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**Click on any of the headings below to read more**

1 : Redundancy selection and a pool of one

2 : Cases coming up in the courts

3 : Was an employment tribunal right to award unfair dismissal compensation beyond the period an employee was entitled to work in the UK?

4 : TUPE - refusal by employees of an offer of self employment was not a failure to mitigate their loss when claiming unfair dismissal compensation

5 : Can uplifts for failure to comply with the ACAS Code be made in favour of workers as well as employees?

6 : Changing employment contracts and dismissal for "some other substantial reason"

7 : A review of the Agency Workers Regulations

**Wherever you see the BAILII logo simply click on it to view more detail about a case**

## 1: Redundancy selection and a pool of one

BACK TO TOP

Can an employer limit the pool of selection for redundancy to just one person?

The answer is that it depends on whether the employer's decision to limit the pool to one person is within the "band of reasonable responses" available to the employer. In*Wrexham Golf Club Ltd v Ingham* the employee was employed as the steward of Wrexham Golf Club. His main role was managing the bar, but he would also look after the clubhouse at weekends. The club wished to cut costs and decided that the role of steward was no longer required. By combining the bar and catering operations the role could be performed by other members of staff. The club put Mr Ingham at risk of redundancy, consulted with him, confirmed his redundancy and rejected his appeal.

The employment tribunal criticised the failure of the employer to put other employees at risk of redundancy and held the dismissal unfair. The EAT overturned the finding of unfair dismissal and remitted the case to another employment tribunal for a fresh hearing. The employment tribunal had not applied the right test. The employment tribunal should have considered whether the decision to place Mr Ingham in a selection pool of one was within the range of reasonable responses available to the employer. In some cases it will be reasonable to focus on a single employee without establishing a wider pool.

## 2: Cases coming up in the courts

BACK TO TOP

There are some notable cases coming up before the courts in the next couple of months. These include the following

*Indemnities in compromise agreements*

Andy Coulson, the former editor of the News of the World has been given permission to appeal against a High Court ruling that the indemnity in his compromise agreement did not make News International liable to pay his legal fees in relation to the phone-hacking scandal. The High Court held that the words "any administrative, regulatory, judicial or quasi-judicial proceedings" in an indemnity provided by an employer to a former employee in a compromise agreement did not cover investigations by the police into

alleged criminal behaviour by the employee.

*Right to manifest religion or belief*

On 4 September 2012 the European Court of Human Rights commenced hearing the combined appeals of *Ladele and McFarlane v The United Kingdom* [2011] ECHR 737 and *Eweida and Chaplin v The United Kingdom* [2011] ECHR 738. The court will consider whether the right to manifest religion or belief, as protected by Article 9 of the European Convention on Human Rights was breached when

- Ms Ladele was disciplined for refusing to carry out civil partnership ceremonies
- Mr McFarlane was dismissed for refusing to provide psycho-sexual counselling to same sex couples
- Ms Eweida and Ms Chaplin were restricted from visibly wearing a cross or a crucifix at work

*Employment status*

The Court of Appeal is due to hear the employer's appeal against the EAT decision in *Quashie v Stringfellows Restaurants Ltd* [2012] IRLR 536. The case concerned the issue of whether a dancer at a lapdancing club was an employee.

*TUPE and Collective Agreements*

The European Court is shortly to hear the referral from the Supreme Court in *Alemo - Herron v Parkwood Leisure Ltd* (Case C - 426/11). The case is currently listed for hearing on 20 September 2012 although the Advocate General's opinion (the legal opinion preceding the hearing before the Court) is not yet available. The case concerns whether a transferee employer is bound, not just by a collective agreement setting pay and conditions existing at the date of the transfer, but also by further collective agreements beyond its expiry in circumstances where the transferee is not a party to the collective bargaining machinery to which the transferor subscribes. The ultimate decision of the European Court will decide the rights of many public sector workers transferred to the private sector.

▲ BACK TO TOP

## 3: Was an employment tribunal right to award unfair dismissal compensation beyond the period an employee was entitled to work in the UK?

No, said the EAT in *Kings Castle Church v Okukusie*

The claimant was employed as a pastor. When he began work he applied for permission from the UK Border Agency to live and work in the UK. This was granted until 11 October 2009.

On 19 January 2010 he received a letter from UKBA refusing his refusing an application to remain in the UK indefinitely. On 10 February 2010 he was dismissed. The employment tribunal found that this was unfair on the basis that the church had acted automatically on the information it had, without investigating further. The tribunal awarded compensation to the date of dismissal and future loss for a further six months.

But a material letter dated 18 May 2010, from UKBA, had not been included in the bundle before the tribunal. It said that the claimant's appeal against the original UKBA decision was refused and that there was no right to remain in the UK beyond 10 May 2010.

It was held by the EAT that the tribunal should have enquired into matters more thoroughly. For they should have been alerted to a problem by virtue of the 19 January 2010 letter, and also because the claimant had failed to produce documentation under an order by another employment judge.

As a result the tribunal erred in awarding compensation based on earnings with the church over the period he would not have been permitted to work. The original award of compensation was therefore overturned and substituted by an award of loss of earnings up to 10 May 2010.

## 4: TUPE - refusal by employees of an offer of self employment was not a failure to mitigate their loss when claiming unfair dismissal compensation

BACK TO TOP

In *F&G Cleaners v Saddington and others* a company won a tender to provide window cleaning services to a local authority. However it would not accept that TUPE applied to the employees of the previous contractor. Two weeks after the transfer date the transferee offered to engage the employees as self employed contractors with no guarantee of regular work and significantly worse conditions. It was held that the employees were constructively discussed and the dismissals were automatically unfair.

