

EMPLOYMENT LAW NEWS IN BRIEF

EUROPEAN COURT OF JUSTICE

1. Age Discrimination. Compulsory Retirement.

In the case of age discrimination, an employer may be able to demonstrate that any less favourable treatment is justifiable as a proportionate means of achieving a legitimate aim. Two recent ECJ decisions have been considered these issues.

(1). **Rosenblatt –v- Oellerking Gebäudereinigungsges.MBH**

The European Court of Justice has held that whilst compulsory retirement age of 65 is prima face discriminatory, it can be justified if certain conditions are met:-

- The contract has been collectively negotiated with the Union
- The employee will receive a pension and therefore have replacement income
- Compulsory retirement has been in widespread use in the relevant country for a long time without having had any effect on the levels of employment

(2). **Ingeniorforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark**

The ECJ held in this case that a provision within Danish National Law negating an employee's right to receive a severance payment if they were entitled to a pension was incompatible with the Directive and was unjustifiable age discrimination.

The employee in this case was dismissed at age of 63. He sought severance pay and alternative employment. He did not wish to retire. His employers argued that he was not entitled to any severance pay and as he could draw the pension. The ECJ held the provision could not be justified as the law took no account of those workers who were of pensionable age but still wanted to work

2. TUPE

Albron Catering BV -v- FNV Bondgenoten and Roest

The ECJ has confirmed that employees employed by a service company who are assigned to a business will automatically transfer their employment to the acquirer of the business even though they are not employed by the 'transferor' of the business.

Usually, the transferor is the seller of the business. The TUPE Regulations provide that employees employed by the 'transferor' of the business will transfer to the acquirer of the business. However, where a service company is utilised to provide staff to a part of a business that is assigned, those employees will also transfer even though they are employed by a separate company.

3. Additional Paternity Leave Entitlements

Alvarez –v- Sesa Espana

The ECJ has ruled that as paternity leave is a time purely devoted to the child and not a measure for the benefit of looking after mother or developing the mother child relationship, then there is no reason to distinguish between men and women and a man should have the same rights and protection as a woman on additional maternity leave.

This will have an impact on the additional paternity leave to come into force in April 2011 so that an employer will have to provide the same rights and benefits to employees on AML and APL.

SUPREME COURT

1. Effective Date of Termination

Gisada Syf –v- Barratt

Mrs Syf was advised of the decision to dismiss her by way of a letter. The letter was sent by recorded delivery and signed for her son on 30th November 2006. At that time, she was away for a few days helping her sister who was giving birth. She did not open the letter until 4th December 2006 when she returned.

Her claim for unfair dismissal was presented on 2nd March 2007. The Supreme Court held that the effective date of termination was 4th December 2006 when she read it and therefore the claim had been presented in time.



It accepted that she did not know of the decision until 4th December 2006 and she had not deliberately delayed opening it or gone away. It is therefore advisable for employers to communicate the decision in person.

COURT OF APPEAL

1. Collective Redundancy Consultation

United States of America –v- Nolan

The Court of Appeal has held that a reference to the European Court of Justice is necessary to determine whether:-

- are employers required to consult over the strategies and business decisions underlying redundancy or;
- can they confine consultation to the consequences of these decisions?

RSA Hythe, a US army base in Hampshire, was closed on 30th September 2006 resulting in around 200 civilian redundancies. The United States did not consult with the workforce over the decision to close RSA Hythe in 2006 and no explanation for the closure of the base. Mrs Nolan made a claim for a protective award on the basis that the USA had not consulted workforce representatives as required by S.188 of TULRCA 1992. Both the ET and EAT held that consultation was required over the decision to close a workplace where it would inevitably lead to redundancies and upheld the protective award.

The US appealed relying on the Akavan case (ECJ decision). The Court of Appeal stated it found the ECJ's reasoning in Akavan 'difficult to follow'. It was not clear whether the consultation obligation arises:-

1. when an employer proposes, but has not yet made a decision that will foreseeably or inevitably lead to collective redundancies; or
2. only when such a decision has actually been made and the employer is proposing consequential redundancies.

It has therefore referred this matter to the ECJ for clarification.

HIGH COURT

1. Group Moves. Breach of Fiduciary duty

Lonmar Global Risks Limited –v- West and Others

A team of employees left Global Risks to join a competitor. Global Risks brought claims for breach of contract and fiduciary duty and for inducement of breach of contract and conspiracy against the new employer (competitor).

Although breaches were identified no loss could be proved. The High Court further held that the employees were not liable for breach of contract of fiduciary duty in failing to inform the company of their intentions. The Court held that unless an employee has a fiduciary duty (such as a director or senior manager) there is no duty to report one's own misconduct or that of fellow employees. A fiduciary duty does not arise from simply a relationship of employer/employee.

