

Bringing disability, sex, race and other grounds of discrimination within one piece of legislation

Equality Act 2010

The Bill finally got Royal Assent on the 8 April 2010 with the explanatory notes published on the 23 April. Having followed the Bill through its various consultations and its progress through both houses, it feels like a long journey with the final destination being broadly what we thought it might be at the beginning. Just like the economy over the last two years the journey had its highs and lows.

The Act certainly is not the great leap forward in discrimination law that some commentators predicted and hoped it would be, but rather a consolidation, harmonisation, standardisation and evolutionary act.

Like it or loath it, the Act is the most important piece of discrimination legislation for some time. Care will be needed in familiarising oneself with the Act and Field Court Chambers will host a seminar on the Act in October 2010 (see below).

Summary

- the introduction of "discrimination arising from disability" and "indirect discrimination" which replaces "disability-related discrimination" putting an end to the difficulties created by the House of Lords decision in ***LB Lewisham v Malcolm*** [**2008**] UKHL 43, which all but killed any disability related claims;
- ban on pay secrecy or gagging clauses which stop employees discussing their pay with their colleagues;
- creation of a single "public sector equality duty" applying to public bodies, embracing grounds such as sexual orientation and religious belief as well as race, disability and gender. Of particular interest may be the new strategic socio-economic duty;
- direct discrimination or harassment based on association or perception that applies to employment are introduced implementing ***Coleman v Attridge Law*** (C-303/06);
- the definition of disability is broadened;
- tribunals will be able to make a recommendation that may affect the whole workforce arising out of a claim brought by a single claimant;
- two combined protected characteristics can be used in discrimination claims;
- the introduction of a single objective justification test, conduct will have to be shown to be a "proportionate means of achieving a legitimate aim";
- the introduction of gender pay reporting for employers (other than public sector employers) with 250 employees or more with an intention to extend this duty by 2013;
- positive action to allow employers to take under-representation into account when selecting between two equally qualified candidates;

- changes to the genuine occupation requirement defence to direct and indirect discrimination claims.

Link to the full text of the Act
http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100015_en.pdf

Link to explanatory notes
http://www.opsi.gov.uk/acts/acts2010/en/ukpgaen_20100015_en.pdf

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Sami Rahman

CHAMBERS NEWS

New tenant Sami Rahman joins employment team

We are delighted to announce that Sami Rahman has joined Chambers' expanding employment team as a new tenant.

Sami was called to the Bar in 1996, has since built up an extensive employment practice acting for employers and employees after 14 years practising predominantly as an employment lawyer.

Sami specialises in all aspects of employment law and is regularly instructed by a broad range of clients including local authorities, non departmental public bodies. He is instructed by a range of City, large regional firms and directly by the HR and legal departments of a number of high profile national and international companies.

Steven Fuller returns to Chamber after Court of Appeal post as judicial assistant

Chambers welcomes back Steven Fuller following his two-term post as Judicial Assistant to Lord Justice Pill at the Court of Appeal.

Steven gained invaluable insight into the appellate process and the advocacy which has most impact with judges.

He assisted the Court of Appeal in a range of key cases covering Field Court Chambers' specialisms, including *Gibson v Sheffield City Council* [2010] EWCA Civ 63 (circumstances in which *prima facie* indirect discrimination is made out in cases of equal pay – *see above*)

EMPLOYMENT SEMINARS

The Law of Unfair Dismissal- an essential guide

Date:15 June 2010

Venue: The Oak Room & Terrace, The Bar Council, 289-293 High Holborn, London WC1V 7HZ
Time: 18.00
CPD points:2

Topics covered:

**When are dismissals unfair?
**What is a claim really worth?
**Best practice and procedures

Equality Act 2010- explained

Date: 5 October 2010

Venue: The Oak Room & Terrace, The Bar Council, 289-293 High Holborn, London WC1V 7HZ
Time: 18.00
CPD points:2

To book a seminar tel: 020 7405 6114, or email the clerks on: clerks@fieldcourt.co.uk.

For further details and updated information on all Field Court Chambers Seminars please go to: www.fieldcourt.co.uk.

(Please check website for updated information on all Field Court Chambers news and events)