Winter 2013 *Issue 12*

Employment Law Newsletter

INTRODUCTION

Welcome to the 12th Field Court quarterly newsletter.

Chambers has given a number of seminars since the last newsletter. If you attended and want to follow up with any of the speakers the clerks will be able to put you through. If you would like to attend future seminars please speak to the marketing team on 020 7405 6114.

Congratulations to John Crosfill who has been recognised as a leading junior in the latest edition of the Legal 500. John will also be striking fear in the hearts of the more junior members of the team by sitting as an Employment Judge.

As always, we hope you enjoy the e-bulletin and we welcome any comments and suggestions for improvement.

Editors
Employment Law Newsletter
Field Court Chambers Employment Group

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For business contact or comments topics covered in this issue a suggestions for future issues plea contact: *clerks@fieldcourt.co.uk*

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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)
Nikolas Clarke (2000)
Francis Hoar (2001)
Jason Braier (2002)
Miriam Shalom (2003)
Christine Cooper (2006)
Rhys Hadden (2006)
Toby Bishop (2008)
Victoria Flowers (2009)
Sara Hunton (2010)

CASE UPDATES

DISCRIMINATION

Indirect discrimination may be 'cured' by an internal appeal

Little v Richmond Pharmacology Ltd [2013] UKEAT/0490/12/LA

Whilst on maternity leave, the Claimant requested a trial period of part-time working on her return to employment. This request was refused and the Claimant was informed of her right to appeal that decision. Accordingly, the matter went to an internal appeal which the Claimant attended and in which she was successful. As a result, she was offered a trial period of part-time work along the lines of her original request. In the meantime, the Claimant had resigned and, following the appeal, she refused the Respondent's offer to withdraw her resignation. The Claimant subsequently brought out of time complaints for constructive unfair dismissal (relying upon a breach of the implied term of mutual trust and confidence) and indirect sex discrimination due to the detriment caused by refusal of flexible working hours. The former complaint was dismissed by an employment tribunal (and the subsequent appeal dismissed by the EAT) on the basis that it was time-barred.

In respect of the unlawful discrimination complaint, the employment tribunal concluded that the successful internal appeal had corrected the original disadvantage to the Claimant. This view was approved by the EAT, observing that the Claimant had been refused part-time working but had been entitled to appeal that decision. Further, the EAT took notice of the fact that the internal appeal was held before the Claimant's planned return to work and, thus, she had suffered no disadvantage by the procedure.

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UNFAIR DISMISSAL

It is unfair to consider a group of potentially redundant employees for an alternative role if one candidate is unaware of the full job description

Somerset CC v Chaloner [2013] (UKEAT/0600/12)

Due to a severe slump in business, the Council decided to reduce the number of senior management roles in one of its businesses from four to two. Ms Chaloner, already the Council's employee, received job descriptions for the two new roles. She was the only applicant for the Business Development Manager (BDM) position, which had been designated a lower grade than her role at the time. After the Council had made three material changes to the BDM job description, a second internal candidate applied for that revised position. Without having been informed of the revised job description, Ms Chaloner was unsuccessfully interviewed and was dismissed.

Ms Chaloner succeeded in a complaint of unfair dismissal. The ET determined she had been unfairly disadvantaged at interview as she was unaware of the revised job description or the addition of a competing candidate for the role. Further, the Tribunal found that the interview panel had assessed Ms Chaloner's skills and other qualifications subjectively rather than according to its redundancy policy.

At appeal, the EAT found the ET had correctly applied the appropriate legal test in s98(4) of the Employment Rights Act 1996, by reviewing all aspects of the Council's decision to dismiss Ms Chaloner according to the standards of a reasonable employer. Thus, the EAT upheld the ET's decision that Ms Chaloner had not been considered fairly by the Council and that her dismissal was unfair.

