Employment Newsletter

Spring 2015- Issue 14

INTRODUCTION

The 14th Edition of the Field Court Chambers' Employment Newsletter sets out recent significant employment decisions in an easily digestible format.

The last few months have been a busy and interesting time for Field Court Chambers' Employment Team. As well as the successful EAT appearances and seminars mentioned in the Chambers News section, members of the Employment Team have dealt with numerous interesting employment issues, including:

- Whether to refuse a job to a religious Jew who couldn't work on Saturdays amounts to indirect discrimination on grounds of religion.
- The circumstances in which a Tribunal can look at the legitimacy of an old written warning in unfair dismissal proceedings.
- Whether it is a breach of contract to require a person returning from absence to do more than obtain a fit note from his GP before allowing him to return to work.
- Whether it is indirect discrimination on grounds of age to decide in a redundancy process that all professors of law will be made redundant whilst leaving other academic staff outside of the redundancy pool.

Chambers now has two working pupils accepting employment law briefs, Eleanor Sibley and Eirwen-Jane Pierrot.

If you have any questions about matters in this newsletter you can contact any of the employment team through our clerks.

Field Court Chambers Employment Group

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DISCRIMINATION

Is obesity a disability?

Kaltoft v Billund (FOA v Kommunernes Landsforening**)** [2014] EUECJ C-354/13

The case concerns the interpretation of the general principles of EU law and of Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment. The Claimant was a childminder employed by a public administrative authority in Denmark. For the whole period of his employment he was medically obese. He was dismissed, seemingly on the basis of redundancy, but the fact of his obesity was raised during a meeting in which his dismissal was discussed.

Whilst obesity cannot be regarded as a ground in addition to those stated in the Directive, it could be a "disability". 'Disability' does not depend on the extent to which the person may or may not have contributed to the onset of his disability. In the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive.

Nik Clarke

Proportionality exercise under section 15 Equality Act 2010 different from article 8 ECHR.

Akerman-Livingstone (Appellant) v Aster Communities Limited (formerly Flourish Homes Limited) (Respondent) [2015] UKSC 15

This was an appeal to the Supreme Court about the proper approach of the courts when a defendant to a claim for possession of his home raised a defence of unlawful discrimination contrary to the Equality Act 2010, and whether the principles that apply to article 8 ECHR defences also applied to discrimination defences.

The Supreme Court held that the lower Courts had been wrong to consider that a court should take the same approach to a defence raising an argument of unlawful discrimination under s.35(1)(b) of the Equality Act 2010 as to a defence based on article 8 ECHR. The substantive right to equal treatment protected by the Equality Act 2010 is different from the substantive right which is protected by article 8 ECHR. The proportionality exercise under section 15 Equality Act 2010 cannot be exactly the same as the proportionality exercise under article 8 ECHR. However, in the circumstances of this case, ensuing events meant that order for possession was in the circumstances inevitable.

Victoria Flowers

Simmons v Castle 10% uplift does not apply to injury to feelings awards in discrimination cases.

Chawla v Hewlett Packard Ltd UKEAT/0280/13/BA

The ET held that the Claimant was subjected to disability discrimination by the Respondent's failure to make reasonable adjustments of ensuring he was informed of developments to his terms and conditions of employment in a timely fashion when he was off sick. The Respondent had withdrawn his access to the corporate email and intranet systems for otherwise justifiable reasons. This led to loss or potential loss in respect of applying to join or joining share purchase plans or exercising share options. Direct disability discrimination was found in respect of delay in joining a share purchase plan. A breach of the information and consultation provisions of TUPE was also found by consent.

The EAT dismissed the appeal on liability, but two grounds of the appeal on remedy succeeded:

- The ET failed to give reasons for making no award for injury to feelings in respect of the default in timely communication of information about a share purchase plan or failed to consider making such an award; and
- The ET erred in failing to take into account a period of time that the Claimant spent in hospital when deciding the amount of a personal injury award.

