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STEPTOE & JOHNSON LLP

UK Employment Law Update, June 2012

June 2012

Welcome to the latest issue of the Steptoe & Johnson Employment Law Update.

The Employment Law Updates are aimed at providing information on recent developments in UK employment law. It is our desire to provide you with not only an update of the law, but also a practical insight in managing workplace issues on a proactive basis.

To achieve our objectives and to continuously improve the Updates, it is important that we receive feedback from you. With a view to this, please e-mail any comments or suggestions which you may have relating to the Updates to employmentgroup@steptoe.com. We look forward to hearing from you.

To view any of the topics in this issue, please click on the relevant link below.

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1. Increase in minimum qualifying period for unfair dismissal

This has increased from one year to two years for employees to acquire the right not to be unfairly dismissed or to request a written statement of reasons for their dismissal. This however will only apply for employees whose period of continuous employment begins on or after **6 April 2012**. Note: there is no qualifying service required for the 27 forms of automatically unfair dismissals and the statutory cap on the compensatory award will not apply in 3 of these cases.

2. New legislation – all change again?

The Department for Business Innovation and Skills has presented the **Enterprise and Regulatory Reform** Bill to Parliament which makes provision for a number of employment law reforms including pre-claim ACAS conciliation, a rapid resolution scheme for claims, a new limit on the compensatory award for unfair dismissal and the public interest test for whistleblowing claims. For the measures to become law, the Bill will require approval of both Houses of Parliament. The Bill's second reading is scheduled to take place on **11 June 2012**. Please click here to view the Bill.

The Government has also announced reforms to the **Equality Act 2010** and the **Equality and Human Rights Commission**. The measures announced include consultation on repealing employers' liability for third party harassment and repealing the Employment Tribunal's power to make recommendations that apply to all an employer's staff.

The Government has published the **Beecroft Report**. The call is still for the introduction of compensated no fault dismissal and exemptions from unfair dismissal law for small businesses with fewer than 10 employees and the Government has issued its response to the Report. Although improvements could be made to the way employment rights are exercised, there is still seen to be a

mismatch between what is being recommended and how that will achieve growth in British businesses. The aim, to improve growth through increased labour flexibility and giving employers the confidence to take more people on, does not look as if it will be met but it has become politicised.

3. ACAS Guidance

ACAS has launched a new guidance aimed at helping managers to have **difficult one to one conversations** with employees in the workplace. Complimentary copies are available on request or obtained from www.acas.org.uk/conversations.

4. Increase in the threshold for making student loan repayments

This has been increased to £15,795 with effect from **6 April 2012**.

5. Minimum wage increase

The Government has approved the new £6.19 rate from **October 2012**. This is an increase of 11p an hour. The rate for 18-20 year olds will remain at £4.98 per hour and for 16 to 17 year olds £3.68 an hour. The rate for apprentices will increase by 5p to £2.65 per hour.

6. Age Discrimination – compulsory retirement of a partner

Seldon v. Clarkson Wright and Jakes 2012UKSC16

The Supreme Court has held that the compulsory retirement age contained in the firm's deed of partnership was a directly discriminatory measure but that it was capable of justification as it was founded on legitimate social policy aims. However, the case was remitted back to the Employment Tribunal for consideration of whether the selection of the specific age of 65 was a proportionate means of achieving those aims in the circumstances of the particular firm. The test for justifying direct age discrimination is now that employers must show (1) they have a legitimate aim, (2) the aim is potentially legitimate in that it is capable of being a public interest aim, (3) the aim is also legitimate in the particular circumstances of the case, and (4) the means chosen to achieve the aim must be both appropriate and necessary.

Key point: All businesses will now have to give careful consideration to what, if any, legitimate policy aims can be justified in their particular business. Employers who have chosen to retain a compulsory retirement age of 65 should review their position in light of this case and again after the Tribunal's decision. The judgment does not say what retirement age is legitimate.

Requirement to hold a law degree

Homer v Chief Constable of West Yorkshire 2012 UKSC15

On the same day as the *Seldon* judgment, the Supreme Court gave its judgment in this case holding that restricting promotion to a certain grade of employee **with** a law degree was indirectly age discriminatory against an employee **without** a law degree and who did not have time to obtain one before retirement. Mr Homer, who was 62, was disadvantaged and this was directly related to his age and not his impending retirement. The Court also remitted the case to the Tribunal for a decision on justification.

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Key point: Employers would be well advised to consider carefully the possible age discriminatory implications of any job requirements before introducing them.

Dismissal to save costs justified.

Woodcock v Cumbria Primary Care Trust 2012 EWCA Civ 330

The Court of Appeal has upheld in this case the Tribunal's decision that a dismissal by reason of redundancy before Mr Woodcock turned 50 to save the costs of an early retirement pension was justifiable age discrimination. The Court considered that his 12 months' dismissal notice was served with the aim of giving effect to the Trust's genuine decision to make him redundant. It was a legitimate part of that aim for the Trust to ensure that it avoided additional costs and not treatment simply aimed at avoiding costs. By dismissing him before he reached the age of 50 the Trust saved at least £500,000 although Mr Woodcock received £220,000 as a redundancy payment.

Key point: An employer cannot justify discriminatory treatment solely because the elimination of such treatment would involve increased costs. The need for employers to find a cost plus justification therefore remains.

Refusing early retirement justified.

HM Land Registry v Benson and Others UKEAT/0197/11

The EAT in this case held that the employer's refusal of applications for early retirement from employees aged between 50 and 54 was not unlawful indirect age discrimination. The Registry had £12m to use for compulsory early retirement schemes. The Registry decided to accept applications from employees who would cost the least – the cheapness criterion - and Mrs Benson and four of her colleagues who were aged between 50 and 54 argued they had been indirectly discriminated against on the grounds of age when their applications were refused. They were refused because the cost of providing their benefits under the scheme was higher than that of employees in other age groups. Although Mrs Benson and the others succeeded in their claims before the Tribunal the EAT allowed the Registry's appeal. Had they been selected they would have received an immediate unreduced pension and were therefore particularly costly. Like the *Woodcock* case, the prevention of a windfall was a legitimate aim. Although the employees had lost out on a chance to take advantage of a substantial benefit they had no legitimate expectation of receiving such a windfall. Whilst the cheapness criterion was disproportionately unfavourable to Mrs Benson et al the Tribunal's key finding had been that the Registry had no real alternative to using it. The decision therefore to refuse the early retirement applications was a proportionate means of achieving the business objective of remaining within budget.

