

EMPLOYMENT LAW NEWS IN BRIEF

COURT OF APPEAL

1. Disability Discrimination. Comparators.

Aylott –v- Stockton on Tees Borough Council

The Court of Appeal has confirmed that the proper comparator in cases of disability – related discrimination is ‘someone who has behaved in the same way as the person concerned but who did not suffer from that person’s disability’ until such time as the Equality Act 2010 rectifies the situation.

On the issue of direct disability discrimination, the Court of Appeal agreed that the correct comparator is a person who was off work for a similar period but did not have the same condition.

EMPLOYMENT APPEAL TRIBUNAL CASES

1. Employer’s Ability to Pay /Compensation. Unfair dismissal.

Tao Herbs & Acupuncture Ltd –v- Jin

The EAT has provided a reminder that Employment Tribunals should not take into account the employer’s ability to pay when considering how much compensation to award an unfairly dismissed employee. The EAT has stated with no equivocation, that the employer’s ability to pay is not a relevant consideration. Any compensation has to be just and equitable in all the circumstances having regard to the loss sustained by the employee.

2. Employment Status.

Community Dental Centres Ltd –v- Sultan-Darmon

The Claimant, a dentist, brought an unlawful deductions claim against his practice. As a preliminary issue, the dentist had to establish that he was either an employee or a worker. His contract provided:-

- he was self employed and independent,
- paid his own tax and NI,
- defined his hours,
- he could arrange for a locum to use the facilities if he was not going to use them for a certain period.

The Tribunal concluded he was not an employee as there was no mutuality of obligation nor sufficient control but that he was a worker as he had to ensure that dental work was carried out at the facility. On appeal, the EAT held that the right of substitution meant that he could not be a worker, because he was not obliged to ‘perform personally any work or services’.

3. Right to bring a claim where elected Employee Representatives.

Nationwide Building Society –v- Benn

The EAT stated clearly that an individual employee has no standing to bring a claim for a failure to consult in a case in which employee representatives have been elected but the consultation with those representatives is said to have been inadequate. Such a claim can only be brought by the elected representatives.

The EAT also found that the dismissals were for an organizational reason entailing changes in the workforce and that it was not necessary for the entire workforce to be affected by the changes.

Employers need to be careful as even if an employer has a successful ETO defence, the employees can still be found to have been constructively dismissed and therefore any process should be fair and thorough, namely, the employer should ensure that there is sufficient and adequate consideration and consultation to justify changes to terms and conditions.

4. Clarification for employers of redundancy whilst on maternity leave.

Simpson –v- Endsleigh Insurance Services and others

Whilst the Claimant was on maternity leave, the employer closed down most of its retail outlets, including the Claimant’s place of work and relocated the operations to call centres. She was invited to apply for a position in a call centre. She did not. She argued that she should have been offered a new insurance consultant role instead of being sent information on vacancies and inviting her to apply. Her employer argued that the automatic right to be offered the position did not arise as it was not suitable given the different location and shift patterns.



Relevant statute provides that employees on ordinary or additional maternity leave are automatically entitled to be offered any alternative vacancy available. In essence, this gives the woman priority over other employees who are at risk of redundancy even if they are better qualified for the job. There are two conditions on the right to be offered an alternative position. The position must be suitable and appropriate and must not be 'substantially less favourable'. She must be capable of doing the work and the place where she is required to work and all terms and conditions must be suitable.

The Tribunal accepted the employer's reasons of why the job was not suitable. The EAT held that the two conditions on the right to an alternative vacancy should be read together when deciding whether the vacancy is suitable. Ultimately, it is for the employer to decide whether something is suitable.

5. Application of TUPE. Appointment of another firm in respect of a substantial account.

Ward Hadaway Solicitors –v- Love and Others

Two solicitors were employed by Ward Hadaway Solicitors who were on a panel of solicitors providing services to NMC. There was no mutuality of obligation between the firm and NMC. When NMC decided to use a different single firm (Capsticks), the two employees at Ward Hadaway were dismissed.

The key question was did the two employees work transfer to Capsticks under the provisions of TUPE? Ward Hadaway continued with the work in progress but all new instructions were given to Capsticks.

The Employment Tribunal found that there had been no service provision change on the basis that only work in progress could amount to activities capable of being transferred under TUPE. There was no cessation of current activities as the work in progress remained with Ward Hadaway. The EAT upheld the Tribunal's findings.

