In Brief—UK Employment and HR Newsletter

Talkback

In this mid-year issue of our employment and HR newsletter, we look at the top ten lessons in dismissal and discrimination that we can learn from case law so far this year. We also highlight the key employment law changes that took effect in April and preview what is expected over the next few months.

For more information please contact:

Ann Bevitt
+44 20 7920 4041
abevitt@mofo.com

Caroline Stakim
+44 20 7920 4055
cstakim@mofo.com

Top Ten Lessons in Dismissal and Discrimination to date in 2011

1. Only treat those on maternity leave more favourably where it is proportionate to do so

In Eversheds Legal Services Ltd v De Belin, Mr de Belin was put at risk of redundancy along with his colleague, Ms Reinholz. As part of the scoring criteria, Eversheds awarded points for "lock-up", which is the time taken by the solicitors to receive fees for work completed for a client. This was to be calculated over the previous 12 month period. As Ms Reinholz was on maternity leave at that time, it was not possible to calculate her lock-up and so she was awarded the highest possible score of 2. Mr de Belin however, only achieved 0.5. As a result, his overall score was 0.5 less than Ms Reinholz and he was selected for redundancy. His claims of unfair dismissal and sex discrimination were upheld on appeal by Eversheds to the Employment Appeal Tribunal ("EAT"). Although Eversheds had awarded the additional points in order to protect Ms Reinholz from suffering disadvantage as a result of her maternity leave, it had disproportionately discriminated against Mr de Belin as there were other less discriminatory ways of removing the disadvantage. In particular, the lock-up rate of both candidates could have been calculated as at the date Ms Reinholz was last at work rather than during the period of her maternity leave, a suggestion Mr de Belin had in fact put forward. Conflicting duties to employees are often difficult to resolve. Before affording more favourable treatment to one employee over the other, all alternative options should be considered and less disproportionate and discriminatory options taken where possible.

(*Eversheds Legal Services Ltd v De Belin* UKEAT/0352/10)

2. Employers can be subjective when selecting the most suitable candidate for an alternative position in a redundancy situation

During a fair redundancy procedure, employers are obliged to consider whether there are any suitable alternative roles for any of their potentially redundant employees. Where there is an alternative role and more than one potentially suitable candidate, the EAT in *Morgan v The Welsh Rugby Union*, has held that, provided the assessment used is fair and reasonable, the employer is entitled to apply its subjective judgment to decide which candidate is most suitable for the position. The obligation to use objective criteria when selecting employees from an at-risk pool for redundancy did not apply to the question of alternative employment and employers, by necessity, will have to carry out some form of assessment of candidates' ability to carry out the new role, particularly where the new role involves a promotion. In the case at hand, Mr Morgan complained that he had been unfairly dismissed because a new role was awarded to another candidate who was less qualified and had less experience than him and than the job specification required and because the interviews had not followed the format set out beforehand. The EAT dismissed his claim, however, holding that the Rugby Club had acted fairly and reasonably in deciding that the job description and interview format did not have to be strictly followed. Both candidates

(Continued on Page 2)

had been considered capable but the other candidate had convinced the panel that he was the best person for the job.

(*Morgan v The Welsh Rugby Union* UKEAT/0314/10)

3. Have clear contractual terms to avoid dispute

In *Locke v Candy and Candy Ltd*, Mr Locke was due to receive a guaranteed bonus of £160,000 on the first anniversary of his employment. Ten days before this date, however, he was dismissed with immediate effect and given a payment of salary in lieu of notice. He claimed that as the payment in lieu of notice provision (PILON) in his contract did not expressly specify that the PILON would be for salary only, he was entitled to receive all salary and benefits that would have been payable had he been allowed to work his full notice period, including the £160,000 bonus. The Court of Appeal disagreed. The contract had to be read as a whole and the PILON interpreted in accordance with its other terms. Although the provisions of the PILON were unhelpful, the bonus provisions made it clear that in order to receive the bonus Mr Locke had to be employed when it was due. As his employer had terminated the employment relationship lawfully by exercising its right under the PILON, Mr Locke was not employed when it was due and so was not entitled to the bonus payment. Although the employer was saved in this instance by the bonus provisions, the dispute could have been avoided altogether by ensuring that the PILON itself was clear and unambiguous and specified that only basic salary in lieu of notice was payable.

(*Locke v Candy and Candy Ltd* [2010] EWCA Civ 1350)

4. Employees are not discriminated against where it is not reasonable for them to take offence

In *Thomas Sanderson Blinds Ltd v English*, Mr English had claimed harassment on the grounds of sexual orientation after being subjected to homophobic banter and innuendo from work colleagues. At a preliminary hearing, the Court of Appeal had held that Mr English was not automatically precluded from protection under the Employment Equality (Sexual Orientation) Regulations 2003 simply because he was neither a homosexual or wrongly believed by his alleged harassers to be a homosexual. However, on the facts, his claim for harassment was rejected by the tribunal and this decision has been upheld by the EAT. Mr English failed to show that he had been subjected to an intimidating, hostile, degrading, humiliating or offensive environment and, in reaching its decision, the tribunal had not erred by taking into account the fact that Mr English had remained friends with his alleged harassers, had not complained about their behaviour for some time and had himself portrayed extremely offensive behaviour.