EMPLOYMENT APPEAL TRIBUNAL CASES

1. Continuity of Employment

Hussain –v- Acorn Independent College

Mr Hussain worked from 25th April 2008 to 8th July 2008 as a cover teacher on a fixed term temporary contract. This expired just before the summer holidays but at the same time he was offered a permanent position to commence in September 2008 when a teacher fell ill. He was dismissed on 12th June 2009. The issue was whether there was continuity of employment between the two contracts given the summer break.

The EAT held that the Tribunal should have looked at the reason for termination of the first contract. The only reason for termination was the temporary cessation of work.

2. Range of Reasonable Responses: Unfair Dismissal

Weston Recovery Services –v- Fisher

The EAT has in its judgement considered the circumstances where dismissal for conduct not amounting to gross misconduct could be fair, if an employer has:-

- Complied with the BHS -v- Burchell test
- Followed a fair procedure and imposed a sanction which fell within the range of reasonable responses.



However, the EAT did not interfere with the Tribunal's finding of fact that the Claimant's dismissal was unfair on the basis that the relevant conduct (returning the vehicle in an unsafe condition) was not gross misconduct.

3. Meaningful Consultation /Redundancy

The EAT has handed down two decisions which deal with selection pools and selection criteria to apply during a redundancy procedure. For consultation to be meaningful and fair, employees should have sufficient information to understand their scores, an opportunity to comment upon and challenge them.

(1). Pine Wood Repro Ltd trading as Country Print –v- Mr G Page

For a consultation to be meaningful and fair, employees should have sufficient information to understand their scores, an opportunity to comment upon and challenge them. The Claimant was one of three potentially redundant employees included in a pool. The Claimant received a slightly lower score than the other two. He sought details of how the scores had been decided upon but he was provided no information. The fact that he had not been provided the information meant that he was unable to properly understand or challenge the scoring.

(2). Falcrun Pharma (Europa) Ltd -v- Bonassera

This case is a reminder that when deciding on the pool of potential redundant employees, it is not sufficient to just identify the role which the employer believes to be redundant and consult only with that person. It is unfair for an employer to automatically assume that where a single senior role was at risk, there would be a selection pool of one.

4. Claims out of Time. Misleading Information from Employer

Northamptonshire County Council –v- Entwistle

Mr Entwistle was dismissed for gross misconduct. He was advised orally of the decision. The decision was confirmed in writing. In the letter, the Council also advised him that he had three months from the date of decision to apply to Tribunal. This was in fact incorrect. In reliance upon this date, the claim was lodged two weeks out of time.

The Tribunal stated that there can be instances, 'wholly exceptional circumstances', where the Claimant could not reasonably practicably have brought the claim on him. The EAT agreed that there can be situations when a Claimant should be allowed to proceed even if their adviser had given the wrong advice. In this case, both Claimant and adviser had been misled by the letter. However, the adviser should have picked on the mistake and had been negligent as he should have ascertained the position for himself.

5. Office gossip can be discrimination and harassment

Nixon –v- Ross Coates Solicitor and another

Ms Nixon was employed by Ross Coates Solicitors. She was in a relationship with one of the solicitors but at the Christmas party was seen with someone else. She became pregnant soon after. Upon her return from sick leave and holiday, it is alleged that the HR Manager made a comment about the paternity of the baby and been gossiping and spreading rumours.

Ms Nixon made clear she could not return to work at that office whilst the HR Manager remained employed there. Her employer insisted she had to return to the same office. She resigned and claimed sex and pregnancy discrimination, harassment and constructive dismissal.

The ET dismissed her complaint of sex and pregnancy discrimination but upheld her claim for constructive dismissal. The Tribunal however held that there should be a 90% reduction in both the basic and compensatory award because of Ms Nixon's contributory fault. The EAT overturned the ET's findings on sex and pregnancy discrimination and harassment on the grounds that gossip connected with pregnancy did constitute harassment. It further stated that the failure to allow her to transfer to a different office was sex and pregnancy discrimination.

6. Pregnancy based sex discrimination

Kulikaoskas –v- MacDuff Shellfish

K and his partner were employed by MacDuff Shellfish. K was dismissed within one month. The employer stated that his dismissal was for capability/poor performance. K said he left his duties to help his wife who was pregnant to lift heavy objects and therefore his dismissal was connected to his partner's pregnancy.



The EAT rejected his claim on the basis that the relevant provision in the Sex Discrimination Act which prohibits pregnancy discrimination clearly related to discrimination against a ‘woman’ on the ground of the ‘woman’s pregnancy’. This case was decided pre Equality Act 2010 and such claims may now be possible under the new Act.

7. Employers liable for future loss of earnings – Bad reference

Bullimore -v- Potheary Witham Weld Solicitors,

A prospective employer withdrew a job offer after the candidate’s former employer, a law firm gave her a bad reference stating she was:-

- inflexible in her opinions
- had a poor relationship with the firm’s partners
- contained a reference to a previous sex discrimination claim that she had made against it.

