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Issue Eight Autumn2010

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Welcome to our Autumn edition of **hrmatters!**

We hope our readers have had a good summer and are ready to embrace the next round of significant legislative change we are going to see this October.

As we go to press, we are delighted to welcome our new colleagues from Wollastons following our merger. In particular we welcome Kevin Palmer, Colin Makin, Clare Barlow and James Davison to the Employment Team (working in the Chelmsford office). We are also pleased to announce the arrival of Clare Hedges to Birketts' Employment Team. Clare is a solicitor who will be working with Abigail Trencher and Lottie Seaborn in our Cambridge office.

In the last issue the team covered a wide variety of topics, including protection for employees who 'blow the whistle' at work and advice on sickness absence. This issue again takes a diverse approach but focuses on the current key employment topics of interest.

We open with a look at the increasingly popular use of social networking in the workplace, focusing on LinkedIn. Although a useful tool, Sonya O'Reilly highlights the challenges employers can face in safeguarding confidential information and the steps they should take to prevent confidential information being released into the public domain.

Following on from Lisa Hayward's article in the last issue, Abigail Trencher explores in more detail the changes that will occur with the introduction of the Equality Act on 1 October 2010.

In particular, Abigail focuses on the implications of the Act on employers.

We then consider the potential for ex-employees to claim career loss damages following the breach of a contractual disciplinary procedure. This article is particularly relevant to those in the NHS where contractual disciplinary procedures such as 'Maintaining High Professional Standards' exist for doctors and dentists.

Given the current economic climate, Ben Conway touches upon a topical issue of protecting employers against serial litigants. He explores how employers can identify non-genuine claimants and the tactics that can be deployed to defeat their claims.

Many of you may have attended our recent Mock Employment Tribunals. Lisa Hayward's penultimate article 'Light relief for Iona Lamp' provides an overview of the events with the facts, decision and action to be taken after the case hearing.

Finally, Jeanette Wheeler highlights the significance of a clear dismissal date and the pitfalls of seeking to rely on a payment in lieu of notice clause to bring termination forwards. Sometimes employees can insist that they remain employed!

As always, we welcome any feedback regarding the articles covered in this issue or future topics of interest, so please feel free to contact a member of our Employment Team.

For further details please contact **Matthew Newnham** on **01603 756412** or **matthew-newnham@birketts.co.uk**



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So your employee wants to be **LinkedIn**!

LinkedIn can be an extremely useful business tool for finding out about people via the internet. It can be of huge assistance in helping working people keep in touch, find out more about individuals they would like to know, track down old contacts, identify potential recruits and enable new introductions to be made. The website, along with tools such as Facebook and Twitter, are changing the way we manage business contacts, but they bring with them some new challenges for employers too. This article will focus on LinkedIn and the confidentiality issues it raises.

by
Sonya O'Reilly
Senior Associate



So how does LinkedIn work?

The basic premise behind LinkedIn is simple: potential members enter the website, type in a name and, if that person is a 'member', the profile that they have posted on the website will appear. Members can connect with other members and, in doing so, can share lists of their connections with others. A member can move to a new job and then update his or her profile knowing that all of his or her connections will then automatically be informed of his or her new role.

What damage could this do to a business?

An employer may not want his employee to 'own' business contacts made during his employment and, particularly, may be very concerned about the employee taking those contacts with him when he leaves. Take, for example, the case of a recruitment consultant who entertains potential clients at his employer's expense. A recruitment consultant very carefully and diligently enters each client on LinkedIn. Some months down the line, the recruitment consultant decides to move to work for a competitor. With a few clicks of the mouse, that consultant will be able to give the competitor full access to 'his' full list of LinkedIn connections made at his previous employer's expense.

What legal claims could be brought?

Claims could arise from a breach of employment contract, for example; breach of the employee's implied duties of fidelity or confidentiality, or of express requirements to comply with the employer's policies or post termination restrictive covenants. These restrictions on activities post termination may include agreements not to deal with or solicit the former employer's clients for a period of time after the employment ends.

If the employee is still employed, the employer may discipline him or dismiss him. However, if the employee has already left, the employer is more likely to consider one or more of the following remedies:-

- an interim order (injunction) to prevent the employee or new employer from using the confidential information and/or requiring them to return or destroy it;
- damages for breach of contract against the employee, or for inducing a breach of contract against the new employer or another third party; and/or
- 'account of profits' made by the new employer or the former employee for using the confidential information.