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The immediacy of an employee's resignation without notice is unaffected by the employer's offer of a cooling off period

Secretary of State for Justice v Hibbert [2013] (UKEAT/0289/13GE)

The issue on appeal was the not uncommon dispute around an uncertain termination date. Against a background of capability hearings and sick leave Ms Hibbert delivered a letter drafted by her solicitors and dated 29 June which included the passage;

> '*I am of the view there has been a fundamental breach of my employment contract by my employer and I have no alternative but to resign my position.'*

Her employer's letter in response dated 3 July included the passage;

> '*I believe it would be god practice to allow a period of five days for you to review your decision...'*

The letter invited Ms Hibbert to a capability hearing on 10 July. On 9 July Ms Hibbert's solicitors wrote to her employer, including the following passages;

> '*Ms Hibbert's decision to resign was based on a substantial number of factors... We can advise you that the timing of the capability hearing has not influenced her decision to resign...'*

The employer responded on 11 July;

'I have no alternative but to accept your resignation as you have requested in your letter dated 29 June 2012.
You are required to provide four weeks' notice therefore your last day will be 27 June 2012...'

The EAT applied Sothern v Franks Charlesly & Co [1981] IRLR 278 Willoughby v CFC plc [2011] EWCA Civ 115 and held the effective date of termination was the 29 June, the date of the employee's initial letter. The EAT concluded that the employer's written assertion that four week's notice were required, that the EDT would be 27 July and their payment for the four weeks were all of no legal effect.

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DIPLOMATIC / STATE IMMUNITY

Provisions of domestic law barring private law employment claims must be disapplied where a 'fundamental' principle of EU law is contravened

Benkharbouche v Sudan [2013] (UKEAT/0401/12/GE & 0020/13/GE)

In conjoined appeals, two former workers at the Sudanese and Libyan embassies in London brought claims for unfair dismissal, race discrimination, and breaches of the Working Time Regulations 1998 *inter alia*. At first instance, their claims were dismissed on the basis that the Respondents were immune from suit under sections 4 and 16 of the State Immunity Act 1978. The Appellants contended that this denied them access to the courts contrary to Article 6 ECHR and, alternatively, that the directly effective nature of the Charter of Fundamental Rights of the EU required these provisions be disapplied to the extent that they breached its Articles.

The EAT held that although the provisions breached Article 6 ECHR, the SIA 1978 could not be read down under section 3, HRA 1998 to comply with the Convention. Parliament's intention in drafting section 4 was to confer immunity from suit.

However, recent EU case law *C-555/07 Kücükdeveci v Swedex GmbH & Co KG* and *C-617/10 Aklagaren v Fransson* provided that where a fundamental principle of EU law is concerned, UK courts must disapply provisions of domestic law that prevent this being upheld, even where the litigation is between private persons. This obligation is limited to rights within the material scope of EU law, i.e. rights under statutory provisions that implement EU Directives or Regulations. The Appellants therefore only succeeded in the claims that fell within the scope of EU law, the others to be pursued through a declaration of incompatibility.

Permission to appeal was granted to both sides.

Anita Rao
Pupil Barrister
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Legislative bars to private law employment claims on the grounds of diplomatic immunity are proportionate breaches of Article 6 ECHR

Al-Malki v Reyes & Suryadi [2013] (UKEAT/0403/12/GE)

Two former domestic workers employed by the Respondents, a diplomat from Saudi Arabia and his wife, brought claims for contractual breaches, non-payment of minimum wage and race discrimination *inter alia*. At first instance, the Respondents claimed diplomatic immunity against such actions under the Diplomatic Privileges Act 1964, and therefore the Vienna Convention on Diplomatic Relations 1961. The Tribunal held that the Respondents reliance on immunity breached the Claimants' Article 6 ECHR right to a hearing and that such interference was disproportionate. The Respondents appealed.

On appeal, the parties were agreed that Article 6 was engaged and that diplomacy was a 'legitimate aim'. The EAT was therefore left to decide on the question of proportionality. The Tribunal held that the breach was proportionate and in reaching this decision, relied on the following. First, the underlying rationales for diplomatic and state immunity were different and the scope of the former is wider than the latter. Secondly, the seriousness of any claim brought was deemed irrelevant to determining whether a given claim falls within the scope of an exception from diplomatic immunity or not. Thirdly, no authority or international Convention had since moderated the articles of the Vienna Convention. Finally, there was no decided case on whether diplomatic immunity was restricted on the basis of breach of Article 6.

The Claimants were granted permission to appeal.

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COSTS

Legal costs in employment case could not be deducted from employee's earnings for the purposes of income tax.