Key point: The decision is fact specific and the use of a similarly discriminatory criterion will not necessarily be justified in other cases.

CIPD Guidance on Managing an Ageing Workforce

The Chartered Institute of Personnel Development has launched a free guide "Managing a healthy ageing workforce: A national business imperative". It focuses on three steps for employers, building a business case, addressing issues for talent management and developing talent management. Complimentary copies are available on request. To view the guide, please click here.

7. TUPE – organised grouping of employees

Seawell v Ceva Freight (UK) Limited UKEATS/0034/11BI

Mr Moffat was employed by Ceva which provided freight forwarding arrangements for Seawell. Seawell terminated this arrangement and took the service back in-house. Seawell was not the only client of Ceva but Mr Moffat spent 100% of his time on the Seawell contract. A Tribunal found that he transferred under TUPE as he comprised an organised grouping of employees and he spent 100% of his time on the Seawell contract. The Employment Appeal Tribunal disagreed. It did not follow that 100% of the activities of the Seawell contract were carried out by him and that as a consequence he was one of an organised group of employees. There was no deliberate putting together of a group of employees for the purpose of this client work. The authorities of *Argyll Coastal Services v Stirling* and *Eddie Stobart Limited v Moreman* were followed. (See below) There was no conscious employee grouping on the facts of this case. Mr Moffat was found not to have transferred to Seawell and to have been unfairly dismissed by Ceva. The decision that Seawell had unfairly dismissed him and were liable to pay compensation to him of approximately £25,000 was overturned.

Key point: Whether or not an employee is assigned in terms of Regulation 4(1) of TUPE is a question of fact. The fact an employee happens to be doing a particular work does not in itself show that an employer assigned him to a grouping which was organised for the purpose of carrying out that work.

Eddie Stobart Ltd v Moreman and others UKEAT/0223/11/ZT

Eddie Stobart stored and transported meat to a number of supermarkets including Asda. Products were picked by employees to fulfil an order placed by the particular supermarket and they were organised into both a day and night shift. It happened that the night shift picked principally for Asda because of the timing of its orders. Following the loss of the Asda contract Eddie Stobart understood that its work was to be performed by FJG and it dismissed the night shift workers taking the view that the work in question had been done by an organised grouping of employees who would transfer to FJG. FJG disagreed and refused to employ the employees who brought claims for unfair dismissal against Eddie Stobart and FJG.

The Employment Tribunal and the EAT concluded that there had been no service provision change. As Asda were not the only client serviced during the night shift, the employees were not organised so as to be a recognised team working for a particular customer and TUPE did not apply.

Key point: If employers choose not to have their employees assigned to a particular team dedicated to serving particular client contracts, then when those contracts are retendered any new contractor will not have to take on the TUPE'd staff. In this case the employees were organised as to their shifts and not around a particular customer.

What is an activity?

Johnson Controls Ltd v Campbell and another UKEAT/0041/12

The EAT held that there was no service provision change under TUPE when a client – UKAEA - cancelled a contract for services provided by a taxi administrator and decided that its secretarial staff would in future place bookings directly with taxi companies. The activity carried out by UKAEA following

the cancellation of the contract was different from the centrally coordinated element. The EAT held that identifying the relevant activity involves an assessment of more than simply the component tasks. Mr Campbell was let go when his contract was not transferred to UKAEA and he brought Tribunal claims for unfair dismissal and a statutory redundancy payment against both Johnson Controls and UKAEA. The EAT found that the booking service had been centralised and coordinated and this service had changed after the transfer. UKAEA were not performing essentially the same activity as that carried out by Johnson Controls. No service provision change under TUPE had therefore happened.

Key point: The case is fairly specific to its facts but it will be a question for the Tribunal of assessing the nature of the activity as a whole. Where a service is significantly remodelled no TUPE transfer will occur.

Service provision change test

Argyll Coastal Services Ltd v Stirling UKEATS/0012/11

This case concerned the delivery of cargo in and around the Falkland Islands by JAG who had 1 ship with 8 crew. When the MOD's contract with JAG expired the MOD entered into a contract with a Dutch company who in turn had a contract with Argyll to hire another ship and its crew to provide 4 ships in all to the MOD, the JAG employees and crew brought claims arguing there had been a service provision change and that their employment had transferred to Argyll as Argyll took over the tasks previously done by their crew.

At a Pre-Hearing Review the Tribunal found that TUPE applied and the contracts of the JAG employees and the crew had transferred to Argyll. Argyll appealed.

The EAT upheld the appeal but remitted the case to a new Tribunal for a re-hearing. In order to show that the contracts had transferred there had to have been an organised grouping of employees situated in Great Britain which had as its principle purpose the carrying out of certain activities, namely those required under the contract between the transferor and the client on behalf of the client. The Tribunal had failed to consider whether the crew and staff were assigned to the group of employees affected by the transfer **before** deciding whether or not they were protected by TUPE.

Key point: An organised grouping cannot comprise the entire workforce of the transferor.

Dismissal for ETO reason

Meter U Ltd v Ackroyd and others UKEAT/0206/11

MU took over a retendered meter reading contract from two companies who employed meter readers. MU's business model was to tender for contracts and then sub-contract the work to meter readers who provided their services as franchisees through their own independent limited companies. During consultation following the transfers MU explained its business model to the employees and offered them the opportunity to set up individual companies to work under the new arrangement. The majority refused and MU dismissed them for redundancy. They brought claims for unfair dismissal. Two different Tribunals upheld the claims of two different groups of employees on the basis that there was no valid ETO reason within the meaning of Regulation 7(2) and therefore their dismissals were automatically unfair. MU appealed.