6. No need to conclude grievance procedure before dismissal

Samuel Smith Old Brewery –v- Marshall

Mr and Mrs Marshall were managers of one of the Brewery's pubs. They were instructed to reduce their staff's working hours. They refused to do so on the basis this would increase their own working hours and raised a grievance. In the interim, given their refusal to obey an instruction, disciplinary proceedings were invoked. They refused to attend the disciplinary as their appeal against the grievance was still outstanding.

Their employers concluded that their refusal to obey instructions constituted gross misconduct and dismissed them. Their grievance was subsequently rejected. They brought a claim for unfair dismissal arguing that the disciplinary hearing should not have gone ahead until the grievance appeal had concluded.

The EAT concluded that it was not unfair in the absence of clear evidence of unfairness or un-compensatable prejudice. It was not outside the range of reasonable responses. Employers should take a pragmatic approach.

1. If a grievance is totally unrelated to disciplinary allegation, it is safe to proceed.
2. If the grievance essentially constitutes a defence to the proposed disciplinary charges, it may be possible to deal with both matters at the same time.
3. If the grievance is against the individual conducting the disciplinary, then it is best to adjourn the disciplinary and hearing the grievance and appeal too.

7. Word 'younger' used in advertisement. Discriminatory

Canadian Imperial Bank's of Commerce –v- Mr A Beck

Mr Beck was employed by the bank. He was 42 years old. In summer 2007, a Mr Risler was appointed over him. They did not get on. They had different ideas and approach on how the business should be conducted. Following a further senior appointment, a decision was made to make Mr Beck redundant.

An employment agency was instructed to recruit a replacement and the bank's person specification for this purpose stated that it was 'seeking younger, entrepreneurial profile'. The word 'younger' was used in various drafts despite the advice of bank's HR. The EAT has agreed that the use of this word constituted the clearest possible evidence of age discrimination.

8. TUPE transfer – Duty to consult and inform

Todd –v- Strain

In January 2008, Mrs Todd sold a care home in Glasgow to Care Concern GB Ltd. In November 2007, she informed the staff in an informal meeting that an offer to buy the home had been made which she could not refuse but their positions were safe. No detailed information was given. Only a third of the staff attended this meeting.



The employees brought a claim against both the transferor and transferee alleging they had failed to inform and consult. The Tribunal held that Mrs Todd had failed to inform and consult appropriate staff representatives and had failed to arrange appropriate employee representatives contrary to Regulation 14. She was ordered to pay 13 weeks pay to each employee. Mrs Todd appealed to the EAT.

The EAT upheld the Tribunal's findings. Mrs Todd had argued that she did not consult as she believed the status quo would be preserved and nothing would change. There were no "intended measures". The EAT rejected this argument. The obligation to inform and consult are separate obligations. Further, TUPE did not prescribe that a measure's effect had to be disadvantageous to trigger a consultation requirement. They also found that Care Concern were jointly liable for this failure to consult as provided by the Regulations. With regard to quantum, the EAT held that it was wrong to make the maximum 13 week award. She had made an attempt even though insufficient and inadequate. The penalty should reflect the seriousness of employer's default. They therefore reduced the level of award from 13 to 7 weeks.

9. Stigma Damages

Brown –v- J & J Baxter (T/A Careham Hall)

The Claimant was dismissed for gross misconduct from her employment as an assistant care home manager on the grounds that she had allegedly mistreated residents within the home. Although she secured an alternative job, she lost it. She alleged this was due to an inaccurate reference and unfounded accusations made against her. She brought various claims including a claim for stigma damages.

Her counsel argued that the circumstances of the dismissal had damaged Ms Brown's reputation and the POVA (Protection of Vulnerable Adults) referral and reference had left her to losing her subsequent job. She relied on Chagger. In this case the Court of Appeal held that where a Claimant is dismissed on discriminatory grounds he can, in principle, recover 'stigma damages' to reflect the fact that other employees may be unwilling to hire someone who has brought proceedings against their former employer. The EAT found that the stigmating conduct complained of did not flow from the dismissal and so was not a consequence of it. Given the incidents, Mr Baxter would have had to make a POVA referral and given an unfavourable reference even if he had not dismissed her.

Therefore, any loss as a result of her dismissal from her new position was a result not of the dismissal but of the unfavourable reference and POVA referral. Employers should ensure references are fair and accurate. In some industries where conduct has to be reported, an unfair and inaccurate reference can prompt claims from both employees and new employers.

