March 2011 *Issue 6*

Employment Law Newsletter

INTRODUCTION

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

In our legislation update, we set out the new maxima for calculating basic and compensatory loss, précis some of the most important proposals of the Government's consultation document on resolving employment disputes (proposals which will make you shudder whether you act for employers or for employees!) and look at the argument raging between eminent QCs as to whether s.147 of the Equality Act 2010 prevents instructed solicitors from advising their clients on the legal effects of compromise agreements.

Our case law update contains something old and something new. As for the old, the EAT has had yet another go at explaining the ***Igen v Wong*** reversal of the burden of proof test (in ***Hammonds v Mwitta***), and has sought to refocus the costs-plus test of ***Cross v British Airways*** to one that brings proportionality to the fore (***Woodcock v Cumbria PCT***). Also, in ***X v Mid-Sussex CAB***, the Court of Appeal upheld the decision of the EAT (see Issue 2 of the newsletter) that volunteers are not covered by discrimination legislation.

As for the new, we have the first associative sexual orientation discrimination case to reach the EAT (***Lisboa v Realpubs Ltd***). A lot of the other case law contained within this newsletter urges Tribunals to focus on matters of relevance – see ***RBS v Ashton*** on reasonable adjustments, ***Tullet Prebon v BGC Broker LP*** on employer's intentions behind acts advanced to make up a constructive unfair dismissal claim, ***Pinewood Repo v Page*** on whether a redundant employee is given sufficient information in consultation to challenge the scoring, and ***Yerrakalva v Barnsley MBC*** on the need for cost awards to broadly reflect the costs incurred by reason of the unreasonable conduct.

We hope you enjoy the newsletter. As always, we welcome any feedback you may wish to provide.

Jason Braier
(Employment Law Group)

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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

Showboat and Weathersfield followed in associative sexual orientation discrimination claim

Lisboa v Realpubs Ltd UKEAT/0224/10/RN (11/01/11)

The Coleherne Public House in Earl's Court had a reputation as London's first gay pub. Its business was falling, and it was bought by Realpubs Ltd, who sought to reposition it as a gastropub for all sections of the community.

Mr Lisboa, who is openly gay, was appointed assistant manager. During his time working at the pub, he was instructed to do a number of things to make clear that the pub was no longer a gay pub. These instructions included (among others) putting a sign in the window saying "this is not a gay pub" (although on discussion this was changed after he refused to comply to "under new management friendly staff"), and being encouraged – along with other staff – to seat in prominent places to passing trade those customers who did not appear to be gay. In disclosure, there was also disclosed from a director an email in which it was written that *"management are hitting the streets and making sure everyone knows about us and that we are no longer an exclusively GAY pub. We are barring 'over the top' customers but this needs to be done right!!"*

Mr Lisboa brought a claim under the Employment Equality (Sexual Orientation) Regulations 2003. The claim was dismissed by the ET, but the EAT reversed this decision. Whilst accepting the question of adoption of a policy of discrimination was far more nuanced than that in ***Wethersfield v Sargent*** and ***Showboat v Owens***, the EAT phrased the relevant question to be asked as follows:

> *The ET was required to make a judgment as to whether the factual matrix as a whole…showed that Realpubs and in particular their director, Mr Heap, in advancing a legitimate policy of widening the appeal of the pub following its re-launch, implemented it in such a way that the old gay clientele was less favourably treated than the desired straight/family customer base on grounds of their sexual orientation.*

The EAT found the ET erred in stopping their enquiry at the point they found the repositioning strategy lawful. As gay customers were unarguably treated less favourably than others on grounds of their sexual orientation, the Claimant was, by association, treated less favourably on grounds of sexual orientation, following the ***Wethersfield*** and ***Showboat*** principles.

Jason Braier
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What employees need to be told on scoring received in a redundancy selection

Pinewood Repro T/a County Print v Page UKEAT /0028/10/SM

A was a printing company who employed R for 23 years as an estimator. In January 2009 A announced redundancies. It produced headings for a scoring matrix for use in the selection process that was agreed with the union. R was not a member of the union. One of the headings used was flexibility. A notified R that as a result of the scoring process it was likely he would be selected for redundancy. R was invited to a meeting to discuss this. R was provided with his own scores and raised queries in relation including some in relation to the flexibility score. He was then given a copy of the scores for the whole department. The marking was close but R received the lowest score in relation to the three people in the pool. A considered the queries raised by R and responded saying that it believed the scores given by the assessor were reasonable and appropriate. A did not explain how the scores were arrived at. Before the ET the markers provided reasons for the scores they had given and R disputed these points. The ET found that it was necessary for an employer to provide an explanation of why an individual had received the scores he had, that the matters relied upon by the markers to mark down R were patently challengeable and should have been aired in the consultation process. The dismissal was therefore found to be substantively and procedurally unfair.

