Summer 2013 Issue 11

Employment Law Newsletter

INTRODUCTION

Welcome to the 11th edition of Field Court Chambers' quarterly Employment Law Newsletter.

The most significant change for practitioners this summer will be the introduction of the new Tribunal rules. To assist you we provide a nutshell guide in this issue.

Our case law update contains some key cases in the areas of discrimination, unfair dismissal, redundancy, contractual and costs as well as legislative updates on the new tribunal rules, the EAT fees, and amended section on what constitutes 'qualifying disclosure' in whistleblowing.

Chambers' employment team also welcomes its newest member, Barry McAlinden, who joined in June this year.

We hope you enjoy the newsletters and as always we welcome any feedback on items covered and suggestions for employment law topics you would like us to cover in our autumn issue.

Editors
Employment Law Newsletter
Field Court Chambers Employment Group

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CASE UPDATES

DISCRIMINATION

Requiring a disabled employee to undergo a competitive interview process during a restructure may breach the employers duty to make reasonable adjustments if the employee otherwise meets the essential criteria for the role

Wade v Sheffield Hallam University (UKEAT/0194/12/1504)

The key issue facing the EAT was whether or not the duty to make reasonable adjustments required the employer to automatically appoint the Claimant to a post without her having to go through a competitive interview process.

The Claimant had been employed at the University for 23 years prior to a reorganisation which place took in 2004 and resulted in her role being deleted. The Claimant was placed on gardening leave in December 2005 and applied for a vacancy in July 2006, she was interviewed, but was unsuccessful because she failed to meet 2 essential criteria. The Claimant was interviewed for the same vacancy in 2008, and it is this interview which formed the subject of her complaint, the relevant statute in force at that time was the *Disability Discrimination Act 1995.*

In rejecting the claim, the employment tribunal considered the House of Lords case of *Archibald v Fife Council* [2004] IRLR 651, which identified that disapplying a competitive interview process could, in principle, constitute a reasonable adjustment. The ET recognized that that would not always be the case and that it would depend on the particular circumstances of the case.

The EAT held that although there was a duty to make a reasonable adjustment, there was no breach of that duty on the facts because Claimant was 'not appointable' in that she could not meet the essential criteria necessary for the role.

Portia Harris
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Statements made by a person who does not have legal capacity to bind or represent an employer, but who is nevertheless closely associated with it, are capable of amounting to facts from which it may be presumed that there has been discrimination, for the purpose of reversing the burden of proof. Once reversed, the burden can be rebutted without evidence which is impossible to adduce without interfering with the right to privacy

Accept v Consiliul National pentru Combaterea Discriminarii (Case C-81/12)

This case was brought by Accept, a gay rights campaigning organisation, against Football Club Steaua on the basis that they refused to employ footballers on the grounds of their sexual orientation. Mr Becali, a prominent figure in FC Steaua, had said that he'd close the club before accepting a homosexual on the team. Mr Becali was not involved in the recruitment of players and had no authority in their selection; he did however play an important management role and was closely associated with the club in the media and in the eyes of the public.

The CJEU held that a lack of legal authority didn't prevent Mr Becails remarks being facts from which discrimination might be presumed, given that he was a person who presented himself and was perceived in the media and among the general public as playing a leading role in that club. The fact that such an employer did not clearly distance itself from the statements concerned is a factor which the court may take into account in the context of an overall appraisal of the facts.

The court went on to consider the sort of evidence that would be required to rebut the presumption of a discriminatory motive. They concluded that it wouldn't be necessary to produce evidence, such as information about the sexual orientation of other players, if that would interfere with those individuals' right to privacy.

Portia Harris
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The EAT found that a decision by a Chief Adjudicator not to assign cases to a parking adjudicator could not equate to a detriment under s47B Employment Rights Act 1996 (ERA) as it was made in the execution of judicial functions and was covered by judicial immunity

Engel v The Joint Committee for Parking & Traffic Regulation Outside London (UKEAT/0520/12/LA)

From a certain date, it was agreed that the Chief Adjudicator had stopped allocating appeals against local

enforcement authorities to Mr Engel, a parking adjudicator. The Chief Adjudicator's reasoning was that she had concerns about Mr Engel's conduct of two hearings. The Employment Tribunal's basis for striking out Mr Engel's claim (that he had suffered detriment contrary to s47B ERA because he had made a protected disclosure) was on the ground of judicial immunity.

