

## Employment Law Update

July 2010

### Legal Update

#### An extension to recovery of damages?

The recent case of *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* seems to have lengthened the period over which damages can be claimed in cases of wrongful dismissal (i.e. a dismissal where the employer has acted in breach of contract). This gives rise to the possibility of greater compensation.

#### Background

Previously, the courts had held that damages for breaches of contract, attributable to a failure to follow an express contractual disciplinary procedure, should be limited to the notice period and the period during which the employee would have been employed had the disciplinary procedure been properly applied. The view had been that the end of a notice period represented a "cut off" date after which no claim for damages could be pursued. Any loss of earnings beyond this point had to be pursued under the remit of unfair dismissal. Where the disciplinary procedure is not expressly contractual then damages for wrongful dismissal were (and still are) limited to losses during the notice period.

#### Facts

Mr Edwards had been summarily dismissed from the NHS Trust for gross personal and professional misconduct and since his dismissal had been unable to obtain permanent employment in the NHS.

He issued proceedings in the County Court, claiming damages for breach of contract of around £4.3m to cover:

- the period he would have been employed had the correct disciplinary procedure been followed;
- his notice period; and
- his future loss assuming he would never work again in the NHS.

Mr Edwards claimed that his disciplinary hearing was defective and breached the contractual Trust procedure. This led to the finding of misconduct which in turn prevented him finding alternative employment.

The Trust claimed Mr Edwards was only entitled to loss of earnings during his notice period and that his loss was caused by his dismissal not the breach of the disciplinary procedure and consequently applied to have the claim struck out.

#### Findings

The Court at first instance agreed with the Trust and struck out the claim but on appeal to the Court of Appeal it was held that Mr Edwards was entitled to claim for damages for loss of earnings during his notice period and the period which he would have been employed by the Trust whilst the correct process had been followed and, most notably and importantly, they stated that there was no reason in principle why he could not claim for future losses i.e. potentially his loss of income following termination.

#### Key point

This case is a timely reminder to all employers to ensure that any contractual procedures are followed to the letter before employees are dismissed to reduce the risk of very substantial damages claims.

#### **No more special treatment for women on maternity leave?**

The recent case of *De Belin v Eversheds Legal Services Ltd* emphasises the need for care to be taken when completing redundancy scoring particularly where the candidates include women on maternity leave. This is an interesting and unusual case of discrimination brought and won by a male employee.

#### Facts

Mr De Belin (Mr D) and Ms Reinholz (Ms R) were both employees of Eversheds and at risk of redundancy. They were scored against five redundancy criteria and were the only two employees in the pool.

Part of the financial performance criteria looked at "lock up" - the time between undertaking work and receiving fees for it. The reference period used covered the time when Ms R was on maternity leave. As a result she was awarded a notional maximum score of 2 whereas Mr D was awarded 0.5 based on his actual figures.

Upon calculation of final scores Mr D scored 0.5 points less than Ms R and Eversheds began a formal consultation with him to terminate his employment by reason of redundancy.

## Grievance

Mr D submitted a grievance claiming that had Ms R not been on maternity leave she would not have been awarded a score of 2 for "lock-up" and consequently would have been chosen for redundancy over Mr D.

Eversheds found against Mr D at the grievance stage and on appeal, maintaining that section 2(2) Sex Discrimination Act (section 2(2)SDA) was to provide a high level of protection for pregnant women and protect employers from male claims of discrimination.

## Tribunal Findings

Mr D took his case to the Employment Tribunal who held that he had been discriminated against on grounds of his sex and also that he had been unfairly dismissed.

They found that artificially inflating Ms R's score for the lock-up criteria was unreasonable and also constituted less favourable treatment on grounds of sex as Mr D became the likeliest candidate for redundancy. Eversheds could have removed the "lock-up" criteria or used a different reference period to prevent artificially inflating Ms R's score.

They held that the section 2(2)SDA requirement of "special treatment" did not offer blanket protection and entitlement to more favourable treatment.

It is expected this case will be appealed so we await with interest further guidance on the meaning of "special treatment".