She had previously brought a sex discrimination claim against the firm. She brought a claim against both her former employer and prospective new employer. The prospective employer settled. The Tribunal found that the actions of both the ex-employer and prospective new employer were acts of unlawful victimisation.

The EAT held that the action of the prospective employer were foreseeable consequences even though those actions were unlawful and therefore ex-employer should be liable for the direct consequences of its actions. It therefore decided that the former employer was liable for future loss of earnings.

8. Age Discrimination – Costs Justification

Woodcock –v- Cumbria Primary Care Trust

Mr Woodcock’s post as Chief Executive disappeared in reorganisation. He was not selected for the successor post. He was given his 12 months notice before the first consultation began so that notice expired before his 50th birthday when he would have been entitled to early retirement at a great cost to the Trust.

The Tribunal held that the dismissal was fair as he would have been dismissed in any event even if the procedure had been complied with and that the timing of the notice was justified because of the costs. The EAT has held that the Tribunal had correctly applied the ‘costs plus’ test in Cross –v- British Airways and this did not prevent the giving of notice being justified. However, doubt was expressed as to whether Cross –v- British Airways was right to hold that ‘costs alone’ could never constitute objective justification.

FORTHCOMING EMPLOYMENT LAW CHANGES

Effective from 14th December 2010

• **Biometric residence permits for Highly Skilled and Temporary Workers**

The government has announced that from 14th December 2010, individuals applying for further leave to remain under Tier 1 or Tier 5 (Temporary Worker) categories of the Points Based System plus any of their dependants applying for an extension will be required to apply for a Biometric Residence Permit as part of the process.

Effective from April 2011

• **Single Equality Duty**

The Equality Act 2010 replaces the current public sector duties to promote equality with a single duty extending to other protected characteristics. This will oblige public authorities to have regard to the need to eliminate discrimination, harassment, victimisation, and other prohibited conduct when exercising their functions. However, the Government has announced that it is abandoning the proposed socio-economic duty on public sector bodies to consider tackling wide socio-economic problems whenever taking an important decision.

• **Additional Paternity Leave**

The right to additional paternity leave (APL) under the new Regulations will apply to parents of babies due on or after 3rd April 2011 and for adoptive parents who are notified of having been matched with a child on or after that date. This new right will operate in addition to the existing rights for new fathers to take two weeks of leave around the time of the birth (or placement in the cause of adoption).

• **Bribery Offences**

The Bribery Act 2010 is due to come into force in April 2011. The Act aims to promote anti-bribery practices among businesses. The Act introduces a corporate offence of failure to prevent bribery by persons working on

behalf of a business. It also introduces a criminal offence of individuals to give, promise or offer a bribe and to request, agree to receive or accept a bribe.

- **Right to make a request in relation to study or training for organisations with fewer than 250 employees**
The Apprenticeship, children and Learning Act 2009 introduces a statutory right to make a request in relation to study or training for employees in organisations with fewer than 250 employees
- **Right to request flexible working extended to parents of children under 18**
Parents of children under 18 will have the right to request flexible working.
- **Special Bank Holidays**
There are laws that allow the dates of bank holidays to be changed, or other holidays to be declared, for example, to celebrate special occasions.

It has been announced that there will be a special bank holiday in 2011 to celebrate the Royal wedding on 29th April 2011 and in 2012 to celebrate the Queen's Diamond Jubilee.

The 2012 late May bank holiday will be moved to Monday 4th June 2012 and an additional Jubilee bank holiday will be on Tuesday, 5th June 2012.

Effective from October 2011

- **Default Retirement age to be abolished**
The default retirement age is to be scrapped from 1st October 2011. The new plans allow for a 6 months transition. Accordingly, from 6th April 2011 employers will not be able to issue any notifications for compulsory retirement using the current procedure.

Between 6th April 2011 and 1st October 2011, only employees who were notified before 6th April 2011 and whose retirement date is before 1st October 2011 can be compulsorily retired.

After 1st October 2011, employers will have to be able to objectively justify retirement ages.

GUIDANCE DOCUMENTS/FORTHCOMING PROPOSALS

- **New Guidance for Employers on preventing illegal working**
The UK Border Agency has published a new guidance on the prevention of illegal working. The aim of the guideline is to help employers understand the status of asylum seekers, refugees and those with Humanitarian Protection. The guidance also highlights what documents employers should ask from a prospective employee to produce to ensure that they have such status and that they can lawfully work for the employer.
- **Proposal to Increase Unfair Dismissal Qualifying Period of two years**
The government is actively considering whether to increase the qualifying period for unfair dismissal from one year to two years. The timetable for a decision has not been announced, and it is likely there will be a consultation period first.
- **Failure of Vetting Scheme**
The Vetting and Barring Scheme (VBS) designed to protect children and the vulnerable is being re-examined. The outcome and decision is expected early in

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