The EAT dismissed A's appeal but stated that the principle set out by the ET that it was necessary for an employer to provide an explanation of why an individual has received the scores he had may be too broad. If the scores were to do with issues such as attendance, timekeeping, conduct and productivity further explanation may not be necessary. It was for a tribunal to decide whether: an employee had been given a fair and proper opportunity to understand fully the matters about which he was being consulted, to express views on those subjects and whether the employer had properly considered those views. That might well involve a tribunal considering whether an employee being given sufficient information to be able to challenge the scores given to him in the redundancy exercise.

Miriam Shalom
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Consideration by Underhill J of costs-plus test in *Cross*

Woodcock v Cumbria Primary Care Trust [2011] IRLR 119, UKEAT/0489/09/RN

Mr Woodcock was born on 17th June 1958. He had been employed in the NHS as a manager since 1980. He first achieved Chief Executive status in 1992 and had been

employed as the Chief Executive of the Primary Care Trust since 2003. By his contract of employment he was entitled to one year's notice.

As a result of an initiative to restructure the Strategic Health Authority with effect from 1st July 2006 the PCT's within the SHA's region were to be consolidated from 42 to 24. Mr Woodcock applied for but did not obtain one of the 24 available Chief Executive posts which remained and was therefore placed at risk of redundancy but notice to terminate his contract of employment was not given, contrary to the HR plan in place at the time. The PCT thereby exercised a discretion in his favour and Mr Woodcock undertook various time limited projects with a view to qualifying him for alternative employment within the NHS.

By early 2007 however moves were afoot to give notice in accordance with the HR plan and efforts were made to arrange a meeting with Mr Woodcock, which through no fault of either party, could not take place until 6th June 2007. Some bright spark then twigged that if notice was not given before 17th June 2007 Mr Woodcock would attain the age of 50 before his 12 months notice had expired and that he would accordingly be entitled to claim early retirement on "enhanced" terms - 6½ added years without any actuarial reduction for early receipt at an estimated cost to the PCT of £500,000.00. The risk that the PCT might not be able to serve notice in the 10 days following the meeting was either deemed unacceptable or the risks/possibility of doing so did not occur to them because notice was served in advance of the Stage 2 meeting fixed for 6th June 2007.

Mr Woodcock was therefore automatically unfairly dismissed but had, by the date of the appeal to the EAT, already received his entitlement in respect of unfair dismissal. His claim of Age Discrimination was dismissed by the ET on the basis that although the decision to dismiss Mr Woodcock so as to prevent him from hitting the pension milestone was discriminatory on the grounds of his age, see *Wooster v LB Tower Hamlets* [previous bulletin], it was justified because the avoidance of substantial additional cost in the form of the enhanced pension windfall was a legitimate object.

Mr Woodcock appealed on the basis that the ET had failed to apply the "costs plus" approach to justification mandated by the decision of the EAT in *Cross v British Airways plc* [2005] IRLR 423 EAT the effect of which is that the avoidance of increased cost alone can never justify discrimination.

Underhill P, who was counsel for BA in *Cross*, discussed the costs plus reasoning of Burton P and doubted, albeit expressly *obiter*, whether the decision in *Hill and Stapleton v Revenue Commissioners* [1999] ICR 48, at para 40(p70), which was the foundation for the costs plus approach subsequently taken up by the ECJ was sufficient to support the proposition that cost alone could *never* justify discrimination. In his view the costs plus approach encouraged the parties and the ET to engage in an unproductive search for the additional factor which was likely to give rise to tortuous and, by implication, unsatisfactory reasoning. Better, he opined, to acknowledge that justification involved the striking of a proportionate balance between the 'significance' of the discrimination on the one hand and the cost of remedying it on the other. The significance of the discrimination is presumably to be measured by reference to the extent of the proven detriment.