The EAT rejected the transferee's argument that the claimants had failed to mitigate their loss by not accepting offers of self employment. The employees had not acted unreasonably in declining these offers. The differences between the employee's terms of employment and the terms offered by the new contractor were regarded as crucial by the employment tribunal. But in any event the duty to mitigate had not arisen. The tribunal found that the dismissal had been effected by F&G at the point when the offers of self employment were declined rather than at the date of the transfer. As the claimants were transferred to F&G by operation of the law on the date of the transfer they continued in the employment of F&G until the offers were made. It was the claimant's refusal of the offers which triggered their constructive dismissals. Their refusal did not affect the amount of compensation due to them.

## 5: Can uplifts for failure to comply with the ACAS Code be made in favour of workers as well as employees?

BACK TO TOP

No, said the EAT in *Local Government Yorkshire v Khan*

The claimant was a project manager seconded to Local Government Yorkshire and Humber (an employers association) from Bradford and Airedale PCT. She was dismissed in circumstances giving rise to a claim for compensation for detriment by reason of having made a PIDA ("whistle blowing") protected disclosure.

The compensation awarded by the employment tribunal included future loss, injury to feelings and a 25% mark up by reason of the employer's non-compliance with the ACAS Code of Practice. The employer appealed to the EAT on the issue of remedy. The EAT refused to disturb the tribunal's award for future loss and the amount of compensation for injury to feelings.

But the interesting point is tribunal's decision to uplift the award for breach of the ACAS Code. It had been conceded in the main proceedings that the claimant was a worker under the extended definition of worker for whistle blowing purposes in Section 43K of the Employment Rights Act 1996. However, the source of the rules on uplift of compensation for failure to follow the ACAS Code is sections 207A (1) and (2) of the Trade Union and Labour Relations (Consolidation) Act 1992. This allows uplift of an award to "the employee" by up to 25%. For these purposes, Section 295 of TURL(C)A defines employee more narrowly than worker, being an individual who has entered into or works under a contract of employment. Therefore, the short answer, said the EAT, was that only employees, as opposed to workers, can take advantage of the remedy offered by Section 207A.

## 6: Changing employment contracts and dismissal for "some other substantial reason"

▲ BACK TO TOP

If an employer has a sound good business reason for introducing change and this cannot be agreed with employees, then, subject to procedural fairness, including consultation, it may be possible to issue notices of termination of the present employment contract and couple it with an offer of new terms. Case law has established that the potentially fair reason of "some other substantial reason" in section 98(1)(b) of the Employment Rights Act 1996 is available to defend any claim for unfair dismissal by a worker who does not want to go along with the change, provided of course, the requirements of reasonableness and staying within the "band of reasonable responses" have been complied with by the employer. In *SW Global Resourcing Ltd v Docherty* employees facing such a change argued that their employer's actions were in breach of the implied duty of trust and confidence and the "some other substantial reason" was not available to the employer.

SW Global Resourcing Ltd provided manpower services to civil engineering companies, particularly to the rail industry. The claimants were employed as welders. They had a minimum basic weekly pay. Throughout the industry, many contractors began to change their practices to save on costs by engaging people to work on contracts on a self-employed basis. SW was feeling the effects of the recession too, struggling to remain profitable. It then announced to its employees that all welding personnel would be moved to ad hoc contracts. The terms removed the guaranteed number of hours per week and provided that a worker might receive no work at all from the company in a particular week. The Claimants found this completely unsatisfactory, resigned and brought proceedings for constructive dismissal.

The Employment Tribunal upheld the claims. The terms were very disadvantageous and gave no employment security. It held that the employer had not shown that the constructive dismissals were for "some other substantial reason" under section 98(1) (b) because the fundamental breach of contract to the claimants and the hurt to the

claimants meant that the company had breached the implied duty of trust and confidence. The welders were therefore unfairly dismissed.

The EAT overruled this decision. The claimants had been fairly dismissed. According to the EAT they were plainly victims of the recession and not of unfair dismissal. This was because the tribunal was wrong to say that the company was in breach of the implied duty of trust and confidence, since it was acknowledged that the company's decision to withdraw the guaranteed pay was for good, sound business reasons that were not arbitrary. As a result, the employer was entitled to rely on "some other substantial reason" and, again, disagreeing with the employment tribunal, the EAT held that the dismissals were within the range of reasonable responses available to a reasonable employer. The employer had engaged in full consultation regarding the need to cut costs, over a lengthy period, and there was a sound good business reason for what was happening. The dismissals were fair.

## 7: A review of the Agency Workers Regulations

▲ BACK TO TOP

The Agency Workers Regulations came into force in October 2011, giving agency workers equal working and employment conditions with the employees of a client firm after a 12 week qualification period.

Many feared that a consequence would be additional burdens on business and/or a reducing the use of agency workers.

An *Employment Trends Survey* carried out by the CBI and Harvey Nash covering 319 businesses and a total workforce of £1.9 million people found that almost half of firms (46%) reported that their business has been affected. Some 57% had said that they had reduced their use of agency workers, and 1 in 12 firms (8%) had stopped using them entirely.

According to the survey, more than a third of companies (36%) are turning to fixed term contracts instead, while 27% have sidestepped the requirements for equal pay by adopting the Swedish Derogation Model. This is where agencies pay workers between assignments, effectively becoming their permanent employers.

Rather than use agency workers, 1 in 7 firms (15%) has hired self-employed people, who are unaffected by the regulations, and 1 in 6 (17%) has asked existing employees to put in more overtime work. (Source: *ACAS Workplace Snippets*, August 2012).

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