Did MU's workforce include employees but also individuals employed by the franchise companies and the franchisee companies themselves? "Workforce" is not defined in the Regulations or the Directive. It was held that the Tribunals had erred therefore in holding that franchisees were included in the workforce. As there was a change in the workforce the dismissals were for an ETO reason and potentially fair by reason of redundancy when MU replaced the transferred employees with the franchisees.

Key point: Franchise agreements could allow businesses to operate at low cost and to tender at competitive prices which is an economic reason entailing changes in the workforce. However, the change of status from an employee to an independent contractor might also constitute a change to the workforce if an employer wants to establish the ETO defence in another factual situation.

Change of location

Abellio London Ltd v Musse and others EAT0283/11

Five former employees had been employed by CentreWest as bus drivers on the 414 route. All operated from Westbourne Park in West London which suited their personal circumstances. The 414 route was transferred to Abellio as a service provision change under TUPE and post transfer the employees were required to start their days work at Abellio's bus depot in Battersea. This added two hours or more to their working day for four of them and an hour for the other. CentreWest advised them that they had a right to object to the transfer of their employment to Abellio. The five resigned. The Employment Appeal Tribunal agreed with the Tribunal that a change in location amounted to a substantial change to the material detriment of the employees so they were entitled to resign and claim automatic unfair dismissal.

Whether or not there has been a substantial change in working conditions is a question of fact. The detriment has to be assessed from the employee's perspective. The fact that their contracts of employment could have been changed following consultation was not relevant to whether there was a material detriment because the comparison that the Tribunal is obliged to make is between the working conditions as they were prior to the transfer and those that will be as a result of the transfer. The liability for the four employees who resigned on the day of the transfer in response to the breach of contract passed to Abellio. The one employee who resigned before the transfer date may not have properly objected to the transfer, but if he did he still had a claim against CentreWest. If he merely resigned without objecting then liability would pass to Abellio. This issue was sent back to the Tribunal for further consideration.

Key point: If the parties treat a post transfer change in location as justifying redundancies, these should be clearly apportioned between the transferor and the transferee for any liabilities that may arise in the event that the dismissals are challenged as unfair. Employers should use Compromise Agreements to cover off claims resulting from the transferred redundancy dismissals.

8. Change of employer without consent

Gabriel v Peninsula Business Services 2012 UKEAT0190

Ms Gabriel was employed by Peninsula as a marketing consultant. Peninsula purchased the shares of a company later known as Taxwise and Ms Gabriel moved to Peninsula's Taxwise department and on to

the Taxwise payroll but ostensibly remained employed by Peninsula. An email was then sent stating that the trade and assets of Peninsula's Taxwise business were to be transferred to Taxwise Services Limited along with her employment contract. However she did not receive the email and was otherwise unaware of the purported change of employer. She later brought claims for sex and race discrimination against both companies and in order to proceed with her claims the identity of her employer needed to be clarified. For her claim to succeed against Peninsula as well as Taxwise she had to show she remained employed by Peninsula over the relevant period. The EAT overruling the Tribunal held that under the authority of *Nokes v Doncaster Amalgamated Collieries Ltd* a case in 1940 her employment had not transferred as she did not expressly or impliedly consent to this. Peninsula therefore remained her general employer and the claim against it could proceed. TUPE was not pleaded by Peninsula and if it had applied, the statutory doctrine of automatic transfer of employment would have been engaged subject only to her right to object.

Key point: Absent TUPE an employee's contract and employment cannot transfer without his or her consent.

9. New Sunday trading laws during Olympic

Shops in England and Wales with a floor space of more than 280 square meters will not have any restrictions on Sunday opening hours for 8 weeks from 22 July to the end of the Paralympic Games on 9 September. This provision will not remove the right of certain shop and betting workers not to be subject to any detriment or dismissed on the account of refusing to work on a Sunday. The Department for Business Innovation and Skills has produced a guidance on the effect of Sunday trading and the existing right of shop workers to opt out. Complimentary copies are available on request, to view the guidance click here.

10. Key changes to Immigration Rules

The UK Border Agency has issued a reminder of the changes to the UK Immigration Rules which came into effect on **6 April 2012**. The changes concern migrants entering the UK under Tiers 1, 2, 4 and 5. Importantly, the post study work category which provides migrants with access to the UK labour market for 2 years after graduation is being closed to new applicants. Complimentary copies of the Statement of Changes is available on request. Click here to view the briefing.

11. Notice of dismissal – shortened by second notice

Parker Rhodes Hickmotts Solicitors v Harvey EAT0455/11

Mr Harvey worked for PRHS as a solicitor from 1 September 2009. He was told on 28 July that his role would be redundant from 31 August 2010 and that he would be paid in lieu of holiday and notice up to 30 August. He was told that the notice was timed to avoid the risk of his acquiring one year's continuous service which would have been the case had he been employed on 31 August 2010. After issuing the notice the partner became concerned the reference to 31 August might have the effect of giving him one year's continuous service and therefore the partner sent on 29 July the second letter also dated 28 July which was in identical terms save that it stated that his role would be redundant from 28 August 2010.