Having made those observations, the EAT held:
i) the issue was whether the discriminatory treatment was objectively justified, it was irrelevant what the dismissing manager's actual motives might have been;
ii) on the peculiar facts found by the ET, the costs plus approach had been properly applied by the ET.

Mr Woodcock had known that he was at risk of redundancy for some time. He had had the benefit of an ongoing informal consultation exercise with his managers and been seeking alternative employment without success and was obviously redundant. What is more, in view of the length of his notice period, the consultation process would continue for a substantial period. The PCT was therefore justified in seeking to avoid the considerable additional cost which would accrue as a windfall benefit to Mr Woodcock if notice was not given even though the ordinary and proper procedural safeguards in cases of dismissal on grounds of redundancy had not been respected.

Max Thorowgood

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Clarification of threshold for *prima facie* race discrimination

Hammonds LLP and others v Mittwa UKEAT/0026/10/ZT

Ms Mittwa was a solicitor at Hammonds who claimed she had been discriminated against on grounds of race by virtue of partners giving her less work than other lawyers. The ET found as a fact that there was a very great disparity, both in absolute terms and percentage terms, between the amount of work given to the Claimant by certain partners and that awarded to her comparators. The ET accepted that the statistics showed a pattern of marginalisation. The ET referred to *Madarassy v Nomura* and *Igen v Wong* in its self-direction on the test for whether a *prima facie* case of discrimination had been established, but did not spell out the test in terms. It held that Ms Mittwa had established a *prima facie* case.

On appeal it was contended that the ET had effectively treated the threshold for a *prima facie* case being established as requiring only facts from which a tribunal could conclude that discrimination *could have* occurred,

rather than from which a tribunal could conclude, in the absence of an adequate explanation, that discrimination *did* occur. The EAT accepted this analysis of the ET's judgment and emphasised again that mere difference in treatment and difference in race alone were not sufficient for a *prima facie* case. Further, the EAT underlined that the absence of an adequate explanation for differential treatment is not relevant to whether there is a *prima facie* case.

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Correct approach to claims of discrimination for failure to make reasonable adjustments under DDA

Royal Bank of Scotland v Ashton (UKEAT/0542/09/LA and UKEAT/0306/10/LA)

Ms Ashton, an employee of RBS, developed a migraine causing her to have frequent, intermittent absences, extending to over half the working year in 2007/08 and 2008/09. The sickness policy identified "trigger points" which if met, may have resulted in formal disciplinary warnings, and in such cases recommended that sick pay be stopped. Ms Ashton passed the trigger points in 2007 and 2008 but nothing was done. The rule of thumb was that trigger points may be adjusted 100-200% with disabled employees, but they were extended to 800% with Ms Ashton. Ms Ashton was eventually given a disciplinary warning for 12 months, and her sick pay withheld for that period.

The ET upheld claims of discrimination by failure to make reasonable adjustments, disability related discrimination and unpaid wages.

In allowing the appeal by RBS, the EAT held that the ET had failed to focus on the wording of the DDA 1995. The ET erred in concluding that there had been no reasonable adjustment by failing to further extend the sick pay scheme to Ms Ashton, when RBS had already gone well beyond the treatment given to non-disabled employees. The ET should not be concerned with the process of how a decision to make a reasonable adjustment or not is made, but with the result – whether there has been, or could be, a reasonable adjustment.

As to the claim for disability related discrimination, the EAT agreed that the ET had "missed the plot". The relevant comparator used by the ET was also disabled; even if she was not, she was not in the same relevant circumstances; and hypothetical comparators did not assist. There was "simply nothing" on which a decision that less favourable treatment had been made could be based.

Victoria Flowers
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Volunteers not covered by discrimination law

X v Mid-Sussex Citizens Advice Bureau [2011] EWCA Civ 28

The claimant, "X", was an HIV-infected volunteer advisor at a CAB. She provided her services under a written agreement that described itself as 'binding in honour only; and not a contract of employment or legally binding'. X frequently did not attend on the days she was expected to and was asked to stop attending as a volunteer. X believed this was for a reason connected to her disability and issued a claim for discrimination.

The ET found that X was disabled but her volunteering arrangements did not amount to 'employment' (s.68), an 'arrangement for employment' (s.4(1)(a)) or a 'work placement' (s.14C) for the purposes of the Disability Discrimination Act 1995 ("DDA 1995"). The EAT endorsed the ET's reasoning. The EAT further concluded that X was not in 'occupation' for the purposes of the EU Equal Treatment Framework Directive (No.2000/78). X appealed to the Court of Appeal.