Wardle v Commissioners for HMRC [2013] UKFTT 599 (TC)

Mr Wardle appealed to the First-Tier Tribunal (Tax Chamber) against a closure notice issued by HMRC in respect of his self-assessment tax return which increased his liability to income tax by over £49,000. He

had been denied a deduction from his earnings of the costs he incurred in bringing a claim against his former employers for unfair dismissal (which went through the ET, EAT and Court of Appeal) together with the costs of the respondent that he had been ordered to pay by the Court of Appeal.

The FTT held that the costs Mr Wardle incurred which were the subject matter of the appeal were not attributable to his role as a regulator but as a result of his dispute with, and subsequent unfair dismissal from, his employers. The costs could therefore only be deducted from his earning if they fell within the conditions of section 336 Income Tax (Employment and Pensions) Act 2003 which required him to have been obliged to pay the costs "as holder of the employment" and for the amount to be incurred "wholly, exclusively and necessarily in the performance of the duties of the employment". Given the nature and duties of his employment they were unable to find he was either obliged to meet his legal costs and those ordered by the Court of Appeal as a holder of the employment, or that they were incurred wholly, exclusively and necessarily in the performance of the duties of the employment. The costs could not therefore be deducted from his earnings and HMRC were correct to make the amendment to his self-assessment tax return. The appeal was dismissed.

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Costs award made and appeal dismissed where no express finding that the claimant was dishonest but equally no finding she genuinely believed in matters complained of and ET had specifically rejected her evidence on a number of factual matters.

Ghosh v Nokia Siemens Networks UK Ltd [2013] (UKEAT/0125/12/MC)

The claimant had brought claims for discrimination on the grounds of her race (against her line manager and employer) and unfair dismissal. The ET had dismissed the discrimination claims but found the Claimant had been unfairly dismissed. At the remedies hearing the ET did not find it just and equitable to make either a basic or compensatory award and awarded £5,000 costs against the Claimant in favour of her employer as the pursuit of the claims (primarily against her line manager) which they had rejected constituted wholly unreasonable conduct.

An appeal on the costs issue came before the EAT. There was no express finding that the Claimant was dishonest, but equally there was no finding that she did genuinely believe in the matters which she complained and the ET specifically rejected the Claimant's evidence on a number of factual matters. In this case the ET was well entitled to find that her conduct was unreasonable. There were a large number of serious allegations of discriminatory conduct which were rejected (some were rejected on the basis that what the Claimant asserted had happened had not in fact happened). The appeal was without merit and was dismissed.

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An insurer which stipulates legal assistance would in principle be provided by its employees is precluded from also providing that the costs of lawyers chosen freely by the insured would be covered only if the insurer took the view the case should be sub-contracted to external lawyers.

Sneller v DAS Nederlandse Rechtsbijstand Verzekeringsmaatchappij NV C-442/12; [2013] All ER (D) 101 (Nov)

This case concerns the Legal Expenses Insurance Directive. The CJEU dealt with the following Dutch reference, arising out of the applicant's wish to pursue an unfair dismissal claim and rely on his legal expenses insurance:

(1) Does Article 4(1) of Directive [87/344] allow a legal expenses insurer, which stipulates in its policies that legal assistance in inquiries or proceedings will in principle be provided by employees of the insurer, also to stipulate that the costs of legal assistance provided by a lawyer or legal representative freely chosen by the insured person will be covered only if the insurer takes the view that the handling of the case must be subcontracted to an external lawyer?

(2) Will the answer to Question 1 differ depending on whether or not legal assistance is compulsory in the inquiry or proceedings concerned?

The CJEU held that, in interpreting an article, the context in which the wording of the article occurred had to be taken into consideration.

Accordingly, A. 4(1) must be interpreted as precluding a legal expenses insurer from imposing in their insurance contracts, that the costs of legal assistance provided by a lawyer chosen by the insured would only be covered if the insurer took the view that an external lawyer should be instructed to handle the case.

The court further stated that this does not oblige Member States to require insurers to cover all the costs incurred in connection with the defence of an insured person or to prohibit insurers from imposing higher premiums for a higher level of cover for legal assistance costs.

The court held that the answer to Question 1 will not differ depending on whether or not legal assistance is compulsory under national law in the proceedings concerned.

Edward Bennett
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TUPE

A transferee employer will not be bound by post transfer collective agreement if it was not a party to the negotiations. The 'static' approach prevails over the 'dynamic'.

