November 2010 *Issue 5*

Employment Law Newsletter

INTRODUCTION

The last few months have been an exciting time for members of Field Court Chambers, culminating in the appointment of our head of chambers, Lucy Theis QC, as a High Court Judge.

The last few months have also been an exciting time for discrimination specialists, with the coming into force of many of the provisions of the Equality Act 2010. Field Court Chambers' Employment Team led the way, putting on a number of seminars looking at the implications of the new legislation.

Whilst the legislative landscape for the future has changed, the courts have been busily engaged in considering the ambit of the old legislation. In ***Aylott v Stockton on Tees BC***, the Court of Appeal confirmed that ***Malcolm v Lewisham*** marked the death of ***Novacold*** (only for it to rise from the dead under the new Act), whilst in ***Kuliaoskas v MacDuff Shellfish*** discussion has continued about the extent of protection against associative discrimination – this time in respect of the partner of a pregnant woman.

The courts have also been busy looking at often overlooked, yet crucial, points about time. In ***Heaven v Whitbread***, it was emphasised that the date of resignation is a matter of statutory construct rather than subject to the discretion of the parties, whilst in ***Gisda Cyf v Barrett*** the Supreme Court held that where dismissal is by letter, the effective date of termination is governed by the date on which the letter is read or, at the very least, the dismissed person has had a reasonable opportunity to read it.

Also included in the newsletter is guidance on when to use the two main approaches to pension loss (***Sibbit v St Cuthbert's Catholic Primary School***) and on percentage reductions to take account of contributing causes to psychiatric injury (***Thaine v. LSE***); a helpful case for solicitors wanting belatedly to rectify ET1s where not all potential claims have been pleaded (***New Star v Evershed***); continuations of the long recent lines of case law on the definition of worker vis-à-vis the right of substitution (***Community Dental Centre v Sultan-Darmon***) and on continuity of employment (***Hussain v Acorn Independent College***); and confirmation by the EAT that the Respondent's ability to pay is irrelevant to the assessment of compensation (***Tao Herbs v Jin***).

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

Jason Braier *(Employment Law Group)*

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EMPLOYMENT TEAM

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

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CASE UPDATES

Resignation date is determined by Statute, not by parties' agreement
Heaven v Whitbread Group plc (UKEAT/0084 /10/JOJ)

Mr Heaven intended to resign from his job. He sent a conditional resignation letter on 29 August. His employer responded that they could not action an equivocal resignation and asked him to indicate whether or not he was resigning. On 3 September, Mr Heaven wrote an email confirming his resignation and saying that it was from 29 August and the employer accepted this.

Before the Tribunal the question arose whether the claim was brought in time. The ET took the agreed resignation date of 29 August as the effective date of termination ("EDT") and held the claim was brought out of time.

The EAT allowed an appeal against this decision. HHJ Pugsley held that the EDT is a statutory construct contingent, in a constructive dismissal case, on actual rather than conditional resignation. The parties could not override the statutory construct to agree to an alternative EDT. Accordingly, the EDT in this case was 3 September and the claim was brought in time.

To content *Jason Braier*

The EDT and unread letters of dismissal
Gisda Cyf v Barratt [2010] UKSC 41

This case concerns the determination of the effective date of termination where the employer does not inform the employee of dismissal by direct communication, but by letter, email, fax or similar means.

Mrs Barratt worked for a charity. She was subject to a disciplinary hearing on 28 November 2006. She was told she could expect a letter on 30 November. Early in the morning of 30 November, she travelled to London to visit her sister, who had given birth a week earlier. She did not return to her home until 3 December. A recorded delivery letter arrived at her home on 30 November and was signed for by her boyfriend's son, but it was not opened and she was not made aware of its contents until her return.

She presented her ET1 on 2 March 2007.

The Supreme Court (in line with all the courts and tribunals below) held that the EDT was, under s.97 of the ERA 1996, a statutory construct rather than something to be viewed through the prism of contract law. The Supreme Court upheld the EAT decision in ***Brown v Southall & Knight*** [1980] IRLR 130 that the EDT was when the employee read the letter and knew of the decision or, at the very least, had a reasonable opportunity of reading it. To hold otherwise would put an employee in the unfair position of having time run against her in relation to the time limit for an unfair dismissal complaint before the employee knew of her dismissal.

