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June 2009 Update

Employment Law Newsletter by

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Legislation

(1) The Blacklisting of Union Members

Under section 3 of the Employment Relations Act 1999 the Government has the power to make regulations prohibiting the compilation of lists which contain details of members of trade unions or persons who have taken part in the activities of trade unions and are compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

In March this year the Information Commissioner used his powers to shut down a database of union activists accessed by construction companies. The Government is to consult over the proposed regulations and a member of the 7 New Square employment team is on the Employment Lawyers Association working party which is responding to this consultation.

(2) The Agency Workers Directive

The Government is consulting over the implementation of the Agency Workers Directive and is proposing that the equal treatment rule should only apply to workers taking up temporary employment through an employment business and that it should not apply to workers seeking permanent employment through an employment agency. See:

<http://www.berr.gov.uk/files/file51197.pdf>

(3) The National Minimum Wage

From 1 October 2009 the national minimum wage will be £5.80 (currently £5.73) for workers aged 22 and over, £4.83 (currently £4.77) for ages 18 to 21 and £3.57 (currently £3.53) for ages 16 and 17. From October 2010 the adult rate will be extended to 21 year olds.

(4) Sick Notes

The Government has launched a consultation on replacing sick notes with new "fit notes". These are set to replace sick notes in Spring 2010. See: <http://www.dwp.gov.uk/consultations/2009/Reforming-the-Medical-Statement-consultation-28May2009.pdf>

(5) BERR & DIUS Merger

The Department for Business Enterprise and Regulatory Reform (BERR) is to be merged with the Department for Innovation Universities and Skills (DIUS) to form a new Department for Business

Employment Tribunals

(6) Employment Tribunal Awards

Research by the Ministry of Justice has found that 39% of Tribunal awards go unpaid. Nearly half of the awards exceeding £5,000 are avoided by employers and more than one in ten large employers refused to pay awards. In response to this research the Justice Secretary Jack Straw has said that he will take action to ensure that judgments can be enforced by High Court enforcement officers. This will replace the current system where Claimants go to the County Court for enforcement of the judgment.

(7) Employment Tribunal statistics 1 April 2007 to 31 March 2008

189,303 claims were accepted by the Employment Tribunals in 2007/08,

132,577 in 2006/07, and

86,181 in 2004/05.

In the last two years over 100,000 equal pay claims have been presented to the Employment Tribunals. Only 9,471 were disposed of during 2007/08.

These statistics are a year old and since then there has been a substantial rise in the number of redundancy and dismissal claims presented to the Employment Tribunals. See:

http://www.employmenttribunals.gov.uk/Documents/Publications/EmploymentTribunal_and_EAT_Statistics_V9.pdf

7 NEW SQUARE'S

EMPLOYMENT LAW

GROUP

(8) Statutory Redundancy Pay

On 1 October 2009 the weekly limit used to calculate statutory redundancy pay will increase from £350 to £380 and will remain at £380 until 2011.

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Case Reports

Constructive Dismissal

(9) There has been a hiatus in constructive dismissal case law as to whether the range of reasonable responses test should be applied to complaints of unfair constructive dismissal. *Abbey National v. Fairbrother* [2007] IRLR 320 and *Claridge v. Daley Rowney* [2008] ICR 1267 state that it is relevant while *Bournemouth University Higher Education Corporation v. Buckland* UKEAT/0492/08 restores the orthodox analysis, i.e. it is not relevant.

(10) The last straw in a constructive dismissal claim has been subjected to analysis in *Wishaw and District Housing Association Limited v. Moncrieff* UKEATS/0066/08. This judgment says that an Employment Tribunal must identify the last straw and decide whether the Claimant was entitled to resign.

(11) In *Parsons v. Burworth Estates* UKEAT/0547/08 the President of the EAT decided that it was possible to separate out a Claimant's complaints and divide them into those which had been grieved over and those which had not. This will impact on the tactics of Respondents who seek to strike-out claims in their entirety by relying on *Cyprus Airways v. Lambrou* UKEAT/0526/06.

Mutuality of obligations

(12) The April/May 2009 Newsletter touched on employment status and sham contracts. In *Little v. BMI Chiltern Hospital* UKEAT/0021/09 Little was a bank theatre porter who from 15 October 1992 to 28 February 2008 worked an average of 20 – 30 hours a week for BMI. The relationship was not to be written agreements and there was no issue about sham contracts. The EAT decided that as BMI could send Little home part way through a shift this negated a succession of specific engagements of contracts of employment and therefore he was not an employee. This case was distinguished from *Cornwall County Council v. Prater* [2006] IRLR 362 where there was no mutuality of obligations between the Council and Prater but nevertheless there was a succession of teaching assignments and temporary cessations of employment resulting in a finding that the Claimant was an employee.

Unfair Dismissal

(13) In *Sandsfield Gravel Co Ltd v. Mrs S Loving* UKEAT/0415/08 the employer's appeal was upheld and the case remitted to a different Employment Tribunal for a fresh hearing. The Claimant had breached the employer's zero tolerance policy towards alcohol yet the Employment Tribunal found that her dismissal was unfair. The EAT said that in reaching this decision the Employment Tribunal had substituted its decision for that of the employer.

(14) The employer failed to carry out a reasonable investigation in *West Coast Trains Ltd (t/a Virgin Trains) v. Ms R L Tombling* UKEAT/0295/08. The Employment Tribunal had not fallen into the trap of substituting its decision for that of the employer. The Claimant was dismissed for wilfully breaking the screen of a computerised till but the Employment Tribunal said that the employer did not have reasonable grounds for its belief and that there had been a flawed investigation.

Costs

(15) An Employment Tribunal found that a Claimant had deliberately lied over an allegation of explicit and offensive racial abuse but refused to make a costs award. In *Daleside Nursing Home Ltd v. Mrs C Matthew* UKEAT/0519/09 the Employment Tribunal was told that this was a perverse decision and were told to make a costs award.

Post-Termination Victimisation

(16) The Court of Appeal in *Rank Nemo (DMS) Ltd v. Coutinho* [2009] EWCA Civ 454 has decided that an Employment Tribunal has jurisdiction to hear a post-termination of employment race relations victimisation claim based on the failure of the Respondent to pay the Claimant an Employment Tribunal award for unfair dismissal and race discrimination.

Age Discrimination

(17) In *Rolls Royce plc v. Unite the Union* [2009] IRLR 49, QBD, the High Court decided that the use of length of service as a criterion for redundancy was a proportionate means of achieving a legitimate aim. Rolls Royce's appeal against this decision [2009] EWCA Civ 387 was dismissed by the Court of Appeal.

Territorial Jurisdiction

(18) In *Dolphin Drilling Personnel Pte Ltd v. Winks*, UKEATS/0049/08/BI, the EAT has considered the correct test for determining territorial jurisdiction in a claim of unfair dismissal. The employee was Nigerian as a Singaporean company on an oil rig registered in Singapore which was located off the Nigerian coast and was operated by a company registered in the United Kingdom. Lady Smith decided that the "substantial connection" test is the wrong test. As a general rule the place of work at the time of dismissal is an important criterion to be considered. Where the employee does not ordinarily work in Great Britain there will be jurisdiction only in exceptional circumstances. The leading authority on this point is *Lawson v. Serco Ltd* [2006] ICR 250.

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