Injunctions can be particularly useful (albeit costly to obtain) as this can stop the activity before damage to the business becomes irreparable. However, courts have a discretion as to whether or not to grant this remedy and will only grant it on the 'balance of convenience' to protect a 'legitimate business interest' such as client connections, confidential information and stability of the workforce. A court will look at whether or not the granting of an injunction is reasonable in all the circumstances of both the parties and it is unlikely that an injunction will be granted in respect of information that was never confidential anyway or is already in the public domain. Therefore, information that somebody could readily obtain by doing an internet search on some other website would already be in the public domain and therefore not confidential anyway.

What is confidential information?

Once somebody puts information out on LinkedIn, can those connections properly be regarded as the employer's confidential information?

By joining LinkedIn, the employee makes a contract with LinkedIn as an individual. The software does not belong to the employer. It could be argued, therefore, that by knowingly allowing the employee to enter data on LinkedIn, the employer is making an agreement accepting that the employee owns the database (as opposed to the more normal situation where an employer would own a database of information if it was created during the course of employment). Indeed, section 14(1) of the Copyright and Rights in Databases Regulations 1997 (SI 2003/2501) confirms that where

a database is made by an employee in the course of his employment, his employer is regarded as the maker of that database unless there has been any agreement to the contrary.

It is not clear whether information stored on LinkedIn is genuinely confidential. In the main, LinkedIn profiles are accessible to anybody who has an internet connection and the information contained in people's LinkedIn profiles does not generally contain anything which may be regarded as confidential. This means that it is probably not the individual's profile alone that is confidential but rather the way the information has been gathered together that is more likely to create a proprietary interest. The list of people's connections could well be confidential.

So what should employers do?

As with many aspects of employment, it may be appropriate for an employer to put in place specific policies in which it sets out what it considers to be appropriate use of social networking sites. It may be that companies choose to expressly prohibit employees from using LinkedIn in particular ways or at all. It may be appropriate to limit or indeed prohibit certain types of employees within an organisation using these types of sites (not least because they are not required for the performance of their duties and therefore they would simply be wasting time in looking at websites which were not relevant for them) whereas other employees, such as marketing managers, may very well need to use such sites to keep pace with modern technology and modern ways of doing business. What is appropriate for one employee may very well not be appropriate for others.

Especially important for employers if they are to try to defend any employment tribunal claims for, say, unfair dismissal based on breach of a social networking policy, would be to be able to show a consistent approach in how they have dealt with different cases arising in their organisations. Such consistency may be critical for the defence against such a claim or indeed if the business is to convince a court that an injunction should be granted in a particular instance.



In summary

What is certain is that this technology and the use of social networking websites seem to be here to stay. Indeed, it can be a really useful way of doing business and for enabling employers to access markets and contacts outside of its normal regional area. Employers should therefore be ready to give this matter some thought because the use of Facebook, LinkedIn and other social networking sites is on the increase. Confidentiality is one issue and derogatory comments being posted online is another. As ever, thinking about the approach a company wishes to take before an issue arises is definitely advisable because failure to do so may make it difficult to 'put the cat back in the bag' in the future.

For further details on this article please contact Sonya O'Reilly on 01603 756413 or sonya-oreilly@birketts.co.uk

Equality Act 2010: the good, the bad and the somewhat awful

by
Abigail Trencher
Senior Associate



After an uncertain future, following the Coalition Government taking office, it has now been confirmed that the Act will come into force on 1 October 2010. This will herald the biggest shake up in discrimination law for 40 years. 13 pieces of legislation will be repealed, including the Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Religion and Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003, and the Employment Equality (Age) Regulations 2006 and will be replaced by the Equality Act ('the Act').

This article will explore the changes that will be introduced by the Act and the implications for employers.

Harmonisation

All primary discrimination legislation will now be housed in one place - the Act, with the aim of harmonising the key provisions that apply across all the 'protected characteristics'. For the purposes of the Act these are age, disability, race, religion and belief, sex, sexual orientation and also gender reassignment, marriage and civil partnership which previously fell within the Sex Discrimination Act.

Direct Discrimination will no longer be defined as less favourable treatment '*on the grounds of*' a protected characteristic but will be replaced by '*because of*'. This wider definition is meant to cover 'associative' and 'perceptive' discrimination. For example, where an employee is treated less favourably not because they are disabled, but because they care for a disabled person or, where an employee is treated less favourably not because they are gay but because they are perceived to be gay.

Indirect Discrimination has been harmonised across all the protected characteristics, including disability, as has the objective justification test which applies to any provision, criterion or practice which

places a person with a protected characteristic at a disadvantage, and requires an employer to demonstrate that that provision, criterion or practice is a proportionate means of meeting a legitimate aim.