In his appeal, Mr Engel argued that the effect of the Tribunal's decision was that judicial office holders who had been removed from office on an illegitimate basis (such as race, sex or disability) would be without a legal remedy. The Respondent countered that a judicial decision could not be challenged on the basis of judicial immunity from suit.

Mitting J sat alone in the EAT and found that where the suitability of a judge was questioned, the decision not to allocate cases to him was likely to be taken in order to preserve public confidence in the administration of justice. He stated that the decision not to allocate was thereby taken in the exercise of judicial functions and was covered by judicial immunity. The EAT went further in holding that had the decision be taken as a free-standing disciplinary action, even with the improper intention of subjecting Mr Engel to a detriment, it would still be subject to judicial immunity.

Sarah Hunton
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It is an act of victimisation to dismiss an employee because he brings a number of grievances and tribunal claims

Woodhouse v West North West Homes Leeds Ltd (UKEAT/0007/12)

In 4 years Mr Woodhouse lodged 10 internal grievances alleging race discrimination and 7 employment tribunal claims they were '*empty allegations without any proper evidential basis for his suspicion.'*

The Respondent dismissed him for a breakdown in trust and confidence. The Tribunal found the dismissal was not victimisation as the Respondent would have dismissed any employee who brought unmeritorious grievances and claims.

The EAT allowed Mr Woodhouse's appeal. The claims were protected acts and there was no suggestion of those acts being in bad faith. Mr Woodhouse was dismissed because of his protected acts and he therefore succeeded in his claim for victimization.

Many readers will have every sympathy with the employer in this claim, but the decision must be right in law. Employers faced with a similar situation might push harder for findings of bad faith in claims which are disposed of at a final hearing. Further employers might consider the merits of an application under s.33 of the Employment Tribunals Act for a restriction of proceedings order.

Note: the requirement for good faith in whistle-blowing claims will be dispensed with by the coming into force of the Enterprise and Regulatory Reform Act, see legislation update below.

Toby Bishop
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UNFAIR DISMISSAL

Reduction of unfair dismissal awards by up to 100% for contributory conduct

Ladrick Lemonious v Church Commissioners (UKEAT/0253/12/KN)

The appellant, Ladrick Lemonious, had been employed for 37 years before sending a number of rogue emails in the names of other employees, one of which implied that another employee had committed a criminal offence. He was dismissed for gross misconduct.

The ET found that the dismissal was unfair as a result of procedural failings. Despite this finding, the ET also held that his conduct was such that there should be no award either basic or compensatory. Both parties appealed.

The Claimant raised three grounds of appeal: (i) reducing compensation by 100% due to contributory conduct was unjustified where there was a finding of procedural unfair dismissal; (ii) the reasoning by the ET for the deduction was insufficient; and (iii) the judgment was perverse.

The Defendant appealed on the basis that as the ET had found that Mr Lemonious' had lied about his conduct and had thus advanced his claim unreasonably, costs should follow as a matter of principle.

The EAT (Langstaff P presiding) dismissed grounds (i) and (iii) of the appeal, holding that a tribunal can reduce unfair dismissal awards, both basic and compensatory, by anything up to 100% if the claimant's conduct justifies it. This is the case even if the dismissal is found to be procedurally unfair as long as the procedural failings did not cause or contribute to the dismissal.

In relation to ground (ii), the EAT agreed that the tribunal had failed to provide sufficient reasoning for the 100% reduction in the present case and remitted the matter back for it to provide an explanation to the claimant.

The EAT also dismissed the cross appeal on the basis that a finding on the balance of probabilities that an

employee committed an act of gross misconduct does not automatically mean costs should be awarded.

