

Employment Law Update

QUEEN SQUARE CHAMBERS

Summer 2007

Special points of interest:

- Whistle blowing
- SDP update
- Discrimination update
- Agency Workers

Editorial

There have been a number of important developments since Stephen Roberts's update (which you can still download from our website).

The last quarter has seen significant legislative change. Amongst the most significant, family friendly rights were extended on 1st April 2007 with the coming into force of the rights of female employees to additional maternity leave (if they qualified for ordinary maternity leave), an increased SMP and MA allowance from 26 to 39 weeks and the introduction of stay in touch days.

The Information and Consultation of Employees Regulations 2004 are becoming more prominent.



Julian Allsop
(1999)

These regulations give employees the rights to be informed about the state of their employer's business, and informed and consulted upon employment prospects and potential substantial changes to terms and conditions. On 6th April 2007, the required employee threshold decreased from

150 to 100 employees.

Next year, the threshold will be 50 employees, thus increasing the importance of employers considering whether or not to hold a ballot to appoint employee representatives under Regulation 19.

In addition to these legislative amendments, there have been developments in the case law, the most interesting of which, in my view, being highlighted within this update newsletter.

Whistle blowing—protected disclosure?

The EAT decision of *Kraus v Penna* [2004] IRLR 260 controversially required the whistleblower, who relied upon a breach of criminal law or another legal obligation as the basis of his or her protected public interest disclosure, to prove that the employer was actually subject to that obligation. The Court of Appeal in the

case of *Babula v Waltham Forest College* [2007] IRLR 346 has overruled this requirement. Relaxing the burden on Claimants, it is now sufficient that the employee has the subjective reasonable belief in the criminality of the act or the breach of the relevant legal obligation that is relied upon. Whilst this decision

brings this area of employment law back in line with the intent behind the Public Interest Disclosure Act, it remains to be seen if it will have an impact on the number of meritorious whistleblowing claims making it past the PHR stage.

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Statutory Dismissal and Disciplinary Procedures

Time is ticking away for practitioners to file their responses to the DTI's consultation on the repeal of the Statutory Dismissal and Disciplinary Procedures which can be found at www.dti.gov.uk/files/file39477.doc. At the present time, the Government's preferred option is to repeal section 98A and revert to a position governed by **Polkey v AE Dayton Services Ltd** but provision would be made for a tribunal to make "alternative

findings reflecting the balance of procedural and substantive unfairness in the dismissal". In the meantime, it is of paramount importance that the application of an employer's internal procedures do not conflict with or otherwise restrict the minimum rights of the employee under the Statutory Dismissal and Disciplinary Procedures. This was illustrated most recently in the EAT decision of **Master Foods v Wilson** [2007] ICR 370. Mr. Wilson was dis-

missed for fraudulently taking sick leave. As is usual, he was told that he had the right to appeal against his dismissal, but that in accordance with the employer's internal procedures, this had to be done in writing within 5 days. He lodged his appeal after this time and the employers refused to hear it. The employer's stance in relation to the appeal was found to be incompatible with the statutory minimum requirements and thus automatically unfair.

Discrimination update

In the case of **Madarassy v Nomura International Plc** [2007] IRLR 246 (the lead case of three in relation to this issue) the Court of Appeal clarified the **Igen v Wong** guidelines applicable to the statutory reversal of the burden of proof which is applicable in all cases of direct discrimination.

The Court of Appeal made it clear that the burden of

proof does not shift from the employee to the employer simply on the basis of the employee establishing a difference in status and a difference in treatment. A nexus between these concepts is required, namely the reason for the differential treatment from which the Tribunal could properly conclude that direct discrimination has taken place in the

absence of a reasonable (non discriminatory) explanation from the employer—and at that initial stage, take into account evidence given by the employer.

Mummery LJ also helpfully set out the type of employer evidence that can assist at this threshold stage, namely evidence as to whether the act complained of occurred at all; evidence as to the ►

"A nexus between these concepts is required, namely the reason for the differential treatment..."

► actual comparators relied upon by the employee to prove less favourable treatment; evidence as to whether the comparisons being made by the employee were of like with like and available evidence of the reasons for the differential treatment. However, it should be noted that the absence of an adequate explanation for differential

treatment of the employee is **not** relevant to whether there is a threshold case of discrimination by the employer.

The absence of an adequate explanation only becomes relevant if a threshold case is proved by the employee, in which case the employer must discharge the burden of prov-

ing a reasonable non-discriminatory reason for the treatment, failing which a finding of discrimination will be made.



OUR TEAM

Our employment department is recognised across the Western Circuit and beyond as a leader in this field.

The strength in depth of our department is such that it contains five barristers who are singled out for mention of their expertise in current editions of either the Legal 500 and / or Chambers and Partners.

We also provide CPD accredited in-house lectures and training.

Please contact James or Megan for further details or view our website at:

www.queensquarechambers.co.uk

UPCOMING EVENTS

Autumn 2007 TBA—Employment Breakfast

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Every care is taken to ensure the accuracy of the contents of this newsletter. However, the reader is reminded that the information in this letter should not be preferred as a substitute to specific legal advice and as such liability is disclaimed.

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Agency Workers

James v London Borough of Greenwich [2007] IRLR 168 answered the vexed question of whether a long serving agency worker could be an employee of the end user as a result of the implication of a contract of employment, by requiring it to be necessary to imply a contract with the end user, thus confining **Cable & Wireless v Muscat** [2006] IRLR 354 to its particular facts. This approach has been readily applied in two recent EAT decisions.

In **Astbury v Gist Ltd** [2007] UKEAT 619/06, the express terms of the Claimant's contract with

his agency (which limited its authority to enter into a contract of service between the Claimant and the Respondent) were inconsistent with the implication of a contract of service with the Respondent, this was fatal to his claim.

In **Heatherwood & Wexham Port Hospitals NHS Trust v Kulubowila (and others)** [2007] UKEAT/633/06, HHJ Clark reversed the finding of the ET that the Claimant was the employee of the end user NHS Trust and stated,

"it is not enough to form the view...that because

the Claimant looked like an employee of the Trust, acted like an employee and was treated like an employee, the business reality is that he was an employee and the ET must therefore imply a contract of employment."

It will be a rare agency worker who succeeds in persuading a Tribunal that a contract of service exists with the end user.