So an employer who has a stringent attendance policy, and who seeks to apply it in respect of an employee whose attendance is affected by their disability, where it is likely people with such a disability will be placed at a particular disadvantage in not being able to meet the attendance policy's criteria, will have to show that the requirement to comply with the attendance policy (or face disciplinary action) can be justified as being a proportionate means of meeting a legitimate aim. The legitimate aim may not cause a problem, as requiring employees to turn up to work should be a legitimate expectation but the employer may struggle to show it was proportionate to enforce the same attendance criteria on a disabled person than on someone who did not have that disability.

Harassment - protection from harassment will expressly cover unwanted conduct related to gender reassignment. It will also cover harassment based on someone's

'perceived' protected characteristics and where the individual is associated with someone who has protected characteristics, for example is disabled or gay. This will widen the scope for harassment claims.

Employees will also be protected from being harassed by third parties, across all protected characteristics, provided they can show their employer knew they had been harassed by that third party in the course of their employment on at least two prior occasions and their employer had failed to take reasonably practicable steps to prevent the harassment.

What's new

Discrimination arising from disability

- the Act will address the effect of the recent case of *Malcolm* following which the comparator for a disabled person who is treated less favourably for a reason relating to their disability is someone who does not have that disability. Following the *Malcolm* case it has become far more difficult for disabled employees to succeed with claims of this nature. For example, an employee who is disciplined because they shouted unreasonably at a colleague, due to a reason relating to their disability, (for example depression) would, after the *Malcolm* case, have to compare their treatment to that which would be suffered by an employee who acted in the same manner but had no disability.

Under the Act this provision will be replaced by **Discrimination arising from disability**. This is in addition to indirect discrimination, but whereas to claim indirect discrimination a disabled person would need to be able to refer to a 'provision, criterion or practice', with this new provision a disabled employee will be protected where they are merely subjected to a detriment on account of a consequence of their disability. If they are, their employer will need to show it is justified as a proportionate means to achieve a legitimate aim unless the employer can demonstrate it did not know and could not reasonably have known that the employee had a disability.

This provision is aimed at making it easier for disabled people to show they have been treated less favourably because of their disability and is likely to lead to an increase

in disability discrimination claims as the hurdle will be lowered. This provision is in addition to the duty placed on employers to make reasonable adjustments to reduce any substantial disadvantage a disabled employee might suffer in the workplace which carries across to the Act largely unchanged.

Pre-employment Health Questions

- under the Act an employer will not be able to ask prospective employees or those applying for a promotion questions relating to their health prior to their having successfully passed an interview or some other assessment. There are some exceptions but these are very limited. Employers who generally ask such questions prior to interview will need to review this practice and determine whether one of the exceptions applies. Otherwise to continue to ask such questions may lead to enforcement action being taken by the Equality and Human Rights Commission or an Employment Tribunal claim from an unsuccessful candidate asserting that the employer relied upon information given in response to such an enquiry.

Pay secrecy - any term that prevents or restricts an employee from disclosing information relating to their pay to a colleague will be unenforceable. The aim of this provision is to increase transparency around pay and make it more difficult for employers to conceal pay disparities. Employers who operate such clauses in contracts of employment will need to review the benefit of having them as it will now be almost impossible to enforce them. However this provision only applies to disclosures between employees where one employee believes a pay disparity exists. It does not protect an employee who discloses pay information to an external person or in the absence of such pay disparity concerns.

What is still to come in the future?

There are further provisions under the Act which are proposed to come into affect sometime in 2011. These include:

Combined Discrimination - under this provision employees will be able to bring a claim of discrimination based on a combination of two protected

characteristics; for example that they have been discriminated against because they are a gay man or a Muslim woman. At present they would have to bring separate claims for each protected grounds but should eventually be able to bring one claim asserting less favourable treatment because of their having a combination of both protected characteristics.

Race - under the Act the definition of race will include colour, nationality and ethnic or national origins but the Government will have the power to include 'caste' as an aspect of race.

Positive action - this provision will enable employers to take the positive step of appointing or promoting an employee who is from a protected group which is at a disadvantage or under-represented in the workplace but only where that person is as qualified as the other candidates applying for the position. In reality this provision is likely to be used in extremely rare circumstances as it will require evenly matched candidates, which is relatively unusual, and also because few employers are likely to be brave enough to adopt this provision given the likelihood of a discrimination claim being made by the unsuccessful candidate.

The provisions set out above are just the key changes that will come into effect under the Act in October 2010 and it is likely to take employers, their advisers and tribunals significant time to adapt to the new Act. We await guidance and new codes of practice to help explain how the new Act and its provisions should work and be defined but the awful truth is likely to be that the Act will result in a significant increase in claims as case law is established by the courts grappling with the Act and its new definitions and provisions, largely at the expense of employers who will need to foot the bill for defending such claims.