Mr Harvey brought a claim for unfair dismissal in the Employment Tribunal and the Employment Judge found that he had not accepted any change to that date and therefore his claim was not out of time and the Tribunal had jurisdiction to hear his claim. The PRHS appealed. The Appeal Judge held that the case was covered by *Stapp v The Shaftesbury Society 1982 IRLR 326* which case had been applied in the recent *M-Choice UK Ltd v Aalders* case where notice of dismissal was given to expire on 1 February 2011 but on 21 January the employer summarily dismissed the employee before she had reached the qualifying period of service. The EAT held that the effective date of termination was 21 January. In the *Stapp* case the Court of Appeal held that summary dismissal, even if wrongful, terminated the employment immediately meaning that an employee did not have one year's continuous service. In the light of *Stapp* the Employment Appeal Judge held that the Tribunal had erred by finding that the second letter did not shorten his notice period ,making the effective date of termination 28 August. The reason for the second dismissal, whether because of a change of mind or it had made an error, was immaterial. The Employment Appeal Judge however acknowledged that notice, once given, cannot be unilaterally withdrawn. However, in this case PRHS did not seek to withdraw the original notice, it wished to proceed with the dismissal by bringing forward the effective date of termination. The second letter constituted a new notice as opposed to a variation of the first and was therefore permissible in line with *Stapp* and *M-Choice*.

Key point: It is permissible for an employer to shorten the notice period by unilaterally serving a fresh notice.

12. Effective date of termination

Horwood v Lincolnshire County Council UKEAT/0462/11

Ms Horwood sent a letter dated 27 January clearly indicating her immediate resignation, when she resigned to claim constructive unfair dismissal. She had unsuccessfully appealed against a final written warning and demotion. She indicated in her letter that she had no intention of working out any notice period. Her letter was delivered by Special Delivery to the Council's Chief Executive to the office on 29 January 2010 when the letter was opened by the administrative staff and date stamped. The employer then wrote to her confirming that they accepted her resignation to commence from the date of the letter namely 2 February 2010. That date was chosen because it was administratively convenient for it to be the same date as her letter.

Ms Horwood sent in her Employment Tribunal claim which arrived at the Tribunal on 29 April 2010. The Council argued that she had brought her claim out of time, as it should have been no later than 28 April 2010 according to when her letter was opened and date stamped. The EAT held that her effective date of termination was 29 January 2010 and her employer could not alter that date. Ms Horwood argued that even if it was 29 January her employer's letter of 2 February had given her a mistaken, yet reasonable belief that her termination date was 2 February and the Council should not be permitted to take advantage of a situation in which it had misled her. That argument was unsuccessful and her claim was out of time.

Agreements to vary an effective date of termination are limited to specific circumstances where the parties expressly agree to bring forward an anticipated effective date of termination but it is not open for the parties to ante-date the termination date.

Key point: Employees and their representatives should ensure that letters are emailed and unfair dismissal claims are submitted well within the 3 month time limit. Where it is appears that a claim may have been brought out of time employers should take the point in the Tribunal.

13. Jurisdiction of the Employment Tribunals

Ravat v Halliburton Manufacturing and Services Limited 2012 AER49

Mr Ravat, a British Citizen worked for Halliburton and was transferred to Libya to work for a Halliburton company incorporated and based in Germany. He worked on a rotational basis in Libya involving 28 days' work on and then 28 days' leave. Although he did not fall within any of the categories of employees as per *Lawson v Serco*, so as to be able to bring a claim in the Tribunal, nevertheless it was held by the Supreme Court that his claim fell within the Tribunal's jurisdiction as he had a stronger connection with Great Britain than with Libya. His claim therefore for unfair dismissal was remitted to the Employment Tribunal for a determination on the merits.

Key point: This decision will have implications for many employees and employers should consider the factors which point towards a substantial connection with the UK where the employee's place of work is not based in the UK at the time of dismissal. The test is whether the connection with Britain is sufficiently strong to enable one to say that Parliament would have regarded it as appropriate for the Tribunal to deal with the claim. If such international "commuters" can claim under UK law employers should handle their dismissal process carefully in order to reduce, if not extinguish, any potential liabilities.

14. Dual contract arrangements

HMRC has published guidance on dual contract arrangements which are most commonly seen where a foreign domiciled worker works both inside and outside the UK. The new guidance sets out the evidence which HMRC expects an employer to keep and explains how it approaches the question of whether work in the UK is merely incidental to employment outside the UK. Complimentary copies of the guidance are available on request. Please click here to view the guidance.

15. Collective consultation - Trigger point

Nolan C-583/10

In this case of *USA v Nolan* the Advocate General has given an opinion that the obligation to consult about collective redundancy is triggered within a group structure when a body or entity which controls the employer makes a **strategic or commercial decision** which compels the employer to contemplate or to plan for collective redundancies. It is for the national courts to then determine the date of the strategic decision and the date when consultation began to decide whether consultation began in good time.

This case concerned a civilian employee who brought proceedings against the USA Government for failure to inform and consult with her when a decision was made to close a military base at the end of September 2006. Whilst consultations must not be launched too prematurely, they must not be launched too late. The employer's obligations must therefore be triggered when it is possible for such consultation to be effective. It will now be for the Court of Appeal to determine whether a strategic

decision compelling the employer to contemplate or plan for collective redundancies had been taken before 5 June 2006, the day on which the consultation actually began.

Key point: Collective consultation must be effective and in good time.

Expiry of fixed term contracts

University of Stirling v University and College Union EATS/0001/11

Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less it is required to consult on its proposal with appropriate representatives of the affected employees. Failure to do so can lead to a protective award being made against the employer to pay affected employees gross pay for up to 90 days.

Following a pre hearing review, the EAT in this case held that fixed term employees were dismissed on the expiry of their contracts for a reason relating to them as individuals and not for redundancy. Therefore the collective consultation obligations did not apply to them. Although the general view has previously been that an expiry and non-renewal of a fixed term contract does give rise to a redundancy the case has never been tested in the Tribunals. The decision that this is not necessarily a redundancy is a departure from current thinking and employers should still consider exercising caution with respect to expiry of fixed term contracts.

Key point: An expiry of a fixed term contract is not necessarily going to lead to a redundancy for the purpose of collective consultation but it may do. If the expiry of a fixed term contract and failure to provide new contract to the individual could be seen as part of a wider exercise involving potential job losses within the business and the number of potential redundancies triggers the obligation to consult then the employer should consult with those individuals.