Rhys Hadden
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On the facts, there was no breach of employee's Art 8 rights in using evidence from covert surveillance to dismiss him

City and County of Swansea v Gayle (UKEAT/0501/12/RN)

The Respondent obtained covert video footage of the Claimant attending a sports centre on 5 occasions when he was being paid to work.

The footage was recorded in a public place and was of the Claimant in a public place i.e. outside the sports centre, the EAT held:

"We do not consider that generally the taking of photographs or the making of observations of individuals in public places will constitute a breach of Article 8 because such individuals will not be in those places to have the reasonable expectation of privacy"

The EAT held:

"*the Claimant here was a fraudster; he was busily engaged on his own business whilst receiving his employer's money for his employer's business…The fact that a person in such circumstances can have no reasonable expectation that their conduct is entitled to privacy is not only correct in principle but has the authority of the words of Longmore LJ in Rugby Football Union v Viagogo Ltd [2011]* EWCA Civ 1585*"*

The EAT allowed the Respondents' appeal and substituted a declaration that the Claimant was not unfairly dismissed.

Toby Bishop
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REDUNDANCY

Parental leave and selection for redundancy

Riezniece v Zemkopības Ministrija (Court of Justice of the European Union, 20 June 2013)

Ms Riežniece was a public official. In 2006 she underwent a performance appraisal. She took parental leave from November 2007 to May 2009.

In 2009 she was selected for redundancy and selection criteria (different to those adopted in the 2006 appraisal) were adopted. Those in the pool that had worked during the period February 2008 to February 2009 were assessed for that period. Ms Riežniece, who had been on parental leave at that time, was assessed on the basis of her 2006 appraisal.

She received the lowest score and was selected for redundancy.

Questions were referred to the Court for a preliminary ruling including:

'Must the assessment of [a female worker's] work and qualifications which takes into account her latest annual performance appraisal before parental leave be regarded as indirect discrimination when compared to the fact that the work and qualifications of other employees who have continued in active employment are assessed according to fresh criteria?'

The answer to the question, where a much higher number of women than men take parental leave, (which it is for the national court to verify), is that:

'A situation where, as part of an assessment of workers in the context of redundancy, a worker who has taken parental leave is assessed in his or her absence on the basis of assessment principles and criteria which place him or her in a less favourable position as compared to workers who did not take parental leave, the national court must ensure that the assessment is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave;'

Nikolas Clarke
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Guidance as to 'bumping' in redundancy pools

Contract Bottling Ltd v Cave (UKEAT/0525/12/DM)

CBL formed a redundancy pool that included employees from the following departments: accounts, sales ledger, sales, production and stock control, quality control as well as an account engineer and warehouse manager.

A selection criteria was applied to them on generic grounds with the intention of dismissing four staff and keeping the others whatever their function had been, retraining them as necessary.

The Tribunal commented that the persons concerned were people with "*a divergence of skills or totally incomparable skills*".

As to the reason for dismissal, applying the two-stage test laid down in *Murray,* the first question for the Tribunal was whether there was a diminution in the

requirements of the business for employees to carry out work of a particular kind. This will usually be work of a particular kind. However, sometimes there is a diminution in the requirements of the business for employees to carry out work of several kinds. Such a state of affairs is capable of satisfying the first stage in the *Murray* approach.

The EAT declined to overturn the ET's decision that the dismissal had been unfair (for reasons unrelated to the formation of the pool).

The ET had been wrong to conclude that there was no evidence to allow for a *Polkey* reduction and the claim was remitted for that purpose only.

Nikolas Clarke
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CONTRACTUAL

No breach of confidence by a defendant without actual or blind-eye knowledge of breach by a colleague

Vestergaard Frandsen A/S and Others v Bestnet Europe Ltd & ors [2013] UKSC 31; [2013] 1 WLR 1556

Vestergaard manufactured insecticidal bednets (i.e. for protection from mosquitoes). Mr Larsen and Mrs Sig were Vestergaard employees. Dr Skovmand was a Vestergaard consultant. The employees had confidential information clauses in their employment contracts, and Dr Skovmand held confidential information, albeit had no contractual term to that effect. The employees resigned and set up a new company in competition to Vestergaard, and Dr Skovmand also held a financial interest in the new company.