Mrs Barratt had not sought to avoid the letter. She had read it on 3 December and that was the date of her EDT. Accordingly her ET1 was in time.

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There are two points for readers to note. First, this is not a charter for employees to bury their heads in the sand; to avoid reading a letter would debar reliance on the ***Brown v Southall*** test. Secondly, if an employer wants to avoid the possible application of this test, all he needs to do is to act with humanity and tell the employee in person (or at least by telephone) of the dismissal so that the message is certainly received.

To content *Jason Braier*

Unfair Dismissal: Intervals between two periods of employment
Hussain v Acorn Independent College Limited (UKEAT/0199/10/SM, 8 September 2010)

Mr Hussain was employed by the College on 26 April 2008 as a teacher by way of a temporary cover contract until 8 July 2008 (the summer exams). Independently, on 8 July 2008 the teacher for whom he was covering resigned and by 25 July 2008 an agreement was reached to employ Mr Hussain on a permanent basis from the start of the new term on 5 September 2008. He was dismissed on 12 June 2009 and brought a claim for unfair dismissal.

The College challenged his claim on the basis that he did not have one year's employment, and the issue was whether the period between the two employment contracts amounted to a "temporary cessation of work" so that it counted as weeks of continuous service for the purposes of section 212 ERA 1996.

Employment Judge Snell, sitting alone at a PHR, held that Mr Hussain did not have sufficient service. He reached this conclusion by looking back from the end of the second contract (12 June 2009) to the beginning of the first contract (26 April 2008).

Mr Hussain appealed, and HHJ McMullen QC in the EAT held that the Employment Judge had incorrectly applied *Ford v Warwickshire County Council* [1983] ICR 273 to the reason for the absence of 7 weeks between the two contracts. The correct approach was to look at the reason for the termination of the first contract, and the interval was short and temporary. The real reason for the absence was the temporary cessation of work, being the summer holidays. The type of contract either side of the temporary cessation (whether limited term, fixed term or indefinite duration) does not matter.

To content *Victoria Flowers*

Permission to amend unfair dismissal claim to add automatic unfair dismissal due to protected disclosure allowed
New Star Asset Management Holdings Limited v Patrick Evershed [2010] EWCA Civ 870

This case concerns Mr Evershed's application to amend his claim of 'ordinary' unfair dismissal by adding an 'automatic' unfair dismissal claim. He had originally claimed that his dismissal was precipitated by accusations that he was unfit to deal with money, made after he raised a grievance. He sought to add that the principal reason for his dismissal was a protected disclosure, which was the same as the grievance letter that caused his dismissal. A free-standing claim would have been out of time. Permission to amend was refused by the employment judge.

Mr Evershed appealed to the EAT, which allowed his appeal. The exploration of issues under each of the claims would overlap substantially. The EAT allowed the application to amend on that basis, emphasising the case-management powers of the tribunal to limit the exploration of 'collateral issues.'

New Star appealed to the Court of Appeal on the basis that the EAT had erred in suggesting that it was open to the tribunal to cut down the inquiry into the issues raised by the amendment.

The CA dismissed New Star's appeal. The thrust of the complaints in both sets of pleadings was essentially the same. The amendment did not raise materially new factual allegations. The 'whistle-blowing' case made by the amendment would require the investigation of the various components of such case, but would not require adducing 'wholly different evidence' as stated in the employment judge's reasons.

To content *John Crosfill*

Guidance on when to use substantial loss approach to pension loss

Sibbit v The Governing Body of St Cuthbert's Catholic Primary School (UKEAT/0070/10/ZT)

The claimant was a teacher. She had been at the same school from 1985 until her dismissal in June 2008. She had intended to retire at the end of August 2009. She was a member of the Teachers' Pension Scheme, which is a final salary scheme.

Having found Ms Sibbit unfairly dismissed, questions of pension loss arose in considering the compensatory award. The ET decided to consider the bases of calculation in the pension rights guidelines. In determining which of the two approaches to calculation of pension loss – the simplified and the substantial loss approaches – to use, the ET opted for the simplified approach.

In holding that the ET should have adopted the substantial loss approach, the EAT noted the following in respect of the application of §4.7 to §4.14 of the guidelines to the facts of this case:

- There was no uncertainty as to the future of the Claimant's employment – she was to retire a year later.
- There was no uncertainty about economic conditions – they are not relevant as a factor in re a public sector teacher.
- The claimant had been in the respondent's employment for a considerable period of time, was not going to be affected by the economic cycle and had reached an age where she would not be looking for new pastures.
- There was a quantifiable continuing loss.