16. Surrogacy

C-DVS-T ET/2505033/11

A Newcastle Employment Tribunal has made a reference to the ECJ concerning whether under EU law a woman who becomes a mother by way of surrogacy arrangement should be entitled to paid maternity leave to bond with her baby, establish breastfeeding and maintain and develop her family life. The exact terms of the reference will be subject to a further case management discussion.

17. Associative pregnancy discrimination

Kulikauskas v Macduff Shellfish (Scotland) Ltd and another ECJ Reference 11 January 2012

The Court of Session has referred questions to the ECJ concerning whether the Equal Treatment Directive requires a non-pregnant employee to be protected against associative pregnancy discrimination. Mr Kulikauskas and his partner were dismissed by Macduff and Mr Kulikauskas brought a pregnancy discrimination arguing that he was dismissed because his partner was pregnant. Both the Tribunal and the EAT dismissed his claim. They declined to refer the matter to the ECJ but Mr Kulikauskas appealed to the Court of Session who has referred the questions to the ECJ, namely whether it is lawful to treat a person less favourably on the grounds of a woman's pregnancy and with reference to the Equal Treatment Directive whether it is unlawful discrimination to treat a person less

favourably on the grounds of the pregnancy of a woman who is his partner or otherwise associated with him. The Equality Act 2010 clearly protects against most forms of associative discrimination but it is arguably unclear whether it covers associative pregnancy discrimination.

18. Whistleblowing – aggravated damages compensation

Commissioner of Police of the Metropolis v Shaw EAT0125/11

When Mr Shaw raised complaints about the suspected misconduct of a colleague he was subsequently suspended and subject to disciplinary charges. However the charges were later withdrawn and he brought proceedings for compensation on the grounds that he had been subject to a detriment for having made a protected disclosure, i.e. that he had only faced disciplinary charges as a result of having complained about a colleague and the head of the unit who had failed to act on his allegations. The Tribunal found that his superior had displayed a wholly indifferent attitude towards the two employees who had been acting in concert to have Mr Shaw removed and in wilful disregard of the facts of the law as well as his welfare. He had suffered no financial loss but he was awarded £37,000 comprising £17,000 for injury to feelings and £20,000 for aggravated damages.

The Commissioner appealed to the EAT arguing that the aggravated damages award was manifestly excessive. It was held the Tribunal had not concentrated on the impact on Mr Shaw on what had happened but on the reprehensibility of the Respondent's conduct. The EAT allowed the Commissioner's appeal and substituted a new compensatory award in the sum of £30,000, £22,500 for the core injury to feelings and £7,500 for aggravating factors. Those factors included the absence of any apology for the way Mr Shaw was treated, lack of action against the other employees and the conduct of his superior.

Key point: Aggravated damages as an aspect of injury to feeling awards are compensatory in nature and not punitive.

19. Redundancy – failure to consider re-employment

King v Royal Bank of Canada Europe Ltd EAT0333/10

Ms King was called to a meeting at short notice and told that her role at the Bank was redundant. She was placed on garden leave with immediate effect. Without explanation or right of appeal she was handed a draft Compromise Agreement and advised to seek a solicitor. She lodged a complaint in an Employment Tribunal rather than reaching a settlement with the Bank. The Tribunal limited her compensation to a basic award plus 2 months' pay representing the period it believed the Bank should have taken to carry out the fair dismissal. The Bank had conceded that her dismissal was automatically unfair. She appealed to the Employment Appeal Tribunal that the Tribunal had failed to make a reinstatement or engagement order or ask her if she wished to have one and it was for the Bank to show that there were no such vacancies not for her to establish that there was suitable alternative work available.

The EAT held that where an employer has dismissed an employee without consultation the Tribunal must take account of the chance that suitable alternative employment might have arisen at any point during the period of consultation which should have taken place for the Bank to have carried out a fair dismissal. The Tribunal should not therefore have restricted itself to a single list of vacancies produced

by the Bank as at the date of her dismissal. The EAT remitted the case to a different Tribunal for a re-hearing on compensation.

Key point: Although rare, reinstatement or re-employment orders are required to be explored by the Tribunal.

Pool of one

Halpin v Sandpiper Books Ltd 2012 AER59

Mr Halpin was originally employed by Sandpiper, a book distributor as an administrator / analyst. He was posted to China with the primary responsibility to promote sales and to raise the profile of Sandpiper in China. He continued with some of his administrative tasks but these were eventually re-distributed to staff in the UK because of the difficulty of his being in China. Sandpiper made a decision in August 2009 to close the China office and work instead via a locally based agency. As it no longer had a requirement for an employee to promote sales in China, Mr Halpin was placed at risk of redundancy. The outcome of the consultation was his dismissal. His argument against that was that no reasonable employer would limit the selection pool to only those workers whose work had diminished and that Sandpiper should have included in the pool those UK based employees with interchangeable skills.

He was unsuccessful and the EAT confirmed that decision. Sandpiper's decision was logical and was a decision that was open to a reasonable employer to take. The selection only operates where there is a number of similarly qualified possible targets for redundancy. Here there were no other similarly qualified possible targets.

Key point: It will not always be unfair for an employer to select a redundancy pool that is the same size as the number of redundancies to be made.

Capita Hartshead Ltd by Byard UKEAT/2012 0445

In this case Ms Byard was successful in her claim that a selection pool of one was unfair. She was one of four actuaries and she was put into a redundancy selection pool of one as her employer maintained there was not enough work to sustain four actuaries and given the personal nature of her work as an actuary for pension schemes that had been wound up or clients lost there was a risk of losing more clients if clients were transferred between actuaries. The majority of the Tribunal found the employer's decision to limit the size of the selection of the pool to Ms Byard as unfair given that the risk of losing clients and reassigning actuaries to pension schemes was "slight". Ms Byard had been unfairly dismissed.

Key point: The circumstances in this case proved the point that similar possible targets should be included in the pool.