In producing a new net, Dr Skovmand used Vestergaard's confidential information. Mr Larsen knew of this. Mrs Sig did not. Vestergaard brought proceedings against the three of them as well as their company. All three individuals were held to be in breach of confidence. In finding Mrs Sig in breach, the Judge accepted she did not know confidential information was used to produce the new net, but held that her close involvement in setting up the competitor company and in its development was sufficient.

The Supreme Court reversed this judgment. Mrs Sig was not in contractual breach herself, and had neither actual nor 'blind-eye' knowledge of the abuse of confidential information. In those circumstances she could not be held personally liable.

Jason Braier
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Settlement/compromise agreements and income tax

Barden v Commodities Research Unit International [2013] EWHC 1633 (Ch)

Mr Barden was the former CEO of CRU Strategies Ltd. He issued proceedings seeking a percentage of the sale of the business. The dispute was compromised by a settlement agreement following mediation. The nub of the dispute was set out by Mr Justice Vos:

'3. The crucial clause 3 of the SA ("clause 3") was headed "PAYMENT OF AGREED SUM" and provided that "[t]he CRU Parties shall by 4pm on 1 November 2012 pay £1,350,000 (the Settlement Sum) by telegraphic transfer into the Cheyney Goulding LLP client account at HSBC Bank, Guilford Branch, account number 73668010 sort code 40-22-26, IBAN GB64MIDL40222673168010, SWIFT CODE MIDLGB22".

4. Mr Barden alleges that clause 3 means that the Defendants (called the "CRU Parties" in the SA) were obliged to pay the full gross sum of £1.35 million to his solicitors' bank account, and to pay another £1.35 million by way of PAYE income tax to Her Majesty's Revenue and Customs ("HMRC"). The Defendants contend that they were entitled, indeed obliged by law, to pay only a net sum having deducted PAYE income tax.'

Vos J rejected Mr Barden's claim holding:

'65 I have reached the clear conclusion that the SA is to be construed as meaning that the payment of £1.35 million due to Mr Barden should be paid net of any PAYE due to HMRC thereon'

Practitioners need to be careful to agree and clearly identify where the tax liability falls, particularly if that liability is worth between £673,177.16 and £1,350,000 to your client.

Toby Bishop
To content

Asserting a start date prior to that agreed in a written agreement requires a finding of variation of contract. That is a question of fact and degree

Koenig v The Mind Gym Ltd (UKEAT/0201/12/RN)

Ms Koenig was dismissed from employment on 29 September 2010. The employer asserted she commenced employment on 1 October 2009 (the date on which her written agreement of 14 August 2009 said she was to start work), meaning she had less than one year's continuous service. Ms Koenig had, however, attended a meeting about the employer's undertaking on 29 September 2009, attendance at which she had been

told it would be of benefit to her, to a client and to the employer's project.

The EAT upheld the Judge's finding of fact that Ms Koenig's employment did not commence until 1 October 2009.

In looking at the statutory definition under the ERA, s.211 (under which the period of continuous employment *'begins with the day on which the employee starts work…*'), one must consider when the employee started work. The date agreed in a contract gives a primary indication of this. For work carried out prior to that date to bring forward the start date for continuous employment, there must be found a variation of contract. Consideration of whether or not such earlier work amounts to a variation will be a question of fact and degree, such earlier work falling on a spectrum between, for example, a social function to which the person is invited at one end, to a full day at the office under the control of the supervisor at the other end.

In Ms Koenig's case, she did not have an active role at the meeting, it was a type of meeting to which the Respondent often sent non-employees to observe, the Respondent was not paid for the meeting and Ms Koenig did not request payment for her attendance.

The EAT accordingly dismissed the appeal on the grounds that the Judge was entitled to reach the conclusion that Ms Koenig's attendance on 29 September 2009 did not vary her contract to bring forward the start date for continuous employment purposes.

