

Employment Law Update

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Employment & Human Rights Commission Report

On 11th October, the Equality and Human Rights Commission released a report into discrimination and disadvantage in Britain.

The report shows that we are in general a tolerant and open-minded society and indicates that some equality gaps have closed over the last generation. However, the report also shows certain long-standing inequalities remain unchanged and perhaps new areas of social and economic inequality are emerging.

The full report can be viewed at: <http://www.equalityhumanrights.com/key-projects/triennial-review/>

Welcome

October has seen the announcement of the much debated government 'cuts'. The public sector is set to lose in the region of 500,000 jobs as a result of the belt tightening. The affect the cuts will have on the private sector is unpredictable, however talk of a double dip recession seems to have faded. We have a few articles related to the cuts this month and we may have a few more in the months to come with the likely increase in trade union activity.

Fitness for work assessments

The government has announced its intention for welfare reform. As part of the reform the government wants all incapacity benefit claimants to have a Work Capability Assessment. If claimants are assessed as fit for work their benefit will be changed to Job Seekers Allowance and they will be expected to look for work. Those who could work but would require extra help and support will move onto Employment and Support Allowance. Trials of the system are up and running in Jobcentres in Burnley and Aberdeen and will continue until January.

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Sixteen month extension failed

In the matter of *Townsley v Perth & Kinross Council* the Claimant was a Scottish Gypsy traveller and the Respondent council ran the Doubledykes travellers' site. The Respondent advertised the vacancy of site manager and the Claimant applied. One of the criteria for the successful candidate to meet was *'educated to standard grade or equivalent.'*

The Claimant was unsuccessful in her application. She was not invited to an interview because *'there [were] other applicants who more closely matched the selection criteria.'* 19 months after receiving notification of the failed application the Claimant brought a claim for indirect discrimination. She complained that like most of the Scottish Gypsy travellers she did not sit or achieve standard grades (the equivalent of GCSEs) because the norm is that they do not attend school beyond primary education stage. As a result, she argued that the proportion of travellers who could comply with the standard grades requirement was considerably smaller than the proportion of persons able to comply that were not travellers. She

was therefore at a particular disadvantage when compared to others and the requirement could not be objectively justified for the position in question.

Her claim was brought 16 months out of time. However, the original Tribunal found that it was *'just and equitable'* to extend the time limit because she had been ignorant of the availability of recourse to the Tribunal. The Tribunal also accepted that *'educated to standard grade or equivalent'* meant that the applicant was required to have the standard grades.

The Respondent appealed. The EAT upheld the Respondent's appeal stating that the finding that applicants to the role had to have standard grades was not one that the Tribunal were entitled to make as it had been accepted evidence at the original Tribunal that *'standard grades or equivalent'* meant standard grades, or a vocational qualification or relevant experience. The vocational qualifications or relevant experience did not require the Claimant to be at school past the primary school age and therefore her claim fell away.

The EAT also held that it was not just and equitable for such an extension to the time limit for presenting her claim. Having inspected the relevant case law the EAT found that it was not sufficient for the Claimant simply to be ignorant of her right to bring a claim, that ignorance also had to be reasonable. During cross examination at the original Tribunal hearing the Claimant admitted that some time prior to submitting her claim she became aware of another traveller who had an employment issue and was pursuing her *'rights'* *'through the courts'*.

Without a satisfactory explanation of why the Claimant did not enquire as to whether she had any recourse in law at that point (and a couple of other opportunities that she had) the Tribunal could not conclude that her ignorance was reasonable. The Claimant's entire claim was thus time barred and dismissed.

