

Employment Law Update

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Employment Tribunal Statistics

On 30th June the Tribunals Service released figures showing that there were 236,000 Employment Tribunal claims lodged in the year 1st April 2009 to 31st March 2010, an increase of 56% as against the previous year. This increase is 'largely as a result of the rise in multiple claims - they rose by nearly 90% on 2008-9, but also partly as a result in the changing economic climate. There was an increase of 14% in single claims over the year.'

In summary there was a 17% increase in the number of unfair dismissal claims and almost three fifths of the current caseload outstanding consists of multiple ET claims waiting to be heard.

Welcome

It's July and summer is now in full flow. The national news this month has been dominated by the cuts in the public sector intended by the coalition government and the subsequent promise of unrest if they are implemented. It looks as if the second half of 2010 may see more strike action than the first!

Effective date of termination

We provided you with an update on the law regarding the effective date of termination in our June Newsletter and it appears that further clarification of the law is needed. The local case of *Wedgewood v Minstergate Hull Ltd* involved a gentleman who was made redundant and required to work his notice period, which would end on 1st December. Mr. Wedgewood asked his employer if he could leave his employment before the expiry of his notice period and his employer agreed in a letter dated 26th November. His employer said that he need not attend work after 26th November save for a handover meeting on 28th November and confirmed that he would be "paid up to and including your notice period date of 1st December."

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Effective date of termination

Mr Wedgewood presented an unfair dismissal claim on 28th February 2009. Just within the 3 month period if his effective date of termination was 1st December. At a pre-hearing review the Judge held that the effective date was 26th November and pointed to the employers letter of the same date as bringing Mr Wedgewood's effective date of termination forward from 1st December to 26th November.

Mr. Wedgewood appealed to the EAT and won. The Judge held that the parties could have agreed to vary the termination date from 1st December but this is not what had taken place. The employer's letter confirmed that Mr. Wedgewood did not have to attend work after the 26th November but it also confirmed that he would be paid up until December 1st. It was therefore held that his claim was within the time limit and it could proceed to a final hearing.



Had the employer wanted to bring his termination date forward they could have agreed with Mr Wedgewood to pay in lieu of the rest of his notice period and confirmed that his employment would terminate on the 26th November. The result of this case may have also been different if the employee had found employment with another employer before the 1st December.

Costs awarded against a successful claimant

Cost awards are extremely rare in the employment tribunal. However in a case heard in Scotland costs were awarded against an employee who won his claim for unfair dismissal.

Mr. Nicolson was employed as a manager by Nicolson Highland Wear Ltd, a partnership that he had formed with a Mr. Chambers. In October 2008 Mr. Chambers visited the shop and found evidence of mismanagement, of Mr. Nicolson running a competing business from the same premises and evidence that Mr. Nicolson had been passing off his own business as the company's business and/or diverting orders to the competing business.

On 26th October Mr. Chambers resolved to dismiss Mr. Nicolson. Mr. Chambers had already written one letter dismissing Mr. Nicolson and he then wrote another letter to him summoning him to a disciplinary

hearing on 28th October. The dismissal procedure followed was far from perfect.

Mr. Nicolson brought a claim for unfair dismissal. The Tribunal found that Mr. Nicolson had been automatically unfairly dismissed as the company had not followed the statutory disciplinary procedure that was then in force and which was revoked in April 2009. However the Tribunal also made a finding of 100% contributory fault against Mr. Nicolson.

The Company applied for costs against Mr. Nicolson. The Tribunal refused the application for two main reasons firstly that Mr. Nicolson had won his claim for unfair dismissal and as a result it was reasonable for him to bring the claim despite the fact that he was not awarded any compensation and secondly Mr. Nicolson was entitled to seek a declaration that he was unfairly dismissed even if he got no compensation.

The company appealed to the EAT who disagreed with the costs finding of the first Tribunal and made an order for costs in the company's favour. The Judge found that the only conclusion open to the original Judge was that he had acted unreasonably in bringing the claim at all and having brought it, persisting with it despite the company stating that it would be relying on the fraud committed by Mr. Chambers.

Future cases are unlikely to be on all fours with the above case because of the repeal of the statutory disciplinary procedures. However, the case could be relied on as authority for costs being awarded against a successful party.