To content

Jason Braier

Definition of "worker" and unfettered right to send a substitute

Community Dental Centres Limited v Dr Sultan-Darmon (UKEAT/0532/09/DA, 2 July 2010)

Mr Dr Sultan-Darmon, a dentist, entered into a contract to provide services to Community Dental Centres Limited ("CDC"). Dr Sultan-Darmon's contract was described as a "licence agreement and contract for service" and specifically stated that his status was a "self-employed independent contractor". It contained a clause providing that if he failed to use the facilities (excluding up to 30 days' annual holiday) for a continuous period of more than 5 days, he shall make arrangements for the use of the facilities by a locum acceptable to CDC, and in the event of his failure to make such an arrangement CDC shall have authority to appoint a locum if possible to act on his behalf (who should be Dr Sultan-Darmon's servant or agent and paid by him). Dr Sultan-Darmon did not use that provision, though other dentists had done so.

Employment Judge Toomer held that although he was not an "employee" within section 230(3) ERA 1996, he was a "worker". CDC appealed against this finding.

Silber J in the EAT held that Dr Sultan-Darmon was not a "worker" as he did not "undertake to do or perform personally any work or services". There was no obligation on him to do work, as he could delegate his duties. He was entitled to decide for himself whether to turn up and provide dental services, and his right not to do so did not depend solely upon whether he was unable to do so, but also on whether he was willing to provide those services. The unfettered right given to Dr Sultan-Darmon to appoint a substitute without any sanction at will means that he cannot be a "worker".

To content

Victoria Flowers

Employer's ability to pay not relevant to assessing compensation payable for unfair dismissal

Tao Herbs & Acupuncture Ltd v Jin (Appeal No UKEAT/1447/09/RM)

C contended she was unfairly dismissed by R and that unlawful deductions had been made from her pay. The ET upheld C's claim and made a substantial award of damages. R sought to appeal this decision to the EAT. On the sift of the notice of appeal, HHJ Serota formed the view that there was no point of law raised. R was given the opportunity to submit a fresh appeal or to have hearing and chose the latter.

At the hearing one of the grounds advanced on behalf of R was that the award to C was not just and equitable because it was substantial. It was submitted that if the award had to be paid R would go into liquidation.

The EAT held that the possibility that an employer would be in difficulty in paying was not a relevant consideration in the assessment of damages for unfair dismissal.This argument along with all others advanced on behalf of R were held to have no reasonable prospect of success.

To content *Miriam Shalom*

Employers' damages may be reduced where discrimination is one of concurrent causes of employee's psychiatric injury

Thaine v London School of Economics (EAT) (Appeal No UKEAT/0144/10/SM)

The Claimant (C) was employed by the Respondent (R) in its maintenance department as a painter and decorator.

C brought several claims against R. Two aspects of her sex discrimination claim were upheld. These related to the presence of pornographic posters and magazines in the general workshop where the maintenance team was based and that the signing in book kept being removed to the men's changing room where sexist remarks were made when she went to retrieve it. She was awarded compensation against the tribunal and she appealed to the EAT against the level of the award.

The tribunal found that the unlawful discrimination which C had experienced at work had been a "material and effective cause" of her ill-health. Since it was that ill-health which ultimately led to her dismissal, the Tribunal found that there was a causal link between the unlawful discrimination of her ill health and loss of earnings. The tribunal also found that a number of other factors had contributed to C's ill health. It assessed the extent to which the unlawful discrimination had contributed to her ill health at 40% and thus discounted her award by 60%.

The EAT considered the issue of whether this apportionment was in accordance with the correct principles to be applied in the case. The EAT analysed the authorities on the point considering cases on multiple causes of workplace injury and concluded that the weight of authority supported the approach of the ET.The appeal was dismissed.