10. Discrimination Claims. Remedies.

Andrew's Catholic School –v- Blundell

Mrs Blundell worked as a teacher from 1992 to 2007. Her employment proceeded without any problems until 2003 when she informed the school that she was pregnant. She claimed she was treated differently from that point on. She brought a claim for Sex Discrimination. She claimed she was victimised and bullied because of this. She went off with stress related illness.

In January 2007, she had an encounter with parents when she broke down, cried and alleged she was being bullied. She was disciplined and dismissed. The Tribunal found in her favour and awarded her substantial damages.

The School appealed against the award. She had been awarded £290,000 comprised of the following:-

- £22,000 - injury of feeling
- £5,000- aggravated damages
- 5 years future loss of earnings
- Letter for school to send with a draft reference which the school did not agree with

The EAT:-

- reduced compensation for injury to feelings to £14,000.
- upheld the aggravated damages award on the basis of the manner in which the Respondent conducted the remedies hearing.
- upheld the award of 5 years future loss of earnings.
- agreed letter should be amended so that the head mistress is not obliged to make statements which she does not agree with.



11. Reasons for disciplinary proceedings should be clearly set out.

Celebi –v- Scolarest Compass Group UK & Ireland Limited

The employer provided catering services to educational establishments. Mrs Celebi was employed as a chef manager at one such establishment. She was responsible for collecting cash and handing it to a secure courier to deliver to the bank. A bag purportedly containing £3,400 was handed to courier but there was only £400 when banked. She was sent a step 1 letter inviting her to an investigation into:-

- Discrepancies in banking;
- Loss of £3,000 cash banking

She brought a claim for unfair dismissal as she was dismissed for theft whilst this was not a charge put against her. The Employment Tribunal found that the charge of dishonesty was never put to her even though the manager believed she had stolen it. The EAT agreed and upheld the dismissal was unfair.

EMPLOYMENT TRIBUNAL

1. Long term sick. Entitlement to accrued holiday.

Khan -v- Martin Mc Coll

An employer has successfully defeated a claim for holiday pay by a worker on long term sick leave. An employment tribunal has dismissed a claim for holiday pay by a worker who had been on long term sick leave on the grounds that he was out of time.

Mr Khan's employment was transferred to Martin Mc Call in 2007. It was agreed that his two weeks unused holiday for year 2007 would be carried forward to 2008. He was entitled to 4 weeks holiday for 2008 in addition to the two weeks. However, in May 2008, he went on sick leave and did not return. He resigned in August 2009. He therefore took no holiday in 2008. On termination his employer paid him his accrued holiday for 2009. Mr Khan brought claim for unlawful deduction of wages in respect of his untaken holiday entitlement for 2007/2008. The Tribunal held:-

1. As there was no deduction for 2009, the last deduction was at end of 2008. Mr Khan was therefore out of time as the claim should have been brought 3 months from date of last deduction.
2. Although the Stringer decision provided that a worker on sick leave was entitled to carry forward their holiday only if they have been denied the opportunity to take it, in this case the Tribunal found that Mr Khan had not been denied the right to take it and therefore the holiday could not be carried forward from 2008 to 2009.

This therefore seems to suggest that employers may be able to defeat claims for holiday pay stretching back over a number of years simply by paying for the most recent holiday year and giving the employee an opportunity to take the holiday. This is however only a Tribunal decision which is not binding on other Tribunal or higher courts.

NEW LEGISLATION

Effective from 1st October 2010

1. Equality Act 2010

The Equality Act is due to come into force in various tranches with the first tranche coming into force on 1st October 2010. Some of the main provisions are:-

1. Consolidating various separate pieces of discrimination legislation into one piece of legislation.
2. There will be a single objective 'justification' test to replace the different tests currently in use.
3. Harmonising thresholds for the duty to make reasonable adjustments.
4. New protection for carers.
5. Clearer protection for breastfeeding mothers.
6. Restricting the circumstances in which an employer can ask job applicant questions about disability or health.
7. Making pay secrecy clauses enforceable.
8. Allowing hypothetical comparator for direct gender pay discrimination.



9. New ways to claim disability discrimination are being introduced to counter the House of Lords decision in London Borough Lewisham –v- Malcolm which severely restricted the right to claim for less favourable treatment.
10. It will be easier to claim reasonable adjustments from service providers.
11. A tribunal will be able to make a recommendation benefiting the wider work force even if it is no longer relevant for the individual claimant.