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Breach a contractual disciplinary procedure at your peril...

by
Matthew
Newnham
Partner



The Court of Appeal has handed down its judgment in the case of *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*. This was a case where Mr Edwards (a Consultant Trauma and Orthopaedic Surgeon before he was dismissed by the Trust in February 2006) was suing the Trust for over £4 million as damages for the loss of his career. Mr Edwards was dismissed for gross professional and personal misconduct following a disciplinary hearing and had been unable to obtain work as a permanent consultant. Mr Edwards, in his application, made the following submissions:

- The way in which the disciplinary hearing was carried out was defective and in breach of the terms of the Trust's Disciplinary Procedure;
- The application of the Disciplinary Procedure was a term of his Contract of Employment;
- The defect in the Procedure directly led to the finding of gross misconduct against him; and
- The gross misconduct finding prevented him from finding future NHS employment following his dismissal.

The Court had to consider whether Mr Edwards was entitled to damages for loss of professional status in circumstances where, if the disciplinary proceedings had been conducted properly and not in breach of contract, he would not have been dismissed. The Court of Appeal agreed that Mr Edwards may now pursue his entire claim for loss of earnings (i.e. for his entire career) on the basis that he is unlikely to find further employment as an NHS Consultant. So if Mr Edwards is able to prove the allegations above, he is likely to recover a significant sum from his employer.

The Courts have previously held that damages cannot be recovered for a breach of an employment contract if the breach relates to the operation of a contractual disciplinary procedure. The logic behind this has been that the sum of damages that could be awarded in such a claim for breach of the terms of a contractual procedure which resulted in a dismissal should be at the same level as would apply in a claim for wrongful dismissal (i.e. wages the employee should have earned during the contractual notice period). The legal view is that this was the correct analysis of the principle that the sum of damages for breach of contract should put the aggrieved party in the position that they would have been in if the contract had been performed properly.

On the basis that an employment contract can always be terminated on notice by either the employer or the employee, the common view has been that the damages for breach of contract resulting in dismissal should be the wages that could have been earned between the date when notice of dismissal could have been given and the end of the notice period. In other words, the conclusion of the notice period represented the point after which no claims should be pursued for damages for loss of income that might have been earned by that employee under that contract.

The Trust's submissions relied on the case of *Johnson v Unisys Limited [2001] UKHL 13*, which stated that an employee cannot bring a claim for breach of the implied term of trust and confidence for the manner in which he was actually or constructively dismissed. This is because the implied term of trust and confidence is concerned with preserving the ongoing relationship of the employer and

employee (and therefore has no application on termination). Further, Parliament has already provided an employee with a statutory right to claim compensation for being unfairly dismissed under the Employment Rights Act 1996. However, the Court distinguished the *Johnson* case in relation to Mr Edwards. The Court of Appeal decided that a restriction on damages was inapplicable where the claim was for the breach of an express term of the employment contract. In the *Johnson* case, the claim was pursued on the basis of an alleged breach of the implied term of trust and confidence and its application to dismissal.

We understand that the Trust is appealing the decision of the Court of Appeal but it seems there are two main issues that arise from this case for NHS employers. First, make sure that the relevant disciplinary policy is followed before dismissing employees (if the member of staff is a consultant then the Maintaining High Professional Standards procedure (as adopted by the employer) should be followed). Secondly, when a disciplinary procedure is incorporated into an employment contract and is not properly followed a claim for compensation could follow for, by way of example, damage to reputation and/or loss of a career.

For further details on this article please contact **Matthew Newnham** on **01603 756412** or **matthew-newnham@birketts.co.uk**

Beware the serial litigator

We were recently instructed to defend a client who had been sued by notorious serial litigant, Mr John Berry. Mr Berry was recently exposed by the Sunday Times newspaper as having brought tens of claims for age discrimination over the past three years in Employment Tribunals across the country.

by
Ben Conway
Solicitor



The Sunday Times alleged that Mr Berry trawled job advertisements looking for those that could be interpreted as favouring youthful applicants. He then brought age discrimination proceedings against the employer before attempting to engage it in settlement discussions. The temptation was to settle to save the cost of going to a Tribunal but, on this occasion, we were instructed to apply for the case to be struck out.

At the pre-hearing review, we demonstrated to the Tribunal that Mr Berry had brought numerous similar claims before and had also turned down an offer to be interviewed for the job in question by the client. This satisfied the Judge that Mr Berry was not a genuine job applicant and could not have suffered a personal disadvantage. The Judge granted our application for strike out and we were awarded our costs (which is highly unusual in the Employment Tribunal) on the basis that the proceedings were misconceived.

The case follows the recent Employment Appeal Tribunal ('the EAT') judgment in *Keane v Investigo* [2010] UKEAT/389/09 and is a useful example of the tactics that can be deployed to defeat claims that are an abuse of process. In particular, it shows the potential value in reviewing the public Employment Tribunal records to establish a claimant's claim history.