It was argued that an award for injury to feelings should in any event be up rated by 10% to reflect the decision in Simmons v Castle [2013] 1 WLR 1239. It was held that the rationale for the uplift explained in Simmons v Castle did not apply to litigation in the ET. Accordingly the 10% uplift decided upon in that case did not apply to increase guidelines in cases on injury to feelings in discrimination cases in ETs. The principle to be applied by ETs in making such awards is that in Da'Bell and Bullimore: to assess the quantum for non-pecuniary loss in 'today's money'.

Victoria Flowers

Caste discrimination is not yet separately covered under the Equality Act 2010 but may fall within the protection against discrimination on grounds of ethnic origin

Chandhok v. Tirkey [2015] IRLR 195

Ms Tirkey, an Indian national from a low caste, was recruited by the Respondents as a nanny in India and then brought to the UK. She was ill-treated and kept in a state of servility. She brought various ET claims, including direct and indirect discrimination and harassment, relying on the protected characteristics of nationality and/or national origin.

By amendment to the ET1, an application was made to include ethnic origins, with the assertion that ethnic or national origins included her status in the caste system. Amendment was allowed and then the Respondents applied to strike out the caste discrimination element of the claim. The application was refused, the ET Judge finding that caste was covered under the Equality Act 2010 insofar as it was an aspect of ethnic origin.

On the Respondents' appeal against a finding that caste was covered under the definition of race, Langstaff P dismissed the appeal. He held 'ethnic origins' to have a wide and flexible meaning, which included descent where descent was linked to concepts of ethnicity. Whilst 'caste' itself is not a distinct concept under the EqA, that did not exclude the wide meaning of 'ethnic origins' covering some situations into which caste would fall.

Langstaff P also considered the circumstances in which it would be appropriate to strike out discrimination claims. He repeated the warnings given by the House of Lords in ***Anyanwu v. South Bank Student Union*** [2001] ICR 391 about the rarity of circumstances in which a discrimination claim should be struck out, and then gave a non-exhaustive list of situations where that rare exercise if discretion may be appropriate. That list includes where there is a time bar to jurisdiction and no evidence presented that it would be just and equitable to extend time, where the pleaded case goes no further than asserting a difference of treatment and difference of protected characteristic, and where claims have been brought so repetitively on the same facts as to be an abuse of process. Of particular interest, Langstaff P considered that the fact that a Tribunal hears evidence on the issues subject to the strike out application does not make a difference to the general principle in ***Anyanwu*** unless the Tribunal can be confident that no further evidence advanced at a later hearing would affect the decision.

Jason Braier

Injury to feelings awards not taxable

Timothy James Consulting Ltd v. Wilton (UKEAT/0082/14/DXA)

Ms Wilton resigned from her employment. She resigned, asserting constructive dismissal, as a result of three acts of harassment related to her sex. She succeeded before the ET in a variety of claims, including for unfair dismissal and harassment. At the remedies hearing, her award included £10,000 for injury to feelings. The total award amounted to over £30,000. The Tribunal did not gross up the injury to feelings award on a ***Shove v. Downs*** basis. The appeal was wide-ranging but it is the taxable treatment of injury to feelings awards that is of particular interest.

In the recent First-Tier Tribunal, Tax Chamber case of ***Moorthy v. HMRC*** [2015] IRLR 4, the Tribunal held that injury to feelings awards were payments taxable under s.401 of ITEPA (subject to

the £30,000 threshold) if *'received directly or indirectly in consideration or in consequence of, or otherwise in connection with…the termination of a person's employment'* and that injury to feelings awards did not fall under the s.406 exception from taxable status for payments made on account of injury to an employee.

However, in ***Wilton***, Singh J preferred to follow the decision of McMullen J in the EAT case of ***Orthet Ltd v. Vince-Cain*** [2005] ICR 324 rather than ***Moorthy***. In ***Vince-Cain***, the EAT held injury to feelings awards fell within the s.406 exception so that they were not taxable.

Thus authority now in the tribunal system which makes injury to feelings awards (the employment tribunal) is that the awards are not subject to tax, whilst the tribunal system which deals with questions of taxability (the Tax Chamber) considers such awards are subject to tax. This provides for a messy impasse which desperately needs to be resolved by higher authority.