20. Disability discrimination – career breaks

Salford NHS Primary Care Trust v Smith EAT0507/10

Ms Smith was signed off sick by her GP in March 2007 and in September of that year was diagnosed with chronic fatigue syndrome. In January 2008 the Trust's occupational health advisor informed it that

Ms Smith was not ready to return to work and recommended that it focused on helping her get back to work in some capacity by either reduction of hours or change of role and that a gradually phased return to work was a suitable option. In February 2008 the advisor assessed Ms Smith again and suggested to the Trust that a career break might be a good option to protect her employment and allow her breathing space she needed to recover.

In April 2008 Ms Smith informed the Trust that she neither wished to nor was able to return to her post as a specialised occupational therapist but could not identify a suitable location to return to in any capacity, rejecting offers of administration work because of her limited IT skills. On 18 June 2008 she was invited to a meeting by the Trust and advised that if she did not attend it might have to consider her employment options including termination.

In a written response she resigned, stating she had no confidence that the Trust had accepted the medical advice of her GP or her advisor to facilitate her eventual return to productive work. She then brought claims for disability discrimination and unfair dismissal.

The Tribunal found that a career break would not have been a reasonable adjustment. The Trust's failure however to make any reasonable adjustments caused her to lose trust and confidence and entitled her to treat herself as constructively dismissed. The Trust appealed. The EAT held that she had not been constructively dismissed. Offering her a career break would not have amounted to a reasonable adjustment. Reasonable adjustments are concerned not with making a disabled person better but enabling him or her to remain in work or return to work. Given her unfitness for any productive work neither light duties nor a career break would have mitigated the effect of the provision criterion or practice, namely the expectation that she would perform her full role within the contracted hours. She therefore lost her appeal for disability discrimination.

Key point: Rehabilitative work is not a reasonable adjustment if it does not enable the employee to return to work.

21. Rehabilitation periods

The Government is proposing an amendment in a new Bill to come into force in **April 2013** that will see a reduction in rehabilitation periods whereby offenders have to declare their previous commission of certain offences to prospective employers.

Adult offenders who have received a custodial sentence of up to 4 years but over 2.5 years will see the current rehabilitation period reduced from never spent to 7 years beginning with the day on which the sentence including any period on licence is completed. A custodial sentence of between 6 and 2.5 years will see the rehabilitation period drop from 10 years to 4 years. Where there is a fine, the current rehabilitation period of 5 years will reduce to 1 year. There is a similar reduction in rehabilitation periods for **young offenders** being those aged 18 at the date of conviction. Custodial sentences of between 2.5 to 4 years will have a proposed rehabilitation period of 3.5 years rather than never being spent by way of example.

22. Vicarious liability

Weddall v Barchester Healthcare Ltd and Wallbank v Wallbank Fox Designs Ltd 2012 EWCA Civ 25

The Court of Appeal in these two separate appeals that were heard together had to decide whether the employer could be fairly held vicariously liable for the violence caused to their employee by a fellow employee. In Mr Wallbank's case, his appeal was allowed and his employer was vicariously liable. He had been attacked at work by an employee to whom he had given an instruction and was thrown onto a table 12 feet away. Friction is inherent in any employment relationship but in a factory where immediate instructions and quick reactions are required frustrations can lead to unpredictable violence. The risk of an over robust reaction to an instruction is a risk created by the employment. Here it was instantaneous.

However, Mr Weddall was not so successful. He was injured by an employee who had, while drunk, bicycled back to his place of employment to attack him. The Appeal Tribunal found the act had been a spontaneous criminal act of a drunken man who was off duty. The assault had been outside the course of his employment and the employer was not vicariously liable for the attack.

Key point: Is the risk of violence reasonably incidental to the employment rather than the independent of it?

Protection from Harassment Act 1997

Vaickuviene and others v J Sainsbury plc 2012 CSOH 69

The Scottish Outer House of the Court of Session has allowed a claim brought against an employer by the family of an employee who was murdered at work by a colleague. Whether Sainsbury's is in fact vicariously liable under the 1997 Act for the acts of one employee to another culminating in his murder will be decided at a full hearing. The Court rejected Sainsbury's argument that the family of the deceased employee would not be able to establish the sufficiently close connection between the harassment complained of and the offending employee's employment duties for liability to arise.

Mr Romasov and Mr McCulloch were shelf stackers for Sainsburys. Mr Romasov was an Eastern European and was the target for repeated verbal abuse and aggressive behaviour by Mr McCulloch which ultimately culminated in his murder. Staff had been witnesses to his aggressive behaviour and had even heard Mr McCulloch threaten to kill Mr Romasov. Mr Romasov submitted a written complaint against Mr McCulloch but the shift manager failed to take any action in response to the complaint received before Mr Romasov was killed two days later. The alleged harassment began with verbal harassment during work and a harassment complaint having been made no steps were taken to prevent Mr Romasov and Mr McCulloch working on the same shifts. Taken together this was capable of being sufficiently closely connected to Mr McCulloch's employment as to potentially render Sainsbury's vicariously liable.

Key point: Employers should deal speedily and effectively with complaints or grievances raised concerning harassment in the workplace.

23. Carried over holiday leave following absence due to sickness

Neidel v Stadt Frankfurt am Main C-377/10

In this case the ECJ decided that the entitlement to carry holiday forward only relates to the minimum 4 weeks' paid leave provided by the Working Time Directive. Mr Neidel was a firefighter in Germany who

after a long period of sickness absence retired in August 2009. He had 86 days' untaken holiday leave which he had been prevented from taking during 2007, 2008 and 2009. He claimed in the courts for this accrued holiday pay which then referred a number of questions to the ECJ. Held: he was only entitled to 4 weeks' accrued leave but the Directive precluded a national law that limited the carry over of any holiday entitlement to a period of 9 months after the expiry of the reference period within which the holiday had accrued.

Key point: The Government has indicated in its consultation on modern workplaces that it would be amending the Working Time Regulations to comply with ECJ case law which requires carry over to be permitted when an employee has been unable to take holiday due to sickness. It has said that it will limit carry over to the basic entitlement of 4 weeks.

