FIELD COURT
CHAMBERS

Spring 2012 *Issue 9*

Employment Law Newsletter

INTRODUCTION

Welcome to the Spring 2012 edition of Field Court Chambers' Employment Law Newsletter.

In this edition, we provide guidance in our legislation update on the first tranche of amendments to Employment Tribunal procedure, as well as the doubling of the qualifying period to bring an unfair dismissal claim and updated figures on the maximum amounts for calculations of basic and compensatory awards. In the case update section, we look at the Supreme Court's clarification of the restrictions of ***Johnson v. Unisys***.

We also cover a number of cases on the interpretation of the TUPE Regs, looking at the types of insolvency proceedings that fall outside of Reg 8(7), the width of the definition of a "relevant transfer" under Reg 7(1), and the approach taken by Tribunals to determine whether there has been a service provision change under Reg 3(1)(b). We have summaries of two cases concerning suitable alternative employment in redundancy situations – one on when it is reasonable to decline an offer of alternative employment, and one on the ability of employers to use subjectivity in grading applicants for alternative employment positions.

Finally for the case update section, we note the stance taken by the Court of Appeal against barring-out relief in employment relationship situations. In our members' cases section, Sami Rahman explains the effect of his recent EAT case on the employer's requirement to make reasonable adjustments.

We hope, as always, that you find this newsletter informative, and we look forward to any feedback or suggestions for improvement.

Jason Braier
Editor

Employment Law Group

CONTENT

CASE UPDATES

Edwards v Chesterfield Royal Hospital; Botham (FC) v Ministry of Defence [2011] UKSC 58

Key2Law (Surrey) LLP v De'Antiquis (Secretary of State for Business, Innovation and Skills intervening) [2011] EWCA Civ 1567

Spaceright v Baillavoine [2011] EWCA Civ 1565

Enterprise Management Services Ltd v Connect Up Ltd & others UKEAT/0462/10/CEA

Samsung Electronics (UK) Ltd v Monte-d'Cruz (1 March 2012; UKEAT/0039/11/DM)

Readman v Devon PCT (UKEAT/0116/11/ZT) (1 Dec 2011)

Caterpillar Logistics Services (UK) Ltd v Huesca de Crean [2012] EWCA Civ 156

LEGISLATION UPDATE

Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989)

Employment Tribunal (Constitution and Rules of Procedure) (Amendment) Regulations 2012 (SI 2012/468)

Employment Rights (Increase of Limits) Order 2011 (SI 2011/3008)

MEMBERS' CASE NEWS

*Bishun v Hertfordshire Probation Service (HPT)*UKEAT/0123/11/DA

EMPLOYMENT TEAM

Paul Randolph (1971)
Hashim Reza (1981)
Franklin Evans (1981)
Miles Croally (1987)
Joshua Swirsky (1987)
David Brounger (1990)
Bernard Lo (1991)
Christopher Stirling (1993)
John Crosfill (1995)
Max Thorowgood (1995)
Sami Rahman (1996)
Nikolas Clarke (2000)
Francis Hoar (2001)
Jason Braier (2002)
Miriam Shalom (2003)
Christine Cooper (2006)
Rhys Hadden (2006)
Toby Bishop (2008)
Steven Fuller (2008)
Victoria Flowers (2009)

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

Edwards v Chesterfield Royal Hospital; Botham (FC) v Ministry of Defence [2011] UKSC 58

No common law damages for failure to follow contractual disciplinary procedures

E and B were both dismissed for gross misconduct. Their claims proceeded on the basis that the contractual disciplinary procedures had been breached, thereby causing reputational damage.

The issue was whether employees could claim damages at common law for breach of a contractual disciplinary procedure leading to dismissal?

In a decision favouring employers their Lordships found they could not. The court extended the ***Johnson v Unisys*** exclusion area to include breaches of express terms, the principle being that Parliament has enacted a statutory framework affording employees an extra contractual protection against unfair dismissal.

That framework includes limitations. To allow the claims would circumvent those limitations and undermine the statutory remedy. However this may not be the final word on the point as 7 Supreme Court Justices reached 3 conclusions on 4 different bases.

Lord Dyson at paragraph 44 has potentially created a new area for employment litigation:

> "That is not to say that an employer who starts a disciplinary process in breach of the express terms of the contract of employment is not acting in breach of contract. He plainly is. If that happens, it is open to the employee to seek an injunction to stop the process."

Will you be the first to make an application for a 'Dyson injunction' against an anticipated unfair dismissal?