In the meantime, I suggest that where in settlement agreements any injury to feelings element is not grossed up a clause be added for the employer to indemnify the employee for any tax payable upon it. If an award is made by the ET, then if HMRC subsequently ask for tax to be paid on the injury to feelings element, an application for reconsideration could always be made for the ET to gross up the award (unless the employer volunteers to take responsibility for that additional tax liability).

Jason Braier

A dismissal can be both fair and unlawfully discriminatory

GMB v Henderson UKEAT 0073/14/DM

Mr Henderson was dismissed for gross misconduct by his employer, the GMB. Amongst a number of issues raised, Mr Henderson had, when carrying out his role organising a picket line for House of Commons staff on strike, publicised a "day of action" letter reporting that Labour MPs were not to cross the picket line – a letter that caused the Labour Party some embarrassment. Mr Henderson was criticised by the GMB's General Secretary in a phone call for being "over the top" and "too left wing".

The Employment Tribunal found that Mr Henderson's dismissal was fair. However, it also found that he had suffered unlawful direct discrimination and harassment on the basis of the protected characteristic of his "left-wing democratic socialist beliefs". Both parties appealed.

Simler J upheld the Employment Tribunal's finding that the dismissal was within the range of reasonable responses of a reasonable employer and therefore fair. She rejected Mr Henderson's argument that the Employment Tribunal must have erred in law when it concluded that the dismissal was, at the same time, both fair and discriminatory stating:

"*provided a tribunal makes findings of fact that are supported by the evidence, correctly applies*

the relevant statutory test, and reaches reasoned conclusions by reference to the facts found, there is no reason in principle why such a conclusion cannot stand."

Having said that, Simler J went on to allow the GMB's appeal in relation to direct discrimination. She gave short shrift to the suggestion that the law affords less protection for a philosophical as opposed to religious belief, nothing that they may be "*just as fundamental or integral to a person's individuality and daily life*", but ultimately held that there was no evidential basis on which to conclude that Mr Henderson's philosophical beliefs operated in the minds of the decision makers.

Simler J also allowed the GMB's appeal in respect of harassment, reasoning that the "trivial" and "*isolated*" incidents referred to did not reach the degree of seriousness necessary to amount to unlawful harassment.

Eirwen Pierrot

UNFAIR DISMISSAL

Reasonableness of investigation is considered holistically under the Burchell test

Shrestha v. Genesis Housing Association Ltd [2015] EWCA Civ 94

Mr Shrestha was dismissed from his support worker role for gross misconduct for fraudulently claiming excessive mileage for travel to clients. When confronted with the allegations, he raised as defences parking difficulties, road works, road closures and one-way streets.

In challenging the reasonableness of the investigation (under the ***Burchell*** test), Mr Shrestha asserted that where an employee raises several lines of defence to allegations of misconduct, an investigation will not be reasonable without the employer investigating each line of defence (save any that are manifestly false or unarguable). The Court of Appeal disagreed, describing the suggestion as *'an unwarranted gloss to the Burchell test'*. It held what matters is the reasonableness of the overall investigation into the issue, rather than specific inquiry into each line of defence. Thus it did not render unreasonable the investigation by Genesis that the investigating officer did not telephone the local authority to ascertain what parking restrictions were in place when the relevant journeys were made and what road works took place on relevant dates.

Jason Braier

EMPLOYMENT STATUS

An unpaid director can be an employee

Stack v Ajar-Tech Ltd [2015] EWCA Civ 46

The issue before the Court of Appeal was whether the Claimant, an unpaid director of the Respondent company with no formal employment contract, was an employee, a worker, or neither under the Employment Rights Act 1996.

The EAT, overturning the decision of the Employment Tribunal, found that the Claimant could not be an employee. It reasoned that any agreement that the Claimant would work for the Respondent could not be a binding contract as there was no consideration. As there was no contract it was not possible to imply a term about payment.