24. Bankers' bonuses

Attrill v Dresdner Kleinwort Ltd and others [2012] EWHC 1189QB

Commerzbank, the successor bank to Dresdner Kleinwort was held to have breached its legal duty to 104 former employees by failing to provide contractual pay outs worth many millions of pounds. In August 2008 the workforce was told by Dresdner Kleinwort that a guaranteed minimum bonus pool would be allocated to individuals according to their performance in the usual way in 2009. The bonus sums were notified to the employees in December 2008 but these sums were subject to a material adverse change clause. A month later after the acquisition of Dresdner Kleinwort by Commerzbank, the material adverse change clause was invoked and the Claimants were told that their bonus awards were to be reduced by 90%.

The former employees sued. The Court held that the announcement to the employees in August 2008 had been clear and unequivocal in terms so as to be capable of giving rise to a legally binding obligation. The purpose of the bonus pool had been to stabilise the workforce at a time when redundancies were being made throughout the Bank. The fact that the announcement did not create an expectation of receiving a particular sum or confirm the details or form of payment did not deprive the announcement of its contractual effect. Nor did the fact that it had been communicated in an informal way in an informal forum prevent it from being a binding obligation on the Bank. Dresdner Kleinwort had already conceded that if the announcement on 18 August gave rise to a binding obligation it had not been entitled to introduce the MAC clause into the bonus letters.

Commerzbank has been refused leave to appeal the Judgment.

25. Discrimination – claims for contribution

Brennan and others v Sunderland City Council UKEAT/0286/11

The EAT held in this case that a Tribunal had no jurisdiction to determine claims for contribution between persons jointly or concurrently liable for damage caused by an act of unlawful discrimination. Claims for contribution are determined under the Civil Liability (Contribution) Act 1978. However, neither the provisions in the Equality Act 2010 or its predecessor acts were capable of confirming jurisdiction on Employment Tribunals to hear such claims.

Mr Justice Underhill went on to express the obiter view that the Act created no right to contribution in relation to liabilities assessed by an Employment Tribunal. The case concerned a long running equal pay dispute between the Council and two recognised trade unions alleging sex discrimination in negotiating equality proof pay. In September 2009 the unions entered into a settlement agreement with the Claimants with the result that financial relief was no longer sought from them. The Council issued the unions with contribution notices seeking the contribution from them for any sums that it may be held liable to pay to the Claimants. The unions applied to strike out the contributions claims and were successful. The EAT upheld that decision.

Key point: This is an unsatisfactory position but such a right can only be created by Parliament.

26. Employment status

Quashie v Stringfellows Restaurants Limited [2012] UKEAT0289/11

Ms Quashie was a lapdancer and claimed she was unfairly dismissed in December 2008 for allegedly drug dealing. Stringfellows responded that she was not entitled to make such a claim because she was not an employee and in any event the contract may have been performed illegally by reason of her tax returns to HMRC. She appealed the employment status decision and Stringfellows raised a cross appeal that the contract was void for illegality in its performance. The EAT held that as a lapdancer was an employee as Stringfellows had the right to control her activities when she was at work and there was sufficient mutuality of obligation for an employment status. There was an employment relationship under an umbrella contract. She had to attend a meeting each Thursday in addition to her commitment under her dance rota she could not take an extended holiday and had to notify Stringfellows when she was going away, and when she got back where she had to dance the next day. The EAT also found that if she had falsely represented her position to HMRC her contract would be unlawful. The case has been remitted to a Tribunal to determine her unfair dismissal claim and the issue of illegality. If her contract is illegal then her claims will fail.

Key point: Although a worker can work elsewhere on his or her days off this will not undermine findings that on balance there is an employment relationship for the other days' work.

27. Discrimination – marital status

Hawkins v Atex Group UKEAT/0302/11

There is no unlawful discrimination on the grounds of marital status if a spouse is dismissed or suffers some other detriment on the grounds of being married to a particular person. Ms Hawkins had been employed for less than a year by a company her husband managed when a policy prohibiting employment of close relatives was implemented leading to her and her daughter's dismissal.

An Employment Tribunal struck out her claim of unlawful discrimination on the ground of marital status and her appeal failed. The decision to dismiss applied to her and her daughter and the company was not motivated in whole or in part by the fact that she was married to her husband.

Key point: It seems there may only be unlawful marital status discrimination where an employee would have been more favourably treated had the relationship been close but not one of marriage. This is a departure from the recent case of Dunn v Institute of Cemetery and Crematorium Management – see

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Update 53 February 2012.

28. Procedure – concurrent High Court and Tribunal claims

Halstead v Paymentshield Group Holdings Ltd [2012] AER161

Mr Halstead started Employment Tribunal proceedings against Paymentshield but then sent a letter before action under the Civil Procedure Rules that he intended to bring a High Court contract claim. Paymentshield sought a stay in the Tribunal proceedings until the High Court claim was resolved to which Mr Halstead consented. However, before he had lodged a High Court claim he applied to have the stay lifted as he could no longer afford to pursue the High Court claim without receiving compensation from the Tribunal.

The Employment Judge felt it was just to lift the stay and Paymentshield appealed. The Employment Appeal Tribunal reversed the decision and restored the stay. However, the Court of Appeal considered it was wrong to deprive Mr Halstead of a statutory remedy simply because he had indicated his potential claims in the High Court without actually initiating proceedings. There was an overlap in the Tribunal and High Court claims but sending a letter before action was entirely consistent with a genuine intention to settle the whole matter. He had agreed to a stay but was entitled to change his mind. Therefore the stay was lifted and the case was remitted for hearing.

Key point: The **absence** of concurrent proceedings was fundamental in this case.

29. Costs

Doyle v North West London Hospitals NHS Trust [2012] UKEAT0271/11

When considering whether to award costs an Employment Tribunal may order, it may have regard to the paying party's ability to pay. In this case, the Claimant was ordered to pay the entirety of the Respondent's costs which were estimated about £60,000. The Tribunal had not considered her ability to pay when reaching the decision nor had the issue been raised by her legal representative. Ms Doyle had brought 12 complaints of race discrimination or victimisation against the Respondent and 6 other named individuals.