^content

Toby Bishop

Key2Law (Surrey) LLP v De'Antiquis (Secretary of State for Business, Innovation and Skills intervening) [2011] EWCA Civ 1567

Businesses in administration fall outside Reg 8(7) of TUPE

The Court of Appeal has held that businesses in administration are not subject to bankruptcy or analogous insolvency proceedings, and hence the exemption contained in Reg 8(7) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 does not apply. Employment protection thus continues to apply following a transfer. The Court of Appeal rejected the approach to Reg 8(7) set out by the EAT in previous case law.

Rimer LJ giving judgment stated that in assessing whether an administration order is made with a view to liquidating the transferor's assets, it will be necessary to focus on the purpose of the procedure triggered by the order rather than on the particular reasons why it was made. In respect of the administration procedure, Rimer LJ stated that when an administrator is appointed their overriding legal obligation is to rescue the company as a going concern and this is something which must be formally considered in all cases.

In the instant case it was not possible rationally to conclude that such an appointment is made 'with a view' to liquidating assets, therefore all administrations fall outside the scope of Reg 8(7). The Appeal was dismissed.

^content

Sami Rahman

Spaceright v Baillavoine [2011] EWCA Civ 1565

Dismissal can be transfer related when at time of dismissal transfer is merely a contemplated possibility

Mr Baillavoine was the Chief Executive of Ultralon, which went into administration. The administrators decided that the best way of carrying out the administration was to sell the business as a going concern. They dismissed Mr Baillavoine on the date that Ultralon went into administration and the business was subsequently sold to Spaceright a month later.

The ET found that the reason for the dismissal was to make the business more sellable, since any purchaser of the business as a going concern would be likely to use its own senior management. It concluded that this was a reason connected with the transfer and so automatically unfair (regulation 7(1) of the TUPE Regulations). The EAT upheld the ET decision. The issues in the Court of Appeal were (i) whether regulation 7(1) applies were the dismissal is said to relate to a *possible* future transfer rather than a transfer to an already identified transferee, and (ii) when a dismissal can be said to be for an economic, technical or organisational reason.

The Court of Appeal dismissed the employer's appeal, holding that: (i) a dismissal carried out in contemplation of a potential transfer where no specific transferee is yet identified is sufficient to bring regulation 7(1) into play and that *Harrison Bowden* and *Morris* were to be followed in future and (ii) for an ETO reason to be available there must be an intention to change the workforce and to continue to conduct the business, as distinct from the purpose of selling it.

^content

Steven Fuller

Enterprise Management Services Ltd v Connect Up Ltd & others UKEAT/0462/10/CEA

Summary of the approach to be taken under TUPE in relation to establishing a Service Provision Change

The issue before the tribunal was whether the employment of the Claimants had transferred from the Appellant (A) to the Respondent (R) under the provisions of regulation 3 of the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (TUPE). The judge held that there had been no transfer and A appealed this.

The factual background was the provision of IT support services to schools by a local authority. Leeds County Council (LCC) had put these services out to tender in 2004 and A had been the sole successful bidder and entered into a framework agreement. In 2009 that agreement expired and LCC invited further tenders. The new proposed framework agreements had some similarities and some differences to that of 2004. The Judge found that the most significant difference was that the new agreement excluded service cover for curriculum systems. This had been included in the 2004 agreement. A decided not to tender. Schools formerly serviced by A were split up among six providers. R tendered successfully and hence was one of the six and covered 62.5% of the schools formerly serviced by A.

The question for HHJ Peter Clark in the EAT was whether the ET had erred in holding there had not been a service provision change (SPC) within the meaning of regulation 3(1)(b) and 3(3) of TUPE. He summarised the principles to be applied from the case law on SPC's in particular under regulation 3(1)(b)(ii) where activities cease to be carried on by a contractor on a client's behalf

and are carried on instead by a subsequent contractor as follows:

1. The first task for the employment tribunal is to identify the relevant activities carried out by the original contractor
2. The next question is whether the activities to be carried on by the subsequent contractor after the relevant date are fundamentally or essentially the same as those carried out by the original contractor. This is a question of fact and degree for the ET.
3. Cases may arise where the division of services after the relevant date ("fragmentation") means the case falls outside the SPC regime.
4. Even where activities remain the same before and after the transfer date an SPC will only take place if:
    a. There is an organised grouping of employees in GB which has as its principal purpose the carrying out of activities concerned on behalf of the client.
    b. The client intends that the transferee will not carry out the activities in connection with a single event of short-term duration.
    c. The activities are not wholly or mainly the supply of goods rather than services for the client's use.
5. The tribunal must decide whether each Claimant was assigned to the organised grouping.