The Court of Appeal rejected the appeal on all grounds. Firstly, this was not an 'arrangement' pursuant to s.4(1)(a) DDA 1995. The purpose of the 'arrangement' was to provide advice to clients of the CAB, not create a potential pool from which full time staff could be drawn. Secondly, this was not a form of 'vocational training' as covered by the Directive. Finally, the scope of 'occupation' within Article 3(1)(a) of the Directive was intended to cover access to professions and sectors, not volunteers. The Court thought it far from obvious that volunteers should be included within the scope of employment discrimination legislation, noting that this had been a topic of genuine debate both in the UK and at European level.

Rhys Hadden
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Costs orders where Claimant lied

Yerrakalva v Barnsley Metropolitan Borough Council & the Governing Body of Dearne Carrfield Primary School

Mrs Yerrakalva claimed to be a disabled person by virtue of an injury to her neck suffered at work in November 2003. This was disputed by the Respondents and was one of the issues to be decided at a pre-hearing review (PHR) in August 2007. The PHR was subsequently abandoned because of illness on the part of the judge. It later transpired that the evidence Mrs Yerrakalva had given at the PHR contradicted statements she had made in a claim for Disability Living Allowance.

Mrs Yerrakalva withdrew her claim and the Respondents applied for their costs, which they quantified at over £92,500. Having found that Mrs Yerrakalva had not given frank evidence at the PHR the Tribunal ordered her to

pay the Respondents' costs to be subject to a detailed assessment by the County Court.

On appeal, Underhill, J held that the approach taken by the judge had been wrong. Although it was not necessary to show a precise causal link between the unreasonable conduct and the costs claimed, any award of costs must broadly reflect the effect of the conduct in question. In the instant case, most of the costs claimed had been incurred prior to the PHR and it was difficult to see how the lies told at the abortive PHR had caused the Respondents any loss for which they were entitled to be compensated. Accordingly, the costs order was quashed.

Christine Cooper

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Employer's intention paramount in constructive dismissal

Tullet Prebon Plc and ors v BGC Broker LP [2011] EWCA Civ 131

The Court of Appeal (Maurice Kay LJ giving judgment) has held that an employer's intention, objectively assessed, is of foremost importance when considering whether the employer's actions towards an employee amount to a repudiatory breach of contract entitling the employee to claim constructive dismissal. There was also clarification that the mutual duty of trust and confidence applies to forward contracts. These are contracts where a party agrees to be employed at a future date.

Facts

The facts of this case are fairly complex. However in brief a senior employee leaves the employment of A, of one of two competing companies and decides to recruit several employees of his former employer to join company B. A offers the employees of B, forward contracts (agreements for future employment) and significant financial inducements (in addition to salary), if they were to join B. In addition he offers indemnities in respect of the costs of litigation should A bring litigation arising out of these events. A discovers the plot, or conspiracy (as it is referred to in the case) and seeks to persuade the employees who are about to leave, to stay. Nine former employees of A claimed that its attempts to persuade them to breach their forward contracts, constituted a repudiatory breach of the mutual term of trust and confidence enabling them to claim constructive dismissal and start work with B. A initiated proceedings in the High Court to prevent this, and B counter-claimed that the three employees who remained at A had breached their forward contracts. The High Court found for A and B appealed.

Comment

This judgment does perhaps bring into question the approach taken to the question of whether fundamental breach (a term not used by the Court of Appeal but perhaps to some degree interchangeable with repudiatory breach) can occur ***inadvertently***, without considering the context of the conduct complained of and the level of knowledge of both the employer and employee, in deciding whether the conduct was ***calculated and likely*** to destroy or seriously damage the relationship.

http://www.bailii.org/ew/cases/EWCA/Civ/2011/131.html

Sami Rahman

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LEGISLATION UPDATES

Compromise – *definition:* An agreement that makes both parties unhappy

When the Government decided to put all of the discrimination statutes in one statute, the Equality Act 2010, somebody thought that it might be a good idea to try and write it in plain English. So far, so good. In common with all other statutory rights a claimant, or potential claimant, could only give up their statutory rights under the various pre-Equality Act discrimination statutes if certain conditions were met. Each Act or regulation had the same formula that provided that, in addition to (1) a tribunal order or (2) an ACAS brokered compromise, a discrimination claim could be compromised where a qualified and properly insured advisor was able to certify that they had advised the claimant on the terms and effect of a compromise agreement. The formula was well understood and it worked. If ever there was a case for "if it ain't broke…" this was it.