Genuine and non-genuine applicants

Our arguments before the Tribunal in the Mr Berry case placed great reliance on the judgment in *Keane*. This is authority for the principle that a non-genuine job applicant who complains about not being appointed to a post cannot succeed in a claim for age discrimination.

In *Keane*, the claimant sued several agencies that had placed job adverts on behalf of accountancy firms. The positions were advertised as being suitable for recently qualified accountants or for those with limited experience. Mrs Keane, however, was aged 51 and had significant experience. When, inevitably, she was not offered an interview for a post, she would serve proceedings against the relevant agency for age discrimination.

The Tribunal found against Mrs Keane. It took the view that she was not really interested in the jobs that she applied for and would not have accepted the positions even if they had been offered to her. Rather, the claims

were brought with a view to reaching a financial settlement. Indeed, several employment agencies did settle the claims that she brought.

The EAT agreed with the Tribunal's decision. It was held that, for an individual to succeed with an age discrimination claim, they must be able to show that they have suffered a detriment. Under the *Employment Equality (Age) Regulations 2006*, a claim of direct discrimination requires a claimant to have been exposed to 'less favourable treatment' and a claim of indirect discrimination a 'disadvantage'. It follows that if a claimant is not interested in a job that they are not considered for, then they cannot have suffered a detriment.

Whilst the *Keane* case is potentially helpful where claims are brought by a claimant whose motive is primarily financial, a distinction must be drawn with the situation where there is a genuine job applicant. If such a person was deterred from applying for a position by discriminatory wording in an advert, or was discriminated against in the selection process, they could still have a claim.

It is also possible for the Equality and Human Rights Commission to take action in respect of discriminatory adverts in certain situations, even where there is not an individual complainant. Notably though, there is not a provision in the age discrimination regulations to allow for this type of intervention.

Background searches

Key to establishing that Mr Berry was a non-genuine applicant, was the search that we commissioned from an organisation that reviews the public Employment Tribunal records. We were sent a spreadsheet which listed every claim that Mr Berry had brought complete with the outcome and location of the Tribunal where the claims had been lodged. This showed that there was a pattern of Mr Berry bringing claims for age discrimination all over the country. The data supported our contention that he was not a *bona fide* job applicant and was pursuing a wider campaign.

The search service has recently been criticised in Parliament, the fear being that it could be used by recruiters to victimise legitimate claimants who have sued their previous employer. We would not advise

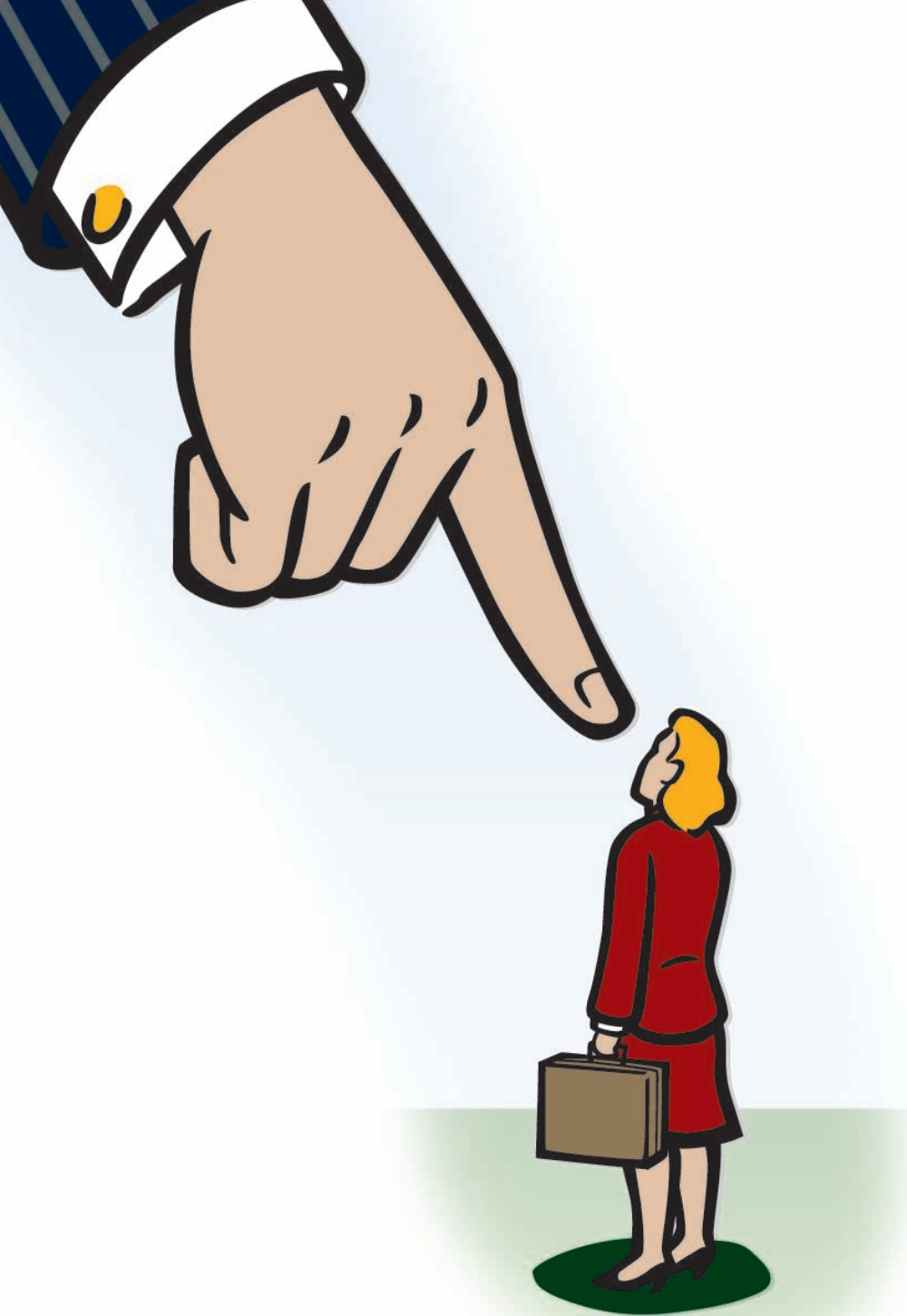
using the service to sift applicants and clearly there will not be value in carrying out a search in all Tribunal cases. However, we would recommend the service to other clients who find themselves facing litigation from a potential serial litigant.