The EAT held that in the present case the ET was entitled to find that no SPC transfer had taken place both on the basis that the activities carried out by R were significantly different to A, and also as a result of the fragmentation of service providers.

^content

Miriam Shalom

Samsung Electronics (UK) Ltd v Monte-d'Cruz (1 March 2012; UKEAT/0039/11/DM)

Subjective criteria may be used in interviewing for alternative employment in a redundancy situation

The Claimant was a senior manager who stood at risk of redundancy following the Respondent's decision to amalgamate four senior manager jobs. He applied for the amalgamated role and also for a role one reporting step below (as a Business Region Team Leader). Those applying for the positions were scored on the basis of ten competencies. The Claimant failed to reach the requisite score to be deemed worthy by the Respondent to be offered either job.

The Claimant was then given a list of other vacancies. He was told he was at risk of redundancy. The Claimant sought to challenge the decision not to appoint him to the last role applied for. He applied for no other vacancies and his dismissal for redundancy went ahead.

The Employment Tribunal found the dismissal unfair on the bases (a) of inadequate consultation; and (b) flaws in the selection process for the Business Region Team Leader job. The criticisms centred mainly on the subjectivity of the process.

The EAT allowed the appeal. The following findings are of interest:

- It was not unfair not to tell the Claimant in advance of interview what scoring method would be used in assessing candidates for the Business Region Team Leader job.
- When interviewing for alternative employment following a redundancy situation, there is no obligation on an employer always to use criteria capable of objective measurement; there is nothing objectionable in principle in assessing on the basis of subjective criteria.
- For a dismissal to be unfair due to the process of interviewing for alternative employment, the failures in process would have to be found to have led to some serious substantial unfairness to the applicant.
- What assessment tools to use in an interview of this kind is prima facie a matter for the discretion of the employer.

^content

Jason Braier

Readman v Devon PCT (UKEAT/0116/11/ZT) (1 Dec 2011)

Redundancy payment: Nurse's refusal of suitable employment in hospital as she had worked in community nursing since 1985 not unreasonable in particular circumstances.

Mrs Readman began her nursing career in 1976 and had worked in community nursing since 1985. When at risk of redundancy she was offered a position working at the same grade as a Modern Matron in a hospital. She responded that she had not worked in a hospital setting since 1985 and had no desire to do so. Devon PCT refused to make a redundancy payment, relying on section 141 ERA 1996.

The ET had to consider:

1. Whether the offer of employment was an offer of suitable employment; and
2. Whether Mrs Readman had unreasonably refused that offer.

The ET concluded that the offer was one of suitable alternative employment (which the EAT said could not be criticised) but found that she refused that position unreasonably as she had done so "without any considered attempt to explore what aspects, if any, of her current job would be lost and what other duties might be required. The refusal was against her desire to emigrate and her desire if possible to be able to take advantage of her redundancy rights and benefits".

On appeal to the EAT, Mrs Readman contended that the ET had erred by in effect asking itself whether a reasonable employee would have accepted the employer's offer rather than asking whether this particular employee was reasonable in refusing it.

The EAT held that, whilst focusing on a number of other issues, the ET had erred fundamentally in failing to address whether her core reason for refusing the offer – that she had no desire to work again in a hospital setting when she had not done so for more than 23 years of her career – constituted a sound and justifiable reason for turning down the offer.

The EAT therefore allowed the appeal and, declining to remit the question, held that the desire not to work in a hospital setting, in the particular circumstances of Mrs Readman, did provide her with a sound and justifiable reason for turning the offer down. The EAT substituted a finding that she was entitled to receive a redundancy payment.

^content

Victoria Flowers

Caterpillar Logistics Services (UK) Ltd v Huesca de Crean [2012] EWCA Civ 156

Barring-out relief is not available where there was an ordinary employer-employee relationship

Ms de Crean was a logistics centre manager for Caterpillar at one of its sites. Her employment contract contained no restrictive covenants although it did include a confidentiality agreement. Subsequently, Ms de Crean accepted a position with Quinton Hazell Automotives Ltd ("QH"), an automotive part supplier and important customer of Caterpillar, with whom there was a 10-year logistics services agreement in place. QH's parent company, Klarius, also supplied automotive parts. The logistics services agreement provided for the contract to be based on certain assumptions, which in effect provided guidance figures that related to matters in respect of which the information was held confidentially by Caterpillar.

