



August 2009 Update

Employment Law Newsletter

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(1) The Equality Bill

The Equality Bill completed the House of Commons Committee stage on 7 July 2009. A "dual discrimination" clause has been introduced into the Bill. This means that it will be discriminatory to treat a person less favourably on the basis of a combination of two protected characteristics, i.e. age, disability, gender reassignment, race, religion or belief, sex or sexual orientation. The dual discrimination combination does not include (i) marriage and civil partnership, and (ii) pregnancy and maternity. These matters are covered elsewhere in the Bill. As there is no need for a comparator with pregnancy and maternity discrimination a woman will have to show that she has been treated "unfavourably" rather than "less favourably."

According to Personnel Today on 7 July 2009 Senior Human Resource Managers have prophesied that Employment Tribunal applications will rise by 10% because of the introduction of dual discrimination claims. This figure appears to be entirely speculative as Claimants can currently make claims of multiple discrimination.

(2) Age Discrimination

The Government intends to bring forward the review of the Default Retirement Age, i.e. 65, to 2010. If the DPA is changed then this would not take place until 2011.

ACAS Annual Report

ACAS has published its Annual Report for 2008-2009. The number of complaints referred by the Employment Tribunals to ACAS for conciliation went down from 151,249 last year to 138,535 this year – a fall of 8%. Unfair dismissal claims went up by 29%. Figures are also given for the ACAS pre-claim conciliation scheme which was piloted in three areas in 2008 and is being rolled out in 2009. This free scheme offers pre-claim conciliation in disputes which are likely to become Employment Tribunal claims. Of the 903 cases referred to ACAS 60% of the parties agreed to conciliation and more than half of the cases were settled. <http://www.acas.org.uk/CHttpHandler.ashx?id+1626>

The Construction Industry and Employment Status

HM Revenue and Customs have published a consultation document entitled 'False self-employment in construction.' Construction workers will be considered to be employees for tax and national insurance purposes unless at least one of the following applies:-

(i) A person supplies the plant and equipment required for the job that he has been engaged to do - excluding the relevant tools of the trade.

(ii) A person provides all the materials to finish a job.

(iii) A person provides and pays other workers under a contract to do the job.

CASE REPORTS

Age Discrimination

The Advocate General in the case of *Kucukdeveci v. Swedex GmbH & Co KG* has recommended to the ECJ that a German law ignoring employment under the age of 25 when calculating service related notice entitlement is incompatible with the prohibition on age discrimination in the Equal Treatment Directive (No. 2000/78).

Equal Pay

The Court of Appeal in *Hovell v. Ashford & St Peter's Hospital NHS Trust* [2009] EWCA Civ 670 (9 July 2009) has decided that an Employment Tribunal does not have to obtain an independent expert's report before making a finding that an equal pay claimant does work of equal value to a comparator ranked higher under a job evaluation scheme.

In *Gutridge v. Sodexo* [2009] EWCA Civ 729 (14 July 2009) the Court of Appeal have said where there is a TUPE transfer then live equal pay claims must be brought against the transferee within six months of the transfer. Claims which arise after the TUPE transfer can be made against the transferee for up to six years losses from the date of the claim. After the termination of that employment then claims are subject to the normal six month time limit.

Indirect Sex Discrimination

In *Somerset County Council v. Pike* [2009] EWCA Civ 808 (28 July 2009) the Court of Appeal dealt with access to the Teachers' Pension Scheme (TPS). Until April 2000 retired teachers returning to part-time work were excluded from the TPS while in contrast retired teachers returning to work full-time could join the TPS. The Claimant said that the exclusion of part-time returners had a disproportionately disadvantageous impact on women and this was upheld by the EAT and the Court of Appeal.

Legal Representation in Disciplinary Hearings

The Court of Appeal in *Kulkarni v. Milton Keynes Hospital NHS Foundation Trust* [2009] EWCA Civ 789 (23 July 2009) has indicated that if NHS Doctors are facing misconduct or capability charges then they are entitled to legal representation. This decision has implications for other employees facing disciplinary charges which if proven could result in them not being able to work in their chosen profession.