The Court of Appeal, however, agreed with the Employment Tribunal and held that the Claimant was both an employee and a worker. It found that there had been an express agreement between the three directors of the company prior to the company being incorporated that the Claimant would work for the Respondent. That agreement was supported by consideration in the form of the "*mutuality of promises*" between the directors as to the skills and money they would contribute to the venture. Upon finding an express agreement, the Court of Appeal then went on to agree with the Employment Tribunal as to the existence of an implied term that the Claimant would be paid. It was "*common sense*" that the Claimant would receive reasonable remuneration – especially as the other directors were themselves being paid. ***Eirwen Pierrot***

JURISDICTION

Staff at a foreign diplomatic mission were able to bring proceedings against their state employer relying on UK employment rights

Benkharbourche v Embassy of the Republic of Sudan; Janah v Embassy of the Republic of Libya [2015] EWCA Civ 33

Ms Benkharbouche and Ms Janah were, respectively, domestic staff at the Sudanese and Libyan Embassies in London. They were dismissed from their jobs and brought claims for, inter alia, unfair dismissal and breach of the Working Time Regulations 1998. Their employers claimed immunity under the State Immunity Act 1978 ("SIA") and defeated the claims at first instance.

The EAT found that ss16(1)(a) SIA (which excludes Mission staff from an exception to immunity under s4 SIA) and s4(2)(b) (which excludes individuals from the exception if they were neither UK nationals nor habitually resident in the UK at the time their contract was formed) breached the Claimants' Article 6 ECHR right to a fair trial, and their right of access to Court under Art 47 of the

Charter of Fundamental Rights of the European Union ("the Charter").

On appeal to the Court of Appeal, the issues were: (a) whether ss16(1)(a) and 4(2)(b) SIA were required by international law; (2) whether these provisions breached the Claimants' rights under Article 6 ECHR; (3) if so, whether they could be read down under s3(1) Human Rights Act 1998; and (4) whether they breached the Claimants' rights under Article 47 of the Charter.

The Court of Appeal found that neither s16(1)(a) SIA nor s4(2)(b) were required by international law or fell within the range of tenable views of what was required by international law. They fell outside the margin of appreciation for states. Further, S4(2)(b) was discriminatory on grounds of nationality.

The Court of Appeal went on to hold that these provisions breached the Claimants' rights under Art 6 ECHR, and that s4(2)(b) breached Article 14 ECHR (right to non-discrimination). It was not possible to read either provision down under s3(1) HRA 1998. Consequently, a s4 HRA 1998 declaration of incompatibility would be made.

Article 47 of the Charter applied to those aspects of the Claimants' case that raised EU law issues, and had been breached. Therefore, ss16(1)(a) and 4(2)(b) SIA would be set aside so far as necessary to enable employment claims by members of the Service Staff whose work did not relate to the Sovereign functions of the Mission Staff.

Eleanor Sibley

BREACH OF CONTRACT

Forwarding pornographic email is a repudiatory breach of contract

Williams –v- Leeds United Football Club [2015] EWHC 376 (QB)

Mr Williams was Technical Director at the Club. His contract provided for a salary of £200,000 and 12 months' notice. On 23 July 2013 he was given notice of termination on the grounds of redundancy. Before that date the Club had decided not to pay him during his notice period, '*probably as early as mid to late June 2013, the Club were actively seeking to find evidence which they could use to justify dismissal of the Claimant on the grounds of misconduct.*'

It was discovered that in 2008 Mr Williams forwarded an email to Denis Wise, then of Newcastle United, which read '*Looks like dirty Leeds!!*' The attachment was a slide show of images. Lewis J set out: Mr Williams '*accepted that they would be likely to offend. He described the five photographs of women in acts suggestive of sexual activity as obscene. I agree. In my judgment, the photographs, taken as a whole, can properly be characterised as obscene and pornographic.*'

On 24 July 2013 Mr Williams was invited to a disciplinary investigation meeting, an adjournment was refused and it proceeded in his absence, he was summarily dismissed for gross

misconduct by a letter dated 30 July 2013. After proceedings started the Club discovered Mr Williams had also forwarded the email to a junior

female employee at the club and to Mr Gus Poyet, then of Tottenham Hotspur. Lewis J applied **Boston Deep Sea Fishing –v- Ansell** (1888) enabling the Club to justify a dismissal by breaches discovered post-dismissal.