Alemo-Herron v Parkwood Leisure Ltd C-426/11; [2013] All ER (D) 379 (Jul)

In a judgment that provides clarity on the impact of collective agreements following a TUPE transfer, the CJEU held that, where a transferee employer is not a party to collective negotiations, it should not be bound by the outcome of those negotiations.

The claimants were employed by a Local Authority, their employment contracts entitling them to pay increases in accordance with collective agreements negotiated from time to time by an external body (the NJC). Following an outsourcing exercise in 2002, the claimants transferred to a private company under TUPE in 2002, and again (to the respondents) in 2004. Later in 2004, a new collective agreement was reached that awarded pay increases to relevant employees. As only public authorities could participate in the negotiations, the respondents played no part and declined to comply with the new terms. The employees brought claims for unlawful deduction from wages, arguing that TUPE preserved their right to have the NJC set pay on an ongoing basis (the 'dynamic' approach). The respondent's submission was that TUPE takes a snapshot of entitlements at the date of transfer and that amendments thereafter are for the employees and their new employer to agree upon together (the 'static' approach).

The Supreme Court's reference concerned whether a 'static' or 'dynamic' approach should be taken in interpreting TUPE.

The CJEU held that where the transferee does not have the opportunity to participate in the negotiations pursuant to a collective agreement that are concluded after the date of transfer, the outcome of these negotiations should not bind the transferee.

The 'static' approach should be taken on the facts of this case. The purpose of the Acquired Rights Directive was not just to protect the rights of employees but also to seek a fair balance between their interests and those of the transferee. A transferee must be in a position to make changes necessary to carry on its operations. A clause that regulates working conditions in the public sector was likely to considerably limit the freedom of a private employer to make such changes. In limiting this freedom, the clause would undermine the fair balance between the employees' and transferees' interests.

Furthermore, the Directive had to be interpreted in accordance with the Charter of Fundamental Rights, specifically its provisions relating to freedom to conduct business. The respondent was unable to participate in the collective bargaining process. Consequently, its contractual freedom was significantly impaired to the point where such impairment could adversely affect its freedom to conduct business.

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CONTRACT / RESTRICTIVE COVENANTS

The Court of Appeal gives useful guidance as to the enforceability of non-solicitation clauses

Coppage and Freedom v Safety Net Security Ltd [2013] EWCA Civ 1176; [2013] IRLR 970

Mr Coppage was a director of Safety Net Security Ltd ("SNSL"). His contract contained the following non-solicitation clause;

> *'for a period of six months immediately following termination of your employment for any reason whatsoever, you will not, whether directly or indirectly as principal, agent, employee, director, partner or otherwise howsoever approach any individual or organisation who has during your period of employment been a customer of ours, if the purpose of such an approach is to solicit business which could have been undertaken by us.'*

The Court of Appeal set out 8 general principles;

> *'(i) Post-termination restraints are enforceable, if reasonable, but covenants in employment contracts are viewed more jealously than in other more commercial contracts, such as those between a seller and a buyer.*
> *(ii) It is for the employer to show that a restraint is reasonable in the interests of the parties and in particular that it is designed for the protection of some proprietary interest of the employer for which the restraint is reasonably necessary.*
> *(iii) Customer lists and other such information about customers fall within such proprietary interests.*
> *(iv) Non-solicitation clauses are therefore more favourably looked upon than non-competition clauses, for an employer is not entitled to protect himself against mere competition on the part of a former employee.*
> *(v) The question of reasonableness has to be asked as of the outset of the contract, looking forwards, as a matter of the covenant's meaning,*

and not in the light of matters that have subsequently taken place (save to the extent that those throw any general light on what might have been fairly contemplated on a reasonable view of the clause's meaning).
(vi) In that context, the validity of a clause is not to be tested by hypothetical matters which could fall within the clause's meaning as a matter of language, if such matters would be improbable or fall outside the parties' contemplation.
(vii) Because of the difficulties of testing in the case of each customer, past or current, whether such a customer is likely to do business with the employer in the future, a clause which is reasonable in terms of space or time will be likely to be enforced. Moreover, it has been said that it is the customer whose future custom is uncertain that is 'the very class of case against which the covenant is designed to give protection ... the plaintiff does not need protection against customers who are faithful to him' (John Michael Design plc v Cooke [1987] 2 All ER 332, 334).
(viii) On the whole, cases in this area turn so much on their own facts that the citation of precedent is not of assistance.'