Concluding thoughts

The decision in *Keane* and our experience in the Mr Berry matter confirm that, in the case of a non-genuine job applicant, applying for strike out can be a cost effective way of bringing the matter to a conclusion. Moreover, with a bit of research, it is possible to use a serial litigant's claim history against him. As a precautionary measure, employers should also be careful in the way that they word adverts to reduce the chance of being sued by an opportunist serial litigant.

For further details on this article please contact Ben Conway on 01473 406374 or ben-conway@birketts.co.uk





by
Lisa Hayward
Associate



and
Sarah
Bartholomew
Trainee Solicitor



We had an impressive turn out to our Mock Employment Tribunals at the University of East Anglia, The Møller Centre in Cambridge and the University of Essex, which provided an insight into the world of the Employment Tribunal and what happens there.

Facts

For those who were unable to attend our Mock Tribunal (and as a re-cap for those that did), Iona Lamp resigned from her employment after 10 years at Bright Ideas Limited following a series of unfortunate events.

Iona was refused a promotion at the company as the new Sales Director, Max Power, appointed a younger male candidate (albeit with less experience). Max Power also made some less-than politically correct remarks about women during Iona's interview. When Iona's allocated sales patches were altered, drastically reducing her commission levels, Iona raised a formal grievance which was not upheld. Max Power then decided to implement a change requiring staff to perform administrative tasks from HQ. This adversely affected Iona who worked from home one day a week in order to care for her children. The final straw for Iona was that, on indicating she was not happy with the new working arrangement, she was invited to a

Light relief for Iona Lamp...

disciplinary meeting where a misplaced 'without prejudice' offer was made when she was told it would be in 'everyone's best interests' for her to leave the company. Iona resigned and subsequently claimed constructive dismissal, sex discrimination and age discrimination.

Decision

Whilst, due to the interactive nature of the Mock Tribunals, slightly different decisions were reached concerning the success of Iona's claim, for the purpose of this article the decision was as follows:

Constructive dismissal

Iona was successful in her claim for constructive dismissal. The Tribunal considered that Bright Ideas Limited's conduct had been sufficient to amount to a repudiatory breach of contract.

Sex discrimination

Iona was successful in her claim for indirect sex discrimination. She was able to prove that the new company practice requiring employees to work from HQ when performing administrative tasks had an adverse effect on women and on her in particular.

Bright Ideas Limited was unable to show that the new company practice was a proportionate means of achieving a legitimate aim (a defence to indirect discrimination) and therefore was guilty of unlawful indirect discrimination.

Iona was not successful in her claim of direct sex discrimination, as she was unable to provide facts from which the Tribunal could conclude that she was treated differently and less favourably by virtue of being a woman.

Age discrimination

Iona was unsuccessful in her claim for age discrimination as she was unable to prove facts which led the Tribunal to conclude that she had been treated less favourably as a result of her age.