As costs do not follow the event in the Employment Tribunal, the Tribunal considered that Ms Doyle's case had not been brought in good faith and therefore it was well within the Tribunal's discretion to order her to pay the costs of the other party's proceedings. Because it was potentially a very large costs award, there was nothing to indicate that Ms Doyle could pay such an award and therefore the EAT concluded the Tribunal had erred in law by not raising the issue of ability to pay before deciding on the costs application. It therefore remitted the matter to the Tribunal with directions that they make reasonable enquiries into her means and what the appropriate costs order should be having regard to her ability to pay.

30. Discrimination – unsuccessful job applicants

Meister v Speech Design Carrier Systems GmbH C-415/10

Ms Meister, a Russian national, applied for the post of an experienced software developer with Speech Design. Her application was rejected without an interview. It was not disputed that her level experience

corresponded with the requirements of the post. She brought discrimination claims on the grounds of her sex, age and ethnic origin. She also claimed that production of the successful candidate's file would show that she was more qualified than that person. However, the CJEU held that the Equal Treatment Framework Directives were not to be interpreted as entitling a person in Ms Meister's position to have access to the successful candidate's file. On the other hand it must be ensured that non-disclosure by the employer did not compromise the objective of the Directive. Therefore it could not be ruled out that an employer's refusal to grant access to the information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination.

Consideration of those factors including the fact she was not even called for an interview and was at least equally qualified was a matter for the National Court. Speech Design did not dispute that Ms Meister's expertise matched the job advertisement.

Key point: To avoid any unfair inference employers may be able to serve a copy of the redacted version of the successful candidate's file to a Claimant if so advised.

31. EU-French law

Being an employee of a US subsidiary of a French company is not enough to apply French employment law. The law of the State of New York is applicable to an employee working in the US under a verbal employment contract by the US subsidiary of a French company, the French Supreme Court ruled when upholding a lower court ruling. As a result the employee's remedies for unfair dismissal and the co-employer status claim against the French parent company were subject to review under New York law. Although the employee had been a US resident in New York City and paid US taxes, he claimed his employment contract was subject to French law as the French parent company would have been a de facto co-employer since this French company had taken all the steps in France to enable his hiring by the US subsidiary and his US employer was a 100% owned subsidiary. The employee also claimed the payment of damages for unfair dismissal as provided for by French law.

The Supreme Court dismissed his appeal and ruled that the law of the State of New York was applicable to the employment contract so that all of the employer's claims were to be subject to the law of New York. The Supreme Court reached its result by applying Article 6 of the Rome Convention. In this Article employment contracts, in the absence of a choice of law made by the parties, are governed by the law of the country in which the employee habitually carries out his work in performance of the contract even if the employee is temporarily employed in another country. In this case the employee habitually carried out his work in the US.

Source – Jeantet et Associés.

32. Race discrimination – racist language

Moxam v Visible Changes Ltd and another EAT0267/11

Ms Moxam who had Jamaican parents worked for Visible Changes as an office manager. She brought a number of complaints in the Employment Tribunal under the Race Relations Act. These claims centred on four incidents which took place in 2009 concerning a senior figure within the company who referred to customers as immigrants and used other abusive language. An Employment Tribunal

rejected her claims in respect of the incidents holding that she was not discriminated against or harassed on the grounds of her race as she was not an immigrant, although she had Jamaican parents. Ms Moxam appealed to the EAT arguing that the Tribunal had erred in concluding that they were not part of one continuous act of discrimination which comprised senior management's mindset and the employer's failure to implement its equal opportunities policy. Furthermore, contrary to the Tribunal's approach the Race Relations Act went wider than simply protecting a person with regard of his or her race.

Her appeal was successful. It was the manager's racist comments that were the central element in the case. It did not matter what racial group Ms Moxam came from. She was entitled to be offended and bring claims when she suffered as a result of any discriminatory language or conduct. The EAT held that the manager's language throughout was a continuing state of affairs and he demonstrated the contempt he had for people of different racial groups and this illustrated his and Visible Changes' failure to observe the employer's equal opportunities policy.

Key point: Having an equal opportunities policy on its own is insufficient to prevent racism unless it is adhered to and enforced by an employer.

33. Human Rights

Mattu v University Hospitals of Coventry and Warwickshire NHS Trust [2012] EWCA Civ 641

Dr Mattu appealed against the dismissal of his claim for a declaration that his dismissal by the NHS Trust was ineffective. The appeal raised a fundamental issue as to the application of Article 6 of the European Convention of Human Rights in relation to disciplinary proceedings by public authority employers.

The Court of Appeal held that Article 6 was not engaged when an NHS employer dismissed a consultant for misconduct. The decision to dismiss was not a determination of his civil rights but the exercise of the contractual power. The fact that he was dismissed by the Trust did not make him unemployable in the NHS and therefore determined his right to practice his profession. In a similar case of *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* Article 6 might be engaged where an NHS doctor faces charges so serious that if they are found proved he will effectively be barred from employment in the NHS.

34. Illegality

Hounga v Allen [2012] EWCA Civ 609

Ms Hounga came from Nigeria to work as an au pair for Mrs Allen. She took part in deception with the British High Commission in Lagos which allowed her to travel to the UK. She was paid £50 a month plus board and lodgings and was later dismissed. She brought a case for unfair dismissal, breach of contract, unpaid wages, holiday pay and race discrimination. Although she suffered serious physical abuse from Mrs Allen it was held that her contract of employment was tainted by illegality and therefore all her claims under her contract failed. Her claim for race discrimination which was not dependent on there being a valid employment contract did succeed however and she was awarded £6,000. The Tribunal found that she knew what she was doing and knew it to be wrong and illegal.

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Key point: If parties are positively linked to an illegal contract then they will not be able to benefit from it so their claims will be barred as a matter of public policy.