Jason Braier
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COSTS

Can a tribunal make a costs award the Claimant cannot pay?

Vaughan v The London Borough of Lewisham & ors (UKEAT/0533/12/SM)

Ms Vaughan has brought a multitude of claims against her former employers, some of which are yet to be determined. In relation to those which were, she was ordered to pay one third of the Respondents' costs, estimated at £260,000, on the grounds that the claim was misconceived.

The EAT upheld the order. It was not wrong in law to order costs when there had been no deposit order. Nor was it wrong in principle to make an award in circumstances where:

'the Tribunal accepted that the Appellant was not at present in a position to make any substantial payment, but it took the view that there was a realistic prospect that she might be able to do so in due course, when her health improved and she was able to resume employment.'

Toby Bishop
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Guidance on indemnity costs orders

Howman v The Queen Elizabeth Hospital Kings Lynn (UKEAT/0509/12/JOJ)

The Tribunal awarded costs on the grounds that Mr Howman's claim was misconceived, concluding he *'must have known [that] his case … never had a chance of success*.'

The EAT gave some general guidance:

"In our view, therefore, costs incurred in proceedings in employment tribunals should only be assessed on the indemnity rather than the standard basis when the conduct of the paying party has taken the situation away from even that very limited number of cases in the employment tribunal where it is appropriate to make orders for costs."

"if the tribunal thought that the costs Mr Howman should have to pay should be capped, it could still have ordered that the costs be assessed by the county court, and assessed on the indemnity basis, while at the same time ordering that the sum which the assessment produces should be limited to such sum as the tribunal thought appropriate. The real question, then, is not so much whether the costs should have been ordered to be assessed on the standard as opposed to the indemnity basis, but whether the order should have been modified in some way to reflect what Mr Howman could afford."

The EAT held it was not wrong to order indemnity costs, but the Tribunal had erred in failing to consider:

- the impact of the order on the Claimant; and
- the imposition of a costs cap.

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MEMBERS' CASES

Details of members' cases can be viewed on their individual profiles

Without prejudice privilege applies only while at least one party reasonably contemplates litigation

A v B & C (UKEAT/0092/13/RN)

An employee was the subject of a disciplinary procedure, the panel decided to issue a final written warning, but did not communicate the sanction to the employee for several months. During those months the employee and employer representatives were negotiating a settlement, the essential terms of which were the employee's employment would be terminated in exchange for a payment.

The negotiations continued for a short period after the employee was informed that he would be issued with a final written warning.

The EAT held that evidence of negotiations conducted prior to the employee being notified of the outcome was privileged as he could reasonably have contemplated commencing litigation if the outcome had been dismissal. However, evidence of negotiations after the employee was notified he would receive a final written warning was admissible as neither party could have reasonably contemplated litigation and there was not a dispute to which the privilege could attach.

Toby Bishop
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LEGISLATION UPDATE

New Tribunal rules

http://www.legislation.gov.uk/uksi/2013/1237/contents/made

As you will no doubt be aware the new Employment Tribunal rules will soon be upon us, coming into force on 29 July 2013 following the Underhill review. The rules are surprisingly readable. They use simple language and are more concise than their predecessors (being less than half the length of the old rules). The new rules merit a careful read through in their entirety; the purpose of this brief article is to point you towards some of the contents of the new rules.

In respect of alternative dispute resolution, rule 3 obliges the ET, wherever practicable and appropriate, to encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.

The ability of Presidents to publish guidance as to matters of practice and how the powers conferred by the rules may be exercised is set out at rule 7. The Underhill review intended Presidential Guidance to address a concern that parties do not know what to expect, or what is expected of them, at various procedural stages and a perception that there are wide variations between how different judges, particularly at different centres, deal with the same kinds of hearing.

An initial consideration or "sift" stage is provided for by rule 26. This means that as soon as possible after acceptance of the response, an Employment Judge will consider all of the documents held by the ET to confirm whether there are arguable complaints and defences within the ET's jurisdiction.