The Club relied on a breach of the implied term of trust and confidence, Lewis J considered the following material circumstances:

- Mr Williams very senior management post
- The nature of the images, being pornographic and obscene.
- Sending to a junior female employee over whose career Mr Williams exerted significant influence and thereby leaving the Club vulnerable to a claim of harassment.
- The nature of the Club's business and its reputation with sponsors and supporters.

Lewis J concluded: '*Put simply, the conduct amounted to gross misconduct and the Club were entitled to rely upon that conduct as justifying the summary dismissal of the Claimant.*'

Toby Bishop

TUPE

An individual employee instructed to carry out all the services to meet the requirements of a particular client was an 'organised grouping' for TUPE purposes

Rynda (UK) Ltd v Rhijnsburger [2015] EWCA Civ 75

The employee was employed by DJ and then, after a merger, by DJD as a commercial property manager, responsible for managing properties owned by the Rynda Group in the Netherlands. In January 2011, REM, a subsidiary of Rynda, took over from DJD, and on 1 January 2011, the employee started work for REM, doing exactly the same job as before. The employee was later dismissed and brought a claim for unfair dismissal. To establish sufficient continuous service to bring the claim, she needed to show that she had transferred from DJD to REM under TUPE 2006.

The tribunal at first instance found that there had been a relevant transfer of undertakings under regulations 3 and 4 of TUPE. The EAT dismissed REM's appeal and REM appealed to the Court of Appeal.

The main issue before the Court of Appeal was whether – despite being a single employee working on her portfolio - the employee constituted an 'organised grouping of employees' for the purposes of regulation 3(3)(a)(i). This question was the last

stage of a four-part test for determining whether there had been a change of service provision [44], the first 3 being; (i) to identify the service provided

by the new company; (ii) to list the activities undertaken by its staff in order to provide that service; and (iii) to identify the employee(s) responsible for providing those services.

The Court of Appeal found that the employee was an organised grouping. Citing from Underhill J in the EAT, Jackson LJ said that in order for there to be an organised grouping there needed to be 'deliberate planning' and 'intent' for the 'group' to carry out services to meet the requirements of a particular client. Citing from *Eddie Stobart* [2012] IRLR 356, Jackson LJ said that an example of a single employee being an organised grouping would be a single cleaner, provided by a cleaning firm to its client.

The Court of Appeal found that the employee met this test. REM had specifically directed her to work on the Netherlands portfolio, and, far from it being a matter of 'happenstance' that she did so, "at each stage of the narrative, the employer decided which client the Claimant should work for" [51], per Jackson LJ. On this basis, she constituted an organised grouping for the purposes of reg. 3(1)(b)(ii) TUPE.

Eleanor Sibley

Legislation Update

Annual Increase in Tribunal Award Limits

The Employment Rights (Increase of Limits) Order 2015 applies where the dismissal or detriment occurs after 6 April 2015.

- The maximum for a week's pay increases from £464 to 475; and
- The maximum compensatory award increases from £76,574 to £78,335

Chambers News

Seminars

Jason Braier and Francis Hoar

In October Jason and Francis delivered a seminar to 30 members of the London Young Lawyer's Group on recent discrimination cases and the new flexible working provisions

Jason Braier

In January Jason conducted a very well received lunchtime workshop on the 12 key discrimination cases of 2014.

John Crosfill and Jason Braier

In the last 4 weeks, both Jason Braier and John Crosfill have had successful trips to the EAT. Jason convinced Mr Recorder Luba QC at a Rule 3(10) hearing to allow 13 grounds of appeal to proceed to full hearing following strike out of his client's case (when acting as a litigant in person) at a preliminary hearing. John Crosfill succeeded as appellant before the President, Langstaff J, and as respondent before Supperstone J.

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

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Contributors

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