Law firm's redundancy process scrutinised

Semple Fraser LLP was the Respondent in a claim for unfair dismissal brought by Ms Daly a newly qualified solicitor. The Claimant had completed her training contract with the firm and qualified into the corporate department on 1st September 2008 in a team that also included a partner, a trainee and a solicitor called Mr O'Gorman who had joined the firm in April 2008. Due to the economic situation that had arisen in 2008 it was decided that one of the two solicitors within the team was to be made redundant. It was accepted that there was a genuine redundancy situation and there was a pool of two, the Claimant and Mr O'Gorman, to select the redundant employee from. The scoring criteria was agreed (the original Tribunal later said that the criteria could not be faulted), the solicitors were scored, the Claimant received 38 points and Mr O'Gorman 42. The Claimant was made redundant after a full and proper procedure was followed.

At the original Tribunal matters were focused on the scoring criteria and in particular the scores awarded to Mr O'Gorman for 'mentoring' and 'business development'. The Tribunal examined the scores awarded and took away the points awarded to Mr O'Gorman for mentoring on the basis that he had not yet performed the mentoring of the trainee that he was appointed to do. They also took away the points awarded for business development,

as they did not consider that Mr O'Gorman had the required 'strong track record of business development resulting in new work for the firm.'

As a result of the remarking exercise performed by the Tribunal the Claimant and Mr O'Gorman both now had 38 points. The Tribunal held that the Claimant's dismissal was therefore unfair.

The Respondent appealed on two main grounds. The first was that the Tribunal had erred in law in concluding that because the two solicitors scores were level the Claimant's dismissal was unfair, when there was no evidence that the Claimant should have retained her job in such a scenario. The second was that the Tribunal had substituted its own views for that of the reasonable employer, scrutinising scores to the extent that they were not entitled to do. They had not considered, as they should, whether dismissal was in the band of reasonable responses open to the employer.

The EAT upheld the appeal. Finding that if the scores had been equal it does not follow that the dismissal of the Claimant was unfair. There was a genuine redundancy situation and one of the two had to go. The implication of the Tribunal's decision is that the only reasonable approach would have been to dismiss Mr O'Gorman when there was no evidence to support this. They also found that the Tribunal had not applied the correct test in law instead involving themselves in a remarking exercise that case law dictates is not the correct approach. The claim was therefore dismissed.



Date of dismissal by post

In the case of *Gisda Cyf v Barrett* the matter of the effective date of the termination was critical. In October 2006 the Claimant was suspended from her employment with the Respondent, a small charitable organisation. After a disciplinary hearing the Respondent informed the Claimant that she was dismissed in a letter sent by recorded delivery and dated 29th November 2006. The letter arrived on 30th November however the Claimant did not open and read the letter until 4th December as she had been away when it was delivered. She lost an internal appeal and lodged a claim for unfair dismissal on 2nd March 2007.

If the effective date of dismissal was held to be the date of the letter, or the date that it arrived at the Claimant's house, her claim would have been issued out of time because the Tribunal did not receive it within three months less one day from the effective date of termination. The matter went all the way to the Superior Court (formally the House of Lords) who found that the effective date of termination was the 4th December stating "*Where a decision to dismiss is communicated by a letter sent to the employee at home, and the employee has neither gone away deliberately to avoid receiving the letter nor avoided opening and reading it, the effective date of termination is when the letter is read by the employee, not when it arrives in the post.*" Accordingly her claim was issued in time.

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HM Treasury spending review

The spending review announced by the government on Wednesday 20th does not directly concern employment law. ACAS has survived the cull on quangos and will continue as normal, other survivors are the Equality and Human Rights Commission and the

Health and Safety Executive. There are of course to be public sector job losses as a result of the review, which will involve compulsory redundancies and increased Trade Union activity is a possibility

And Finally....

The government 'cuts' have been hanging over the nation like the sword of Damocles and now they have been announced, individuals and companies can fully focus on work. As always, if you need any Employment Law advice, you know where to find us.

Bye for now

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Good Economic News!

Figures released by the Office for National Statistics at the end of October indicate the economy grew 0.8% in the third quarter of this year. This growth was twice as fast as expected by most economists. On the year on year index our gross domestic product (GDP) grew by 2.8%, the fastest annual rate in three years. Sterling also jumped up against the dollar and the euro.

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