"Preliminary hearings" are introduced by virtue of rule 53. At this hearing the ET may conduct a preliminary consideration of the claim and make a case management order, determine any preliminary issue, consider whether a claim or response should be struck out, make a deposit order and explore the possibility of settlement or ADR. If the preliminary hearing involves any preliminary issues (any substantive issue which may determine liability eg. jurisdiction or whether an employee was dismissed) the ET shall give the parties at least 14 days notice, and the notice shall specify the preliminary issues that are to be, or may be decided at the hearing. The distinction between case management discussions and pre-hearing reviews is therefore removed.

Other rules which merit particular attention are rule 20 on applications for extensions of time for presenting responses, rule 21 on the effect of non-presentation or rejection of a response and rule 78 as to detailed assessment of costs by an Employment Judge.

Victoria Flowers
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Fees

http://www.justice.gov.uk/downloads/tribunals/employment/et-fees-factsheet.pdf

There are 2 levels:
1 – claims due on termination e.g. unpaid wages, payment in lieu of notice, redundancy;
2 – unfair dismissal, discrimination, equal pay etc.

The fees for single claims will be:

Fee Type	Level 1	Level 2

Issue fee	£160	£250
Hearing fee	£230	£950
Review default judgment	£100	£100
Application to dismiss following settlement	£60	£60
Mediation by judiciary	-	£600
Counter claim	£160	-
Application for review	£100	£350

EAT fees:

Appeal fee	£400
Hearing fee	£1200

There will be a remissions scheme for those who meet the criteria.

The fees are set to come in to force on 29 July 2013. There are however judicial review proceedings outstanding challenging the fees both in England and Scotland.

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Whistleblowing

Section 17 of the Enterprise and Regulatory Reform Act 2013 amends s.43B of the Employment Rights Act 1996. The amended section will read: "*In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one of the following…"* (inserted words underlined).

Section 18 ERRA 2013 omits the words "in good faith" from stated subsections of Part 4A Employment Rights Act 1996 (protected disclosures) so that, for example, section 43C(1) will read "*a qualifying disclosure is made in accordance with this section if the worker makes the disclosure (a) to his employer…"* (the words "in good faith" having been omitted from after "disclosure"). It also provides the tribunal with power to reduce an award by no more than 25% if it appears to the tribunal the protected disclosure was not made in good faith.

Section 20 ERRA 2013 amends section 43K ERA 1996 which concerns the extension of the meaning of "worker" etc for Part IVA ERA 1996 (worker including individuals who are not workers as defined by section 230 but who satisfy the criteria set out).

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Settlement

Section 14 of the Enterprise and Regulatory Reform Act 2013 introduces a new s.111A in to the Employment Rights Act 1996. The first subsection reads: *(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.*

The section broadens the protection of without prejudice privilege in unfair dismissal claims. The provision will not apply to automatic unfair dismissal or in cases of '*improper behavior'*. A term which the draft ACAS code describes as '*slightly wider than that of unambiguous impropriety*'.
This provision will be in force from 29 July 2013.

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CHAMBERS NEWS

Seminars

Nikolas Clarke, Francis Hoar, Jason Braier, Toby Bishop and Victoria Flowers have presented the following topics at seminars this quarter:

- Privilege and the admissibility of HR advice;
- Covert recordings;
- Settlement negotiations pre and post Enterprise and Regulatory Reform Act 2013;
- The new Tribunal rules, fees and whistleblowing provisions;
- Redundancy – redeployment, pools and trial periods.

WORKSHOP

The employment group will be putting on a series of CPD accredited workshops over the summer starting with:

New Employment Rules and Fees
on
Friday 26th July 2013
at
5 Field Court, Gray's Inn
London WC1R 5EF
from
1pm - 2pm

With the new Employment Tribunal Rules coming into force on 29 July 2013, this lunchtime workshop aims to highlight the changes brought in by the new regime and to explain the forthcoming fee structure.

Spaces are limited to 10 delegates per course date. Future workshops are planned.

To check availability of space and future dates contact: clerks@fieldcourt.co.uk

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