## Key Points

As a result of this case, employers should be wary about automatically giving the benefit of doubt to an employee on maternity leave as this may not shield them from claims. Instead, it is advisable to assess other possible ways of mitigating any unfairness in the workplace resulting from maternity absence.

Employers should also be mindful of using fixed criteria for scoring redundancies and would be best advised to make a considered judgement as to whether certain criteria could be removed in any particular set of circumstances.

## ***Munchkins Restaurant Ltd and another v Karmazyn and others***

## Facts

Four waitresses all resigned and brought claims for constructive unfair dismissal and sex discrimination relating to historical and persistent sexual harassment suffered at the hands of their employer.

## Findings

The Tribunal believed it was reasonable that the waitresses "soldiered on" for several years finding a

balance between conduct which was unwelcome and unlawful, without bringing claims as they were young vulnerable migrant workers that had job security with Munchkins. This balance tipped beyond repair when the assistant manager who had helped maintain the situation at manageable limits left.

The Tribunal had to decide whether there was one or more related acts of discrimination extending over a period. If they did, then these acts could all be considered as part of the waitresses' discrimination claims. If any such act did not extend over a period then it needed to decide if it was just and equitable to allow the Claimants to bring compensation claims.

The Tribunal concluded that there was essentially one complaint of continuing harassment and so their claims were allowed. In reaching this conclusion the EAT commented that "putting up with it" does not make it welcome and that therefore grounds for constructive dismissal did exist.

## Key points

This case is interesting as it suggests that employees may not be deemed to have waived their right to claim constructive unfair dismissal when there is a significant delay between the breach of contract and the employees' resignation. It also compared the waitresses to battered wives commenting that "putting up with [sexual harassment] does not make it welcome."

## **Quick Fire**

### **Queen's Speech 2010 - Employment implications**

Relatively little was mentioned about employment law, but it did include plans to remove barriers to flexible working and promote equal pay, limit the number of non-EU economic migrants entering the UK, require a referendum on any further transfer of power to the EU, and abolish identity cards.

### **Delays to the Equality Act?**

Commentators have recently noted the withdrawal of the time line for implementation of the Act that had previously appeared on the Government Equalities Office website. Some commentators have suggested that this raises doubt over whether parts of the Equality Act will come into force in October 2010, as previously thought, or if ever at all.

Nevertheless as a guide the Equality and Human Rights Commission Website outlines the following key dates, but notably states that they are "subject to change".

### Employment, Equal pay and Services, Public Functions and Associations

Comes into force: October 2010

Guidance published: July 2010

Draft code of practice laid before Parliament: June 2010

## Education (further and higher education)

Comes into force: October 2010  
Guidance published: July 2010  
Draft code of practice laid before Parliament: January 2011

## Education (schools)

Comes into force: October 2010  
Guidance published: July 2010  
Draft code of practice laid before Parliament: May 2011

## Age Protection outside the workplace

Comes into force: April 2012  
Guidance published: December 2011  
Draft code of practice laid before Parliament: January 2012

## **Budget - 22 June 2010** **Impact on pensions and retirement ages**

The Chancellor of the Exchequer announced in his first Budget that:

- A consultation exercise will be conducted on how the government can “quickly phase out the default retirement age” of 65 from April 2011.
- A review of the planned increase in state pension age to 66 will take effect along with any future increases to the state pension age.
- Annual increases in the state pension from 2011/12 will rise by a minimum of the lower of 2.5%, the increase in earnings or the increase in prices.
- An overhaul of plans to restrict pensions tax relief for high earners from April 2011 will take place.
- The requirement of compulsory annuitisation at 75 will be abolished from 2011/12, in the interim anyone who reaches 75 on or after 22 June 2010 will not have to buy an annuity until age 77.
- From April 2011 annual increases in public service pensions will be calculated by reference to the consumer price index.

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Registered office:	Kingfisher House	Daedalus House
24-26 Museum Street	1 Gilders Way	Station Road
Ipswich	Norwich	Cambridge
IP1 1HZ	NR3 1UB	CB1 2RE
t 01473 23 23 00	t 01603 23 23 00	t 01223 32 66 00
f 01473 23 05 24	f 01603 23 05 33	f 01223 32 66 29

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