To content *Miriam Shalom*

Novacold "deceased as a case", but will come back to life

Aylott v Stockton-on-Tees Borough Council [2010] EWCA Civ 910

This was a case relating to disability discrimination in which the employee claimed direct discrimination, discrimination for a reason relating to disability and discrimination for failing in the duty to make reasonable adjustments. The case is principally of interest for the Court of Appeal's clarification of the status of *Clark v Novacold* [1999] ICR 951 (*Novacold*) in light of the decision of the House of Lords in *Lewisham Borough Council v Malcolm* [2008] 1 AC 1399 (*Malcolm*). The claimant was supported by the EHRC in seeking clarification of: (i) whether *Novacold* is still good law on the interpretation of the employment discrimination provisions of the 1995 Act or whether it was overruled in whole or in part by *Malcolm* and (ii) whether *Malcolm* is distinguishable from *Novacold.*

The court made clear that the EAT had been right in *Carter v London Underground Ltd* UKEAT/0292/08/ZT that *Malcolm* had overruled *Novacold* and that *Malcolm* was binding as to the correct approach to disability related discrimination in the employment field. Further, the court held that the claimant's valiant effort to distinguish *Malcolm* on the basis of highly technical arguments relating to amendments resulting from the implementation of the Equal Treatment Directive with effect from October 2004 also failed.

Accordingly, *Novacold* was "deceased as a case" for the purposes of cases falling to be determined under the 1995 Act. However, it should of course

be noted, as the court pointed out, that for future purposes the Equality Act 2010 resurrects the *Novacold* test and nullifies *Malcolm*.

To content *Steven Fuller*

No associative discrimination claim for partner of pregnant woman (yet...)
Kuliaoskas v MacDuff Shellfish UKEATS/0062/09/BI

Mr Kulikaoskas contended in his ET1 that the reason for his dismissal had been the fact that his partner had become pregnant. As well as an unfair dismissal claim, he presented a claim for sex discrimination on the basis of the alleged facts. The ET did not allow the ET1 to proceed in so far as it presented a sex discrimination claim. Mr Kulikaoskas contended that the principle established in *Coleman v Attridge Law* that disability discrimination encompassed associative discrimination against a disabled person's carer could be extended by analogy to his case. He argued that the recast Directive (2006/54/EC) required the tribunal to read in words to the Act so as to provide protection for those discriminated against by association

The EAT held that there was no claim under the Sex Discrimination Act 1975 for associative discrimination on the basis of another's pregnancy and further that the question was *acte claire* such that there was no need for a reference to the ECJ. Lady Smith held that where the courts had previously permitted associative discrimination this was on the basis of interpretation of specific statutory provisions and that there was no room for a straightforward analogy. In her judgment the relevant European legislation was intended solely to provide protection for the pregnant woman and did not envisage the form of associative discrimination contended for by Mr Kulikaoskas.

As for future cases, however, s.13 in the Equality Act 2010 – which does not refer to the protected characteristic of a *particular* person – is intended to be interpreted to include associative discrimination.

To content *Steven Fuller*

LEGISLATIVE UPDATE

Equality Act 2010 comes into force

On 1 October 2010, around 90% of the provisions of the Equality Act 2010 came into force, including those:

- Defining the protected characteristics.
- Setting out the tests for direct and indirect discrimination, discrimination arising from a disability, harassment and victimisation – including changing the wording of the direct discrimination test from "on grounds of" to "because of"; bringing in indirect disability discrimination; extending third party harassment to all protected characteristics; and changing victimisation from a comparator test to a detriment test.
- Making pay secrecy clauses unenforceable.
- Restricting the circumstances in which employers can ask job applicants about disability or health.
- Allowing claims for direct gender pay discrimination without requiring a comparator.
- Introducing new powers to enable ETs to make recommendations to benefit the wider workforce.

There are, however, still plenty of provisions not yet in force, most importantly including those concerned with:

- Combined discrimination.
- Public sector equality duty.
- Socio-economic duty on public bodies.
- Positive action in recruitment and promotion.

Some of these are likely to come into force in April 2011, whilst others look less likely to ever make their way into application, most especially the socio-economic duty under section 1, which Theresa May confirmed in a speech of 17 November 2010 would be shelved.

SEMINAR SUCCESSES

Over the past couple of months, Field Court Chambers' Employment Team has put on a number of well attended, highly successful events, including:

- an evening seminar on the Equality Act 2010,
- a full day on the new Act in partnership with the Local Government Group. John Wadham (legal director of the Equalities and Human Rights Commission) joined Field Court as guest speaker,
- a Mock Tribunal in association with the Chartered Institute of Personnel and Development.

We will announce a series of seminars in 2011.
We are also willing to provide in-house seminars at solicitors' firms on any employment law subjects of interest. Please send your requests to: sabina.smith@fieldcourt.co.uk