After the hearing

The Tribunal dismissed the parties and ordered that a remedies hearing (in relation to those successful elements of Iona's claim) be listed for six weeks' time.

At the remedies hearing, the Tribunal were told that although Iona started a new job in

October 2009 (two months after leaving Bright Ideas Limited), she had not been retained past her probationary period and had been out of work since January 2010.

Tribunal awards in cases of unfair or constructive dismissal include a 'basic' and a 'compensatory' award. The basic award is calculated on the same basis as the statutory redundancy payment, taking account of the employee's age, length of service, and weekly pay (capped at £380.00¹). The compensatory award will, subject to statutory limits, be such amount as the Tribunal considers just and equitable in all of the circumstances having regard to the loss sustained by the employee because of the dismissal (so far as the loss is attributable to the employer's action).

The Tribunal awarded Iona a basic award, which is automatic in claims where the Tribunal finds that there was an unfair or constructive dismissal. The Tribunal also awarded Iona loss of earnings up to the date of her re-employment in October 2009.

The Tribunal considered whether Iona should be awarded any compensation for further loss of earnings following the non-retention of her employment in January 2009. Following the case of *Dench v Flynn and Partners*², the Tribunal decided to attribute the continuing loss to Bright Ideas Limited and award Iona loss of earnings from January 2010 until August 2010. The Tribunal chose to end the award at August 2010 as this would be one year from Iona's resignation and in the Tribunal's view, ample time to obtain alternative employment.

£250 was awarded to Iona for loss of statutory rights. In other words, because Iona was no longer protected from unfair dismissal by virtue of having one year's continuous service, she was entitled to compensation for loss of that protection.

The Tribunal awarded Iona £4,000 as compensation for injury to feelings. In discrimination claims, the possible award is uncapped and is not limited to reimbursement of economic loss. The case of *Vento*³, subsequently affirmed by *Da'Bell*⁴, sets out three 'bands' of compensation payable for injury to feelings, dependant on the level of injury to feelings experienced:

- The lower band (which is £600 - £6,000) for one off or isolated incidents and less serious cases;

- The middle band (which is £6,000 - £18,000) for serious cases, but those that do not merit an award in the level of the 'top band';
- The upper band (which is £18,000 - £30,000) for the most serious cases. This is an exceptional award only given in, for example, prolonged cases of harassment.

In total Iona was awarded:

Basic award:
£4,700.00

Compensatory Award:
£22,000.00
(8 months' net salary)

Injury to feelings:
£4,000.00

Loss of statutory rights:
£250.00

£30,950.00

Bright Ideas Limited has been left in a dark mood after being forced to pay out such a large sum. Iona meanwhile feels that she has been compensated fairly and says that the result 'has really brightened her day'.

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¹ Figures correct as at date of publication.

² [1998] IRLR 653

³ *Vento v Chief Constable of Yorkshire Police*, [2003] IRLR 102 (EWCA)

⁴ *Da'Bell v NSPCC*, UKEAT/0227/09

So when was it you dismissed him/her? Are you sure?...

It may seem like knowing when an employee's effective date of dismissal falls is fairly straightforward; indeed statute seems to be quite clear on the matter. But as recent cases show, this can be far from true in practice and HR practitioners need to be careful.

by
Jeanette Wheeler
Partner



The legal test

In theory, the statutory test appears to be relatively straightforward. **Section 97 of the Employment Rights Act 1996** ('the Act') states that an employee's effective date of termination ('EDT') will be;

- a) the date on which notice of termination expires; or
- b) if no notice is given, then the date on which the termination takes effect; and
- c) in the case of fixed term contracts it shall be the date the contract expires.

For non-statutory purposes and contractual purposes the termination date may or may not be the same as the EDT.

Importance of knowing when employment is/was in fact terminated and when the EDT is/was for statutory purposes

In practice, the termination date and the EDT are of fundamental importance in employment law on which many events, rights and defences rely. e.g;

- the EDT marks the date from which time limits for bringing a number of employment tribunal claims start to run;
- the EDT also marks the end of an employee's continuity of employment so can affect their ability to bring certain Tribunal claims (e.g. to qualify to bring an unfair dismissal claim, an employee needs to show that they have been employed continuously for one year or would have been had they been given their statutory one week's notice);
- the termination date and the EDT may affect the calculation of certain statutory and contractual termination payments (e.g. redundancy pay and accrued untaken holiday pay and bonuses).

So where the parties disagree as to the termination date and/or EDT, even by a day or two, the consequences can be significant, as can the associated legal costs in seeking a resolution.

Two very recent cases highlight some of the 'bear traps' that employers fall foul of.

