



November 2009 Update Employment Law Newsletter

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Contents

Part 1

Consultation, Legislation and Statistics

Part 2

Case Reports

Consultation, Legislation and Statistics

The Agency Workers Directive (AWD)

The Government has embarked upon another consultation on draft regulations to implement the AWD. The Government has decided that equal treatment between permanent and agency workers will not apply to basic working conditions, i.e. pay, working hours and holidays, during the first 12 weeks of employment. The Regulations are to come into force in October 2011. This consultation closes on 11 December 2009.

For further information go to:

<http://www.berr.gov.uk/consultations/page53060.html>

CASE REPORTS

Vento guidelines

The Vento guidelines for injuries to feelings have been revised to take account of inflation. In *Da' Bell v. NSPCC* the EAT (28 September 2009) has decided with immediate effect that the lower band is to be increased from £5,000 to £6,000, the middle band from £15,000 to £18,000 and the upper band from £25,000 to £30,000.

Equal pay

Guidance has been given by the Court of Appeal on when an employer has to justify service related pay in an equal pay case. In *Wilson v. Health and Safety Executive* [2009] EWCA [2009] EWCA Civ 1074 (20 October 2009) the Court has said that if justification is an issue then the employer can be required to objectively justify the adoption of service related pay and its application in practice.

The 3 month time limit

The 3 month time limit (section 111(2)(b) of the ERA 1996) has been revisited in *Cambridge and Peterborough Foundation Trust v. Crouchman* UKEAT /0108/09 (18 March 2009). The Claimant was charged with 5 offences and dismissed for gross misconduct on 21 February 2008. His appeal hearing took place on 19 May 2009 when the panel told him that the decision to dismiss was upheld. He knew about the 3 month time limit but decided that submitting an ET1 would be pointless. However, on 28 May 2009 he received the written reasons from the appeal panel and found that 4 out of the 5 charges against him had not been upheld. On 29 May 2009 he submitted an ET1. At a PHR the ET decided that because of this "crucial" letter it had not been reasonably practicable for the Claimant to present an ET1 prior to 29 May 2009. This decision was upheld by the EAT.

Sham contracts

The Court of Appeal has delivered another judgment on the issue of sham contracts. *Autoclenz Ltd v. Belcher and others* [2009] EWCA Civ 1046 (13 October 2009) follows *Firthglow Ltd (t/a Protectacoat) v. Szilagyi* [2009] IRLR 365. In *Belcher* 20 car valets had signed 'subcontractor' contracts with no mutuality of obligations, no guarantee of work and a substitution clause enabling them to supply a suitably qualified substitute. An ET decided that they were employees but the EAT overturned this decision on the basis that the ET had not been entitled to go behind the written terms of the 'subcontractor' contract. The Court reinstated the decision of the ET and said that an ET must consider whether the words of the written contract represent the true expectations or intentions of the parties at the beginning of the contract and during the performance of the contract. In this case the valets were workers and employees.

TUPE

Royal Mail Group Ltd (RMG) and the Communications Workers Union (CWU) disagreed over whether employees would TUPE transfer from RMG to WH Smith when post offices were franchised. RMG accepted that there would be a TUPE transfer but decided that no contracts of employment would transfer as affected employees would either be redeployed because of a mobility clause or would accept voluntary redundancy. In the light of this belief RMG did not consult the CWU in accordance with regulation 13 of TUPE 2006. The ET decided that this breached regulation 13 but the EAT disagreed and the CWU's appeal to the Court of Appeal was dismissed [2009] EWCA Civ 1045 (14 October 2009), i.e. RMG's mistaken but genuine belief that regulation 4 did not apply meant that RMG had not breached the regulation 13 duty to inform and consult representatives of the affected employees.

EAT procedure

Rule 37 of the EAT Rules 1993 (SI 1993/2854) gives a general discretion to extend time for the doing of any act in the EAT whether the deadline has passed or not. In deciding whether to grant relief from an unless order, etc, the EAT will apply principles analogous to those in the High Court by reference to the guidance in civil procedure rule 3.9 for relief from sanctions. This case of *Mrs Roberts v. Miss T E Tarling* UKEAT/0183/09/DA (8 October 2009) cited with approval *Chukwudebelu v. Chubb Security Personnel Ltd* [2008] EWCA Civ 327 and *Marcan Shipping (London) Ltd v. Kefalas and Another* [2007] EWCA Civ 463.

EAT REVIEW

Discrimination

In *MOD v Fletcher* UKEAT/0044/JOJ the EAT:

- ◆ Adopted as a test for exemplary damages that the 'guilty' party's conduct must cross a high threshold of being oppressive, arbitrary or contumelious, finding that this test was not satisfied in this case where a soldier was provided with no mechanism for redress for complaints of sex discrimination.
- ◆ Although there should be no 'double recovery' when deciding aggravated damages and compensation for injury to feeling, where the basis of both overlap a reasonable sum may be awarded by way of aggravated damages in respect of uncompensated aggravating elements of conduct which form part of the basis of the awards. Here, a decision to award a reasonable sum as aggravated damages was unimpeachable to the extent that it related to the MOD's 'extremely reprehensible' conduct in misusing its disciplinary procedures against the Claimant and in dealing with her application for redress.
- ◆ A party's conduct of proceedings may form a justified part of an award for aggravated damages but 'bad advocacy' whether through inexperience or incompetence is not of itself sufficient for an award of such damages.

In *Grainger Plc v Nicholson* UKEAT/0219/09/ZT, the much celebrated case involving 'eco-beliefs', the EAT held with regard to the Employment Equality (Religion or Belief) Regulations 2003 that for a claimant to attract protection in relation to his belief:

- ◆ There must be a genuine belief rather than an opinion or viewpoint based on the present state of information.
- ◆ The belief must relate to a 'weighty and substantial' aspect of human life or behaviour.
- ◆ The belief must have a certain degree of cogency, seriousness, cohesion and importance.
- ◆ The belief must be worthy of respect in a democratic society and be not incompatible with human dignity and not conflict with fundamental rights of others.

It is not a requirement that the belief form part of a system of beliefs or 'world view' and it may derive from scientific tenets. The latter is an interesting point and hard to reconcile with the requirement that the belief must not be a viewpoint based on the present state of information; i.e. a belief contingent on evidence to the contrary not emerging (see *McClintock*).

Practice and Procedure

In *A v B and C* UKEAT/0450/08/JOJ the EAT held a claim should not have been struck out on the basis that there were no reasonable prospects of success because it was incapable of being determined properly without evidence being heard. It applied a test concerning whether the chances of success were real rather than 'fanciful'. This case serves to remind parties that under the 2004 ET Rules of Procedure the position therefore is very similar to that for striking out under Part 3 or that for summary judgment under Part 24 CPR. If a claim or response is capable to succeeding in law it should not be disposed of by way of a pre-hearing review and should proceed instead to a final hearing provided there is a serious evidential issue or a credibility dispute that is properly determinable only by hearing and testing in cross examination of oral evidence (*Bridgeman v McAlpine-Brown* [2001] LTL Jan 19, CA; *Beiersdorf AG v Ramlert Ltd* [2004] EWHC 117, Ch D)

Employment Appeal Tribunal cases can be accessed on:-

www.employmentappeals.gov.uk/

Court of Appeal, House of Lord and Supreme Court cases can be accessed on:-

www.bailii.org/uk/cases/

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