2. National Minimum Wage to increase

The rates will increase as follows:-

- Adult hourly rate £5.80 to £5.93 per hour
- Development rate £4.83 to £4.92 per hour
- 16-17 years £3.57 to £3.64
- Apprentice rate £2.50 who are under 19 or 19 or over in their first year

3. Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010

A number of administrative steps that employment agencies were required to undertake have been removed. Advertisements for jobs have to state whether the position is temporary or permanent. Agencies are no longer required to undertake checks for jobs seekers other than those who work with vulnerable people or securing agreement terms with permanent employer.

FORTHCOMING LEGISLATION

Effective from April 2011

- Parental leave.
- Single Equality Act 2010 will promote equality with a single equality duty extending to other protected characteristics.
- Increase in personal allowance and national insurance contribution for employees.
- Increase in national insurance threshold and contributions for employers.
- Bribery Act 2010 introducing new offences to come into force. This will promote anti-bribery practices among businesses.
- Light to make a request in relation to study or training for organisations with fewer than 250 employees.
- Default retirement age to be abolished. The Government confirmed recently that it plans to abolish the default retirement age of 65 with effect from 1st October 2011. The effect of the proposal means no new notices of intended retirement can be issued after 6th April 2011 when it is envisaged the phasing out will begin. Employers will still be able to retire employees and operate their own compulsory retirement age, if they can objectively justify the need to retire employees at a certain age.
- Additional Paternity Leave. From 6th April 2011, eligible employees will have the right to take additional paternity leave and pay. However, the right will only apply where:-
 - their partner is due to give birth on or after 3rd April 2011
 - they and/or the other adoptive parent receive notification on or after 3rd April 2011 that they have been matched with a child for adoption.

As they will apply in respect of children conceived from July 2010, employers should start thinking now about updating their maternity and paternity policies.

CONSULTATIONS

1. Default Retirement Age to be abolished next year.

The Government issued a consultation document about its proposals on 29th July 2007 which is **open until 21st October 2010.**

2. Regulations on ‘one-in’, ‘one-out’ basis

The Government has announced details of its new ‘one-in’, ‘one-out’ approach to regulation. A new regulation imposing costs on a business cannot be introduced without identifying current regulations with an equivalent cost to be removed. Regulations made in response to emergency or to address systemic financial risks will be excluded from the rule.



3. Revised Remuneration Code

On 29th July 2010, the Financial Services Authority published a consultation paper on revising its Remuneration Code. **The consultation period will close on 8th October 2010.** The revised code will come into force on 1st December 2011 and will apply to remuneration due for performance in 2010 relating to the remuneration practices of certain financial institutions and investment firms operating in the UK.

The revised Remuneration Code will cover most UK hedge fund managers and some private equity fund managers. This will include UK affiliates of hedge funds. The revised code will apply to the remuneration awarded or paid to staff in certain categories and the FSA expects it to apply both with respect to employees and to most partners with limited liability, including members of LLP's.

Relevant firms will have to establish Remuneration Certificates and at least 50% of a bonus must be paid in shares or equivalent non-cash instruments. Further, at least 40% of any code staff bonus must be deferred vesting over a minimum three year period. In the case of a bonus exceeding £500,000 at least 60% must be deferred. The FSA has produced a cost benefit analysis to support its recent proposals to extend the code.

4. Bribery Act 2010

This act is proposed to come into force in April 2011.

The Act provides 4 bribery offences:-

- The offence of bribing
- Requesting, agreeing to receive or accepting a bribe.
- Bribing a foreign public official.
- The 'corporate offence' – where a commercial organisation fails to prevent persons performing services on its behalf from committing bribery. This is most relevant to employers. The offence can be committed in UK or abroad. Both the company and its directors could be liable to criminal sanctions.

The consultation on the guidance closes on 8th November 2010 allowing the final guidance to be published early in 2011. The guidance sets out the principles for bribery prevention. The Government accepts that the suggested procedures may not be applicable to all organisations whether procedures are adequate or not will only ever be determined by the particular circumstances of the case and will be dependent on the size of the organisation.

5. Government to extend right to request flexible working and consult on parental leave

Currently, the right to request flexible working is available to parents of children aged under 17 and disabled children under 18, and carers of certain adults.

The Government has announced that the right to request flexible working will be extended to parents of children under 18 years old from April 2011. A consultation on extending the right to all employees, and the introduction of a flexible parental leave system, will be published later this year.

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