The Equality Act introduces a new formula in sections 144 and 147. The ability to compromise claims by means of (1) a tribunal order and (2) by an ACAS settlement on a COT3 (sub-section 144(4)(b)) remain as does the ability to enter into an enforceable compromise agreement. The difficulty that has been identified is whether by reason of sub-section 147(5)(d) a lawyer who has been acting for and advising a claimant on her complaint is excluded from the definition of "independent advisor" in sub-sections 147(3) & (4).

Just as nature abhors a vacuum, an interesting little legal point sucks in QCs. The Law Society, clearly with cash burning a hole in its pockets, has instructed not one but 2 QCs to give their advice to the grubby ranks of the

profession sitting patiently at their feet. This turns out to be money well spent because the two QC's reach diametrically opposed conclusions. Their full opinions can be accessed by following this link to the Law Society's web site: http://www.lawsociety.org.uk/productsandservices/practicenotes/compromiseagreements/4746.article#ca1_2.

John Bowers QC *"has little doubt"* that a person that has been instructed by the employee prior to the production of the compromise agreement or acted in any way in the course of her complaint would not be an "independent advisor" and that therefore the resulting agreement would not be binding on the employee.

Thomas Linden QC is *"firmly of the view"* that the opinion of the Government Equalities Office that the Equality Act has not altered the status quo is correct. He says that reading section 147 as a whole it is clear that all references to "person" in sub-section 147(5) cannot include the complainant herself.

At some point, no doubt, the matter will be resolved by the courts. However, given that it will require a claimant to wish to resile from a compromise agreement and argue that her own lawyer was not a relevant independent advisor, we may wait for some years for the matter to be resolved by the courts.

This interesting little debate is of less consequence if advising employees as a compromise agreement that fails to satisfy the statutory requirements is only unenforceable insofar as it precludes tribunal proceedings. In other words the statutory provisions do not prevent the employee enforcing the agreement's monetary terms. On the other hand, those advising employers will have to decide whether or not to accept a compromise agreement where the independent advisor was the lawyer instructed on the complaint. The Law Society website gives some practical guidance although in my opinion the advice is cautious. The risk that the employer will make a payment for nothing in return can be addressed by a suitable warranty. It is likely that employers will be making greater use of ACAS until the difficulty is resolved.

My own opinion (available free of charge) is that Tom Linden's reasoning is to be preferred – watch this space.

John Crosfill
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Resolving Workplace Disputes: A consultation

In January, the Department for Business, Innovation and Skills launched a wide-ranging consultation document. We will comment in future newsletters about the merits and demerits of proposals once the consultation concludes and proposals are either retained, amended or dropped, but for this issue, here is a list of the highlights (and lowlights – depending on whether you tend to represent claimants or respondents):

- Charging a fee for bringing a claim.
- Increase in the qualification period to bring an unfair dismissal claim to two years.
- Requiring parties to attempt to settle through ACAS for a month before putting in the ET1.
- Incorporation of a Schedule of Loss into the ET1.
- Formalising the process of making offers and firming up the rewards and penalties for making or refusing an offer better or worse than the amount actually awarded.
- Extending the ET's jurisdiction to strike out on grounds of no reasonable prospects of success to any hearing (not just PHRs) and to the court's own initiative.
- Greater ability for the ET to make deposit orders and increase in the maximum deposit order to £1,000.
- Increase in the costs an ET can award to £20,000.
- Extension of the occasions on which Judges can sit alone to include unfair dismissal trials.
- Penalising employers who lose in the ET by requiring them to pay to the Exchequer a penalty of 50% of the total award made by the ET, up to a maximum of a £5,000 penalty.

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The Employment Rights (Increase of Limits) Order 2010

Increase in Statutory Limits

As of 1 February 2011, increases in award limits in unfair dismissal claims and redundancy calculations are as follows:

Award category	Old Amount	New Amount
Compensatory award	£65,300	£68,400
Weekly pay for basic award	£380	£400
Weekly pay for redundancy payment	£380	£400