Court of Appeal and House of Lords cases can be accessed on:

www.bailii.org/uk/cases/

EAT decisions:

Constructive Dismissal

In *Nationwide Building Society v Niblett* UKEAT/0524/08/ZT the EAT declined to express a view on whether the approach in *Bournemouth University Higher Education Corporation v Buckland* [2009] UKEAT/0492/08 should be preferred to that of *Abbey National Plc v Fairbrother* [2007] IRLR 320 and *Claridge v Daler Rowney Ltd* [2008] IRLR 672 ('range of reasonable responses' test v. 'unvarnished' approach when deciding whether an employer's treatment of a grievance amounts to a breach of the implied term of trust and confidence).

Practice and Procedure

In *Bennett v. London Probation Service and others* UKEAT/0194/09/JOJ the EAT upheld a tribunal's decision to a strike out a race discrimination claim following persistent non-compliance with an 'unless' order that the claimant consent to disclosure of a psychiatric report. The report was referred to in the ET1 and its disclosure was considered essential for a fair trial because it might provide a basis for challenging the claimant's credibility.

In *Jarretts Motors Ltd v Wells* UKEAT/0327/08/DA the respondent failed to present its response in time and wrongly labelled its application for a review as being made in respect of default judgment under rule 33 of the 2004 ET Rules of Procedure when default judgment had not been made. The EAT decided that there was sufficient information in the application for the tribunal to treat it as being made in respect of judgment under rule 34 and that it erred in not so doing, commenting that although there may be circumstances when it is right to hold parties to formal labels attached to applications, generally a flexible approach is required to mitigate injustice that might otherwise result from complex and rigid procedural rules. *Obiter*, to err in naming a respondent render an ET1 a nullity only where they create "realistic uncertainty" as to the identity of the intended respondent.

In *Enterprise Liverpool Ltd v Jones and others* UKEAT/0112/09/CEA employees were transferred to the respondent and presented individual claims alleging breaches of regulations 13 (duty to inform and consult) and 14 (election of employee representatives) of the TUPE Regulations 2006. In fact, all of them were members of recognised trade unions hence the claim should have been brought in the capacity of the unions under regulation 15(1)(c). The tribunal allowed amendment to substitute the unions as claimant. The EAT dismissed the appeal that the amendment should be disallowed, made on the basis that the union claim was time-barred – the 3 month time limit had expired. Its reasoning, *obiter*, was that the substitution of claimant was an amendment merely designed to alter the basis of an existing claim which did not purport to raise a new head of complaint. Even if the amendment did amount to a new claim, the tribunal had correctly directed itself in accordance with *Selkent v Moore* [1996] ICR 836 in not treating as determinative the time limit issue when balancing the injustice and hardship between the parties when allowing the amendment.

Limitation Periods

In *Teva (UK) Ltd v Heslip* UKEAT/0008/09/JOJ the EAT dismissed a respondent's appeal against a tribunal's decision that it was not reasonably practicable to present an unfair dismissal claim in relation to purported redundancy within the 3 month time limit. The claimant sales executive learnt after the time limit expiry that another employee was working in the locality in which the employer had told her it was ceasing to trade. The EAT reviewing *Machine Tool Industry Research Association v Simpson* [1988] ICR 558, *Marley UK Ltd v Anderson* [1996] ICR 728 and *Cambridge and Peterborough Foundation NHS Trust v Crouchman* [2009] UKEAT/0108/09, which all similarly concerned knowledge acquired by employees after dismissals for redundancy, agreed with the tribunal that it was not reasonably practicable to present the claim notwithstanding that the claimant always believed her dismissal was unfair because until her discovery of a new fact she did not believe her claim was "viable". The EAT also warned against an over-technical approach to the test of reasonable practicability, finding that in such situations it is not a "key issue" whether the knowledge that a claimant acquires concerns a new 'ground' or a new 'fact' which lends weight to existing grounds for believing that she has been unfairly dismissed.

Employment Appeal Tribunal cases can be accessed on:

www.employmentappeals.gov.uk/

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