After Ms de Crean left Caterpillar for QH, Caterpillar threatened legal proceedings on the basis that her employment by QH (and hence Klarius) placed her in a position directly conflicting with her fiduciary duties to Caterpillar, with the inevitable consequence that she would use Caterpillar's confidential information for the benefit of QH/Klarius. It was suggested her employment by QH was for this precise purpose.

Following correspondence, Caterpillar issued a claim for, among other things, an interim injunction restraining Ms de Crean from (1) using or disclosing confidential information and (2) from undertaking any task in relation to the logistics service agreement or commercial relationship between Caterpillar and QH/Klarius, namely barring-out relief.

In the ***de Crean*** case, the Court of Appeal held that – save for exceptionally - barring-out relief should not be extended to the ordinary relationship of employer and employee but is confined to the solicitor-client relationship and other relationships closely analogous. The Court of Appeal noted that Caterpillar could of course have achieved the same result as can be gained by barring-out relief by way of an appropriate restrictive covenant.

Jason Braier

LEGISLATION UPDATE

Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989)

As of 6 April 2012, the qualifying period for bringing an unfair dismissal claim doubles to two years, and the qualifying period for bringing a claim for failure to provide a statement of reasons of dismissal doubles in like manner.

Practitioners can expect an increase in discrimination claims and claims based on protected disclosures, as claimants with less than two years' service seek to bring their unfair dismissal claims within the Tribunal's jurisdiction.

^content

Jason Braier

Employment Tribunal (Constitution and Rules of Procedure) (Amendment) Regulations 2012 (SI 2012/468)

These regulations come into force on 6 April 2012 and provide for some of the less controversial aspects of the changes to employment tribunal process being brought in by the Government.

The most interesting changes under these Regulations are that:

- The maximum amount for a deposit order is doubled from £500 to £1,000.

- The maximum costs that the Tribunal can award under cost orders and preparation time orders is also doubled, from £10,000 to £20,000.
- Costs orders can now be made to take account of the expenses incurred by a witness in attending the hearing.
- Witness statements will now be taken as read and stand as evidence in chief (in line with the EAT's decision in ***CSA v Mehta***) unless the Tribunal orders otherwise.

^content *Jason Braier*

Employment Rights (Increase of Limits) Order 2011 (SI 2011/3008)

For cases where the effective date of termination is 1 February 2012 or later, the maximum amount of a week's pay for redundancy and basic award purposes has increased from £400 to £430, and the compensatory award limit has increased from £68,400 to £72,300.

^content *Jason Braier*

MEMBERS CASE NEWS

Bishun v Hertfordshire Probation Service (HPT) **UKEAT/0123/11/DA (judgment on 2 Feb 2012)**

Reasonable adjustment and the employee's duty to cooperate with the implementation of the adjustment.

This was an appeal against a decision that dismissed the claimant's claim for failure to make reasonable adjustments in respect of the provision of assistive technology in the form of software that would help Mr Bishun read and draft documents. I was instructed by the HPT to oppose the appeal and was successful.

Mr Bishun was a trainee probation officer and was disabled in that he suffered from sleep apnoea. He also suffered from a significant impairment in that he could not read at an appropriate speed for someone of his educational background, although not diagnosed with dyslexia. The claimant was told by the HR manager to seek assistance with assistive technology from Access to Work and an application form was sent to him. Initially the Claimant had brought a number of race discrimination claims which he withdrew shortly before the hearing in front of the Tribunal. At the time the Access to Work scheme required the employee to make contact with them by means of completing paperwork. Access to Work offered HPT a limited financial contribution to the cost of the assistive technology in addition to carrying out all the required assessments.

The ET dismissed his claim, rejecting the argument that the respondent had an obligation to monitor the application to Access to Work, or that it had a duty to provide the assistive technology even though Mr Bishun had not cooperated with the Respondent's system for the implementation of reasonable adjustments of this nature, which was though Access to Work.

The EAT upheld the ET decision, finding that the Tribunal was entitled to hold that it was the claimant's refusal to cooperate that frustrated any attempt to assist the Claimant.

Comment

It has been a long held view of many employment lawyers (including myself) that there may be circumstances in which the Claimant's non-cooperation with an employer's attempts to make reasonable adjustments could discharge the duty to make reasonable adjustments or for that matter render the adjustment unreasonable. Apart from this case there are very few decisions of the EAT or the Court of Appeal (***Callagan v Glasgow City Council*** **[2001] IRLR 724** (at 14) cited by me in this appeal**),** which provide support for the proposition that the employee's non-cooperation may discharge the duty to make a particular adjustment altogether.

^content *Sami Rahman*