On the facts Sir Bernard Rix, giving the leading judgment, held there had been nothing wrong with Simon Brown QC's approach at first instance. The clause was reasonable and enforceable against Mr Coppage. The Court of Appeal set out 6 considerations;

'Firstly, the clause in question was plainly a non-solicitation clause and not a non-competition clause in form.
Secondly, the post-termination restraint was only six months. That was a fundamental consideration of reasonableness – a restraint period as short as six months was a powerful factor in assessing the overall reasonableness of a clause.
Thirdly, Mr Coppage was a key employee who had the power to influence all customers with whom he had come into contact, both current and past.
Fourthly, the stability of the customer list and the small minority of relevant customers who had ceased to provide business within the last 12 months showed that it had been entirely reasonable to draft the clause to relate to all customers within the period of Mr Coppage's employment. The facts in the present case were different to those of Office Angels – it could not have been said in the present case that the insertion of a 12-month retrospective limitation would have been "much less far-reaching and less potentially prejudicial". There was nothing to support a conclusion that a non-solicitation clause "in principle" ought to have been limited by a retrospective limitation along the lines of "within the last 6 [or 12] months".
Fifthly, account had to be taken of the limitation to the clause provided by its concluding proviso that "if the purpose of such an approach is to solicit business which could have been undertaken by us". In that proviso, "could" there was not a reference to a mere theoretical possibility, but to a commercially practical reality. It had been entirely reasonable to express the clause in the way in which it had been expressed, namely, to assume that a customer within the period of Mr Coppage's employment as the "face" of that business was prima facie out of bounds, for the strictly limited period of six months, but subject to a proviso that there was a commercially realistic possibility of Safetynet providing services for the customers concerned. If the ex-customers concerned had left under bad terms, such that there was no realistic possibility of Safetynet recovering their business, then the solicitation of such customers would not have been a breach of the clause.
Sixthly, with regard to the submission that the clause was unreasonable because, at the outset of Mr Coppage's contract of employment, it could theoretically have been posited that he could have worked for Safetynet for six years and have been prohibited from soliciting an ex-customer who had been a customer at the outset of his employment but had left a short two weeks later, that had been an example of an argument from merely theoretical or fanciful possibilities which the jurisprudence decried.'

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LEGISLATION UPDATE

TUPE reform

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254738/bis-13-1272-draft-tupe-regulations-2013.pdf

Following consultation the government has published draft regulations to reform collective redundancy and TUPE regulations. The changes are expected to come in to force in January 2013. The proposed changes include;

- Clarifying that in order to apply to SPCs the SPC must be '*fundamentally or essentially the same'* after the transfer.
- Pre-transfer consultation by the transferee counting for the purposes of collective redundancy.
- Allowing renegotiation of collective agreements one year after transfer, provided the changes are not less favourable to the employees.

End of third party harassment liability

http://legislation.data.gov.uk/uksi/2013/2227/made/data.htm?wrap=true

With effect from 1 October 2013 subsections 40(2) to (4) of the Equality Act 2010 are omitted. Employers will no longer be liable for third party harassment of its employees.

Update on impact of fees

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251517/ad-hoc-employment-trib-stats-jul-sep-13.pdf

The MoJ has published an ad-hoc set of statistics for the period July – September 2013. The average number of claims in January – May 2013 was around 17,000 per month. There was a significant spike in June up to 25,000, which is to be expected as Claimants sought to lodge before the fee structure came in to force. July was around 17,000 and August fell to 7,000, which may be a result of the June rush. September was then 14,000.

The report was published on 18 October 2013, it may be that some ET1s had not been processed by that stage, so the true August/September figures may be higher.

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CHAMBERS NEWS

Seminars

Jason Braier chaired a seminar for the London Young Lawyers Group at the Bingham Rooms in September, with sessions from the following speakers;

- Francis Hoar – Trial bundles
- Toby Bishop – Witness statements
- Victoria Flowers – Disclosure

Chambers' preparation for trial seminar in October 2013 was well attended. If you wish to discuss any of the topics raised the speakers were:

- Joshua Swirsky – Chair
- Mark Tempest – Mediation
- Victoria Flowers - Disclosure and evidence
- Francis Hoar - Bundles
- Franklin Evans – Summary assessment of costs

To check availability for future seminars and workshops contact the clerks at:

clerks@fieldcourt.co.uk

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