What happens with regard to an EDT when a summary dismissal is ineffective?

Generally, a lawful summary dismissal would be a situation where an employer immediately terminates an employee's contract of employment without notice in response to a fundamental breach of contract, such as gross misconduct, by the employee. However, it is common for an employer to seek to dismiss immediately



by making a payment in lieu of notice where there may not be any proven fundamental breach of contract by the employee (perhaps in a redundancy or capability situation).

Facts of the case of *Geys v Société Générale* (March 2010)

- On 29 November 2007 the Bank told Mr Geys that his employment was terminated with immediate effect and he was escorted off the premises.
- There then ensued solicitors' correspondence about a possible severance agreement but Mr Geys' solicitors reserved his rights throughout and no agreement was reached.
- On 18 December the Bank made a payment into Mr Geys' bank account but didn't communicate to him what the payment represented.
- On 21 December Mr Geys queried the calculation of various payments.
- Having received no response on 2 January 2008 Mr Geys affirmed his contract i.e. argued that his employment had not been effectively ended and his employment therefore continued. He also reserved his rights with regards to acceptance of the December 18 payment until he had received confirmation as to what the payment was for.
- By letter dated 4 January, the Bank explained that the payment was in fact payment in lieu of notice made in accordance with the provisions of the staff handbook, the relevant part of which was contractual.

Decision

The Chancery Division of the High Court agreed with Mr Geys that the actions of the Bank on 29 November 2007 amounted to a repudiatory breach of contract which Mr Geys could decide whether to waive or accept. The Bank had not properly operated its contractual right not to give Mr Geys notice of termination and instead pay him in lieu. The payment in lieu was not made on termination and notified as such - in accordance with the contract - hence the breach. Mr Geys had validly chosen to waive this breach and treat himself as not lawfully dismissed!!

Judge Leggett considered that in order for the Bank to have properly exercised its contractual right to terminate immediately by making a payment in lieu of notice, it needed both to make the payment **and** inform Mr Geys that it was exercising its right to pay him in lieu of notice (an employee must be informed when his/her employment is being terminated). Consequently, Mr Geys' employment was found to have terminated on 6 January 2008 - two days after the posting of the Bank's letter dated 4 January explaining that it had made payment in lieu of notice.

If only the Bank had worded its letters to Mr Geys more appropriately and in a timely manner. The consequences of the Bank's failings on this occasion meant that Mr Geys became entitled to significant additional payments made up of bonuses and other elements costing the Bank several Million euros extra.

This case is, therefore, a **strong warning** to employers of the importance of establishing a clear dismissal date and ensuring that any contractual clauses allowing termination without notice are carefully and effectively operated.

What if you don't even have a contractual right to pay in lieu?

What happens if you want to bring forward the termination date of an employee who is already working out his notice?

Employers do not always have the benefit of a contractual right to reduce the notice period after notice has already been given. In those instances, following the recent case of *Wedgewood v Minstergate Hull Ltd* (July 2010) it would seem that employers are only left with one 'safe' lawful option if they want to bring forward the dismissal date and that is to formally agree this with the employee in writing using clear and unambiguous language.

The facts

- Mr Wedgewood (an accountant) had been given notice that his employment would terminate on 1 December 2008 by reason of redundancy. Mr Wedgewood was uncomfortable working his notice and made this clear to his employer.

- In response, on the 26 November 2008 he was informed by letter that he was being 'released today and will still be paid up to and including your notice period date Monday 1 December 2008.'
- Mr Wedgewood signed an acknowledgment contained in the letter and further agreed to attend the office on the 28 November 2008 for a handover meeting.
- Mr Wedgewood contended that his employment still ended on 1 December (not earlier on 26 November) so giving him until 28 February 2009 to bring his Tribunal claim. Minstergate claimed he was out of time because his EDT was 26 November meaning his application should have been made by 25 February 2009.

The decision

At first instance the tribunal found in favour of the employer, but on appeal to the Employment Appeal Tribunal, the Judge found in favour of Mr Wedgewood holding that by absolving him from working his period of notice the EDT was not altered and, furthermore, that the EDT could only be altered by the express agreement of the parties, but that this had not occurred on the facts of this case - the letter of 26 November merely released Mr Wedgewood from working the remainder of his notice.

If an employer wants to bring forward an employee's EDT, they should **expressly agree** this with the employee and be sure that what is being agreed is early termination and not just a waiver of an obligation to work.

Final word of warning

Finally employers should exercise real caution when negotiating severance agreements, particularly where the negotiations drag on or don't get concluded since a number of questions may remain unanswered - should you stop paying the employee; is cessation of payment sufficient to terminate; have they been dismissed (even if they are no longer working in the business)?

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