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Employment Law BULLETIN

In this issue we note a number of interesting cases from the EAT (Employment Appeal Tribunal) as well as other developments.

Finally, as the Agency Workers Regulations begin to bed in we are holding a free breakfast seminar on the subject on 29 November 2011.

Click here for details – we hope to see you there.

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1: The future of unfair dismissal law

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Some recent thoughts and proposals on reducing employment "red tape" have prompted

Eye-catching the proposal might be; but most regard it as a non-starter.

criticism.

A leaked Government report has urged legislation to remove "unproductive" workers' rights to claim unfair dismissal. The report was written by Mr. Adrian Beecroft a Conservative party donor.

Also doing the rounds is a story that the Government is formulating proposals under which "protected conversations", enabling frank discussion between employers and their employees, would not be admissible in tribunal proceedings.

2: The unfair dismissal qualifying period and proposed employment tribunal fees

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On a more immediate note, on 3rd October 2011, at the Conservative Party Conference the Chancellor of the Exchequer, George Osborne, stated that the unfair dismissal qualifying period would rise to 2 years and that fees would be introduced for employment tribunal claims.

It is a move that will be popular with some employers but highly unpopular with employees and those concerned about access to justice.

The Government has estimated that increasing the qualifying period to two years will exclude 2,000 claims per year.

As to tribunal fees, the reported proposals are an issue fee of £250 and a listing fee of £1,000 with higher fees if a claim exceeds £30,000.

Employment Minister Ed Davy has now said that people on low incomes will not have to pay a fee to lodge an employment tribunal claim.

Detail however is yet to come and it appears now that tribunal fees will not fully be introduced until December 2013.

3: First conviction under the Bribery Act 2010

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A former magistrates court clerk has been prosecuted & convicted under section 2 of the Bribery Act 2010 for accepting a bribe with a view to improperly performing his functions.

He had accepted £500 in exchange for omitting to record a traffic offence. The Bribery Act 2010 has been described as one of the toughest anticorruption measures in the world.

The Act, which received the Royal assent on 8 April 2010 and came into force on 3 July 2011, creates offences not only of being bribed but also of bribery in general, the bribery of foreign public officials and the failure of an organisation to prevent bribery on its behalf.

To avoid corporate liability, organisations should consider the formulation of bribery prevention procedures proportionate to risk.

For an organisation will have a full defence if it can show that despite a particular case of bribery, it nonetheless had adequate procedures in place to prevent persons from bribing.

If you require our assistance in the formulation of anti-bribery policies and procedures please get in touch with your usual Wrigleys contact.

4: Changing employment contracts after a TUPE transfer

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Employers may wish to make some changes to employment terms following the acquisition of a business or taking over a contract under TUPE

But those plans are fraught with difficulty.

Regulation 4(4) of TUPE makes any purported variation of an employment contract void if the sole or principal reason is the transfer itself.

One way of avoiding this problem is to establish a reason for the change in employment contracts that is not related back to the transfer. This is difficult in practice. For example, mere passage of time between the transfer and the proposed change does not necessarily cause the connection with the transfer to evaporate.

The EAT decision in **Smith v Trustees of Brooklands College** (EAT/0128/2011) provides an example, however, of a successful variation of terms notwith-standing a preceding TUPE transfer.

In August 2007 the college was transferred, under TUPE, to Brooklands. Afterwards, Brooklands realised the claimants were on terms out of step with the rest of the sector. It sought to bring the contracts into line.

Reluctantly, the employees agreed a detrimental adjustment to achieve this, effective from 1 January 2010. Subsequently, the employees claimed the variation in pay was ineffective due to the restrictions in TUPE.

The employments argued that "but for" the TUPE transfer, the variation would not have taken place. But, said the EAT that was not the test.

The question was, what was the reason for the change? What caused the employer to do it? This was a clear question of fact and the finding of the employment judge that the variation was not by reason of the transfer would not be disturbed.

The judge had correctly had regard to what was in the

In this case the employees, who were teaching assistants, were employed by Spelthorne College. They enjoyed unusual employment terms. They were paid as full time employees when they only worked part time.

employer's mind (the need to correct an obvious error in pay) and also the distance between the transfer and the variation. The transfer then, was not the sole or principal reason for the change and the change was effective.