Appeal Tribunals Jurisdiction

The Employment Appeal Tribunal has jurisdiction only to correct errors of law made in the first hearing by the Employment Tribunal. It cannot re-try factual issues. Further if the EAT accepts that there may be an arguable point of law, it does not follow that there was an error of law in the original Judgment. If there is no error of law discovered, the Appeal Tribunal will dismiss the appeal.

In the case of *Hussey v Photogenic Limited* the claimant had claimed that he was unfairly or constructively dismissed. The facts of the matter were that on 6th June Mr. Hussey was criticised by Photogenic's managing director Mr. Lake because of his mathematical and IT skills and he was invited to a meeting to be held in the next week to discuss his role in the company and whether he should leave it to concentrate on his own business that he ran from the Respondent's premises with the Respondent's consent.

Before the meeting Mr. Hussey returned his keys to the company and left a note stating that he had been dismissed because he had been asked to resign or face dismissal. Mr. Lake responded to this note by email stating that he had not been dismissed. Mr. Hussey then sent a written grievance stating that he had been constructively dismissed, harassed and bullied. Mr. Lake responded disapproving of Mr. Hussey's hostile letters and informing him that as a result he was no longer considered to be an employee.

It was therefore for the Employment Tribunal to determine the facts

surrounding the dismissal, who, when, what, where and how and then apply the law of unfair and constructive dismissal to the facts.

The Employment Tribunal found that Mr. Hussey had not been dismissed but had resigned on 9th June. It ruled that there had not been the fundamental breach of contract by the employer needed to establish a claim for constructive dismissal. Mr. Hussey appealed and lost.

The Appeal Judge held that the Tribunal was entitled to find as a fact that Mr. Hussey had resigned on 9th June and not in response to a fundamental breach of contract by the Employer. He stated further that when deciding whether an employee had resigned or been constructively dismissed the Tribunal needed to determine who really terminated the contract. If it was the employee the Tribunal could still find that he had been dismissed if he resigned in a situation where he was entitled to end the contract without giving notice as a result of the employers conduct.

At the appeal Mr. Hussey tried to argue that he had not resigned and that the Respondent dismissed him by letter dated 13th June. However the original Tribunal had found as fact that Mr. Lake did not tell Mr. Hussey that he would be dismissed if he did not resign and therefore he had not been dismissed as a consequence of this statement on 6th June, as he had originally argued. It was not for the Appeal Tribunal to try the facts of the matter again and conclude who brought the contract to an end. As there was no error of law, the appeal was dismissed. This is an interesting illustration of how the EAT approach appeal cases.



Equality Act Update

In a written answer in the House of Lords on 19th July, in response to the question "*which sections of the Equality Act 2010..have [the government] decided not to commence*" Conservative Whip Baroness Verma responded: "*The Government announced on 3rd July that the first wave of implementation would go ahead in October. The Government are considering how the rest of the Act can be implemented in the best way for businesses and will make an announcement in due course.*" In other words we are still don't know which parts will be implemented.

Employment on the rise?

Research published by Totaljobs indicated a 6.5% rise in the number of jobs available in the second quarter of 2010. John Salt, director of Totaljobs.com commented "A slight rise in recruitment has encouraged those in employment to have confidence to seek their next position. This is increasing competition for those out of employment, and increasingly pitching the desperate against the ambitious in a two- speed jobs market."

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Simon Cowell claim update

New details have emerged about the employment law claim brought against Simon Cowell, his company Syco and Freemantle Media by failed Britain's got talent hopeful Emma Czikai. She claims that producers knew about her cervical spine neuritis condition and yet the judges and show still subjected her to exploitation, humiliation, degradation and barbarism. At a pre-hearing review Ms Czikai informed the Tribunal that she was seeking £300,000.00 for injury to feelings, compensation of £1 and loss of earnings of £1.25m. She may not have talent but she has got huge expectations!

Employment Law – have your say!

The government has launched a website designed to allow people to voice their opinion on current legislation. The website is called 'your freedom' and is available at the following web address: <http://yourfreedom.hmg.gov.uk>.

The site covers all areas of the law including employment and makes for interesting reading as well as giving you the opportunity to have a rant about the raft of employment or other legislation. The Equality Act 2010 has already it's fair share of comments.

And Finally....

That's all from us this month. We hope that you have enjoyed this month's newsletter. For those of you heading on your holidays we hope that you travel safely and have a well earned rest. For those of you working through August you know where we are if you require any employment advice.

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