5: Discrimination claims

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When an organisation can be liable for the acts of its employees or agents even when they were not authorised to discriminate.

In **Bungay v All Saints Haque Centre** (EAT 331/2011) the EAT confirmed the principle that agents of an organisation can make it vicariously for acts of discrimination under the Equality Act 2010 even though they have not been authorised by the principal to discriminate.

The appellants were members of the board of a religious centre. It was held by an employment tribunal that they had caused the unfair dismissal of the claimants, who were employees of the centre and that they had unfairly discriminated again them on ground of their faith (on account they were Hindu).

The board members were authorised to run the centre even though they did this in a discriminatory manner. Under agency principles however their acts were treated as being done by the centre.

The tribunal also found that board members were jointly and severally liable with the centre for discrimination damages on the ground they were "prime movers" in the campaign against the employees.

Further, aggravated damages could be awarded in respect of the board members' postemployment conduct in taking a high-handed approach to disciplinary proceedings and making unfounded allegations to the police, which caused the employees much distress.

6: The territorial reach of unfair dismissal protection

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The Rev P Walker v Church Mission Society (CMS) (EAT/0036/11) concerned a regional manager who worked in Africa for Church Mission Society, a Christian mission based in Oxford.

Ms Walker was made redundant and claimed this was unfair. But the question was whether the employment tribunal had jurisdiction to hear her claim. CMS works with Anglican and other Churches of England, Scotland and Wales involved in mission work with people of Africa, Asia, the Middle East and Europe through the exchange of personnel, ideas, project funding and scholarships. Ms Walker was a regional manager who frequently worked abroad.

For the last eight years she had worked in Africa and the Sudan the intention being to de-centralise CMS's work in Africa away from Oxford, the claimant reporting to a line manager based in Africa.

According to the House of Lords in **Lawson v Serco Limited** [2006] ICR 250 there are four gateways to jurisdiction to hear a claim by an employee who is not working in Great Britain at the time of dismissal:

i. The Peripatetic Employee - the employee whose base is in Great Britain.

ii.The Expatriate (1) meaning an employee who works and is based abroad and who is the overseas representative, posted abroad by an employer for the purpose of a business carried on in Britain (the so-called " foreign correspondent of the Financial Times" example).

iii. The Expatriate (2) being an employee who works in a "British enclave" abroad. There the tribunal has jurisdiction provided the employee was recruited in Britain.

iv. The Expatriate (3) the employee who has equally string connections as the above two expatriate examples with Britain and British employment law.

The employment tribunal felt that Ms Walker fell within example (ii) (the expatriate who is based abroad representing a British based 'business', e.g. the foreign correspondent of the Financial Times).

The EAT disagreed. She was not the foreign representative of an Oxford based organisation but was conducting her work and engaging in her duties overseas. Nor did she have otherwise strong connections to Britain and British employment law. The employment tribunal could not therefore hear her unfair dismissal claim

7: The abolition of the default retirement age

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The default retirement age of 65 was abolished with effect from October 1st 2011. Employers have a number of options.

These include treating all workers equally with no automatic retirement age. Dismissal will then only be fair if a potentially fair reason under the statute is available (such as performance).

Alternatively some employers may wish still to consider imposing a retirement age. A retirement age would be directly discriminatory but can be objectively justified if it is a proportionate means of achieving legitimate aims.

Two cases will be heard in the Supreme Court on 17 January 2012 which may shed some light on considerations the employer may be able to take into account in deciding on an employer justified retirement age. These are **Seldon v Clarkson Wright & Jakes** (a partnership) and **Homer v Chief Constable of West Yorkshire**.

In Seldon, the court will hear an appeal against the Court of Appeal's decision to uphold a tribunal's conclusion that a rule requiring partners in a law firm to retire at 65 was a proportionate means of achieving the legitimate aims of workforce planning and providing associates with promotion opportunities.

In Homer the court will hear an appeal from the Court of Appeal's decision that a tribunal was wrong when it found that an employee in his 60's who would be unable to complete a degree before he retired had been indirectly discriminated against on the grounds of age when his employer required possession of a degree for admission to the highest level of its careers structure.

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