(*Thomas Sanderson Blinds Ltd v English* UKEAT/0316/10)

5. British employment law rights can extend to employees based outside of Great Britain

The Court of Appeal in *British Airways plc v Mak* has ruled that cabin crew of BA were entitled to bring claims of race and age discrimination under the Race Relations Act 1976 and the Employment Equality (Age) Regulations 2006 despite being based and ordinarily resident outside Great Britain. The claims were lodged following a decision by BA to compulsorily retire only cabin crew based in Hong Kong, unlike their counterparts based in London, at the age of 45. Under those pieces of legislation, only individuals who work "wholly or partly" in Great Britain are afforded protection and, on the facts, the Court of Appeal found that they fell within that group. The crew, all Chinese nationals, based and resident in Hong Kong, worked on flights between London and Hong Kong. On each trip, they would spend 30 minutes in British airspace before landing and after take off plus additional time debriefing on arrival and for rest periods. They were also required to attend compulsory training courses in London. All of this put together, the Court held, was enough to bring them within the ambit of the protection and they were entitled to bring claims before the UK tribunals. This case serves as a reminder to employers that employees based overseas may still benefit from UK discrimination protection if they work wholly or partly in Great Britain. However, discrimination rights are, from 1 October 2010, contained in the Equality Act 2010. That Act has no equivalent jurisdiction provisions and it remains to be seen what approach the courts will take in relation to such claims.

(*British Airways plc v Mak* and others [2011] EWCA Civ 184)

6. The definition of philosophical beliefs is potentially very wide

Established case law tells us that for a belief to be a philosophical belief worthy of protection from discrimination it must comply with the following requirements: (a) it must be genuinely held, (b) it must not be merely an opinion or viewpoint, (c) it must be a belief as to a weighty and substantial aspect of human life and behaviour, (d) it must attain a certain level of cogency, seriousness, cohesion and importance and (e) it must be worthy of respect in a democratic society, not incompatible with human dignity and

(Continued on Page 3)

not conflict with the fundamental rights of others.

This appears to be a fairly high threshold to meet. However, in two recent cases a belief in the "higher purpose" of public service broadcasting (*Maistry v BBC*) and a belief in the sanctity of life which included a belief in anti-fox hunting and anti-hare coursing (*Hashman v Milton Park (Dorset) Ltd t/a Orchard Park*) were held to fall within that definition. In *Hashman*, the judge was keen to stress that his decision was based on the particular facts of the case and that not everyone who disagreed with fox hunting, for example, would automatically meet the requirements set out above. Nonetheless, these decisions are further examples of the tribunals' willingness to take a fairly broad approach when deciding whether a belief is a philosophical belief for the purposes of discrimination legislation and employers should be wary of hastily dismissing a belief that is being asserted by an employee.

(*Maistry v BBC* ET/1313142/2010 and *Hashman v Milton Park (Dorset) Ltd* (t/a Orchard Park) ET/3105555/2009)

7. Arbitration clauses do not prevent discrimination claims being brought before a tribunal

Following her expulsion as a partner of Clyde & Co in January 2011, Ms van Winkelhof brought claims of sex and pregnancy discrimination and a whistleblowing claim. Clyde & Co sought an injunction at the High Court to prevent these claims from being heard and to compel Ms van Winkelhof to resolve the dispute in accordance with the terms of the dispute resolution provisions of their partnership agreement. The High Court rejected the injunction application, however, holding that the dispute resolution provisions of the partnership agreement were unenforceable because they sought to contract out of statutory protections without complying with the contracting out provisions of the Equality Act 2010 or the Employment Rights Act 1996. Employers should be aware that it is not only compromise agreements that may seek to have employees waive statutory rights. Where such a waiver is sought, the requirements of the contracting out provisions of the relevant statute must be met.

(*Clyde & Co LLP and another v Winkelhof* [2011] EWHC 668 (QB))

8. Online conduct in or out of the office can justify summary dismissal

After carrying out an investigation, JD Wetherspoon dismissed one of its pub managers, Miss Preece, for gross misconduct after she posted comments online, whilst in work, about two customers who had verbally abused and threatened her. Contrary to her belief, her comments were not only accessible by her online "friends". JD Wetherspoon considered that she had brought the company into disrepute and had acted in breach of its disciplinary and email, Internet and intranet policies and she was summarily dismissed.

In another case, Mr Gosden sent an offensive email from his personal email account on his home computer to the personal email address of Mr Yates, an employee of HM Prison Service ("HMPS"). The email was headed "It is your duty to pass it on!" and Mr Yates obliged by sending it to others at their HMPS email accounts. HMPS investigated the matter and as a result, compulsorily retired Mr Yates and excluded Mr Gosden from working in its prisons in Yorkshire and Humberside. Lifeline, Mr Gosden's employer, subsequently carried out an investigation and found Mr Gosden guilty of gross misconduct for damaging its reputation and integrity with its largest client and for breach of its equal opportunities policy. It also found that his employment was unsustainable due to the exclusion from Yorkshire and Humberside prisons. As a result, he was summarily dismissed.

Both Preece and Gosden's claims for unfair dismissal were rejected by the tribunals. The employers had acted within a band of reasonable responses and were entitled to dismiss the employees. Whilst it is quite expected that an employee could be guilty of misconduct for their actions at work, these cases show that employers can also be justified in taking action in relation to an employee's conduct outside the workplace. With the rise in social media and other online activity, employers should ensure they have adequate policies in place to cover this type of conduct.

(Preece v JD Wetherspoons plc ET/2104806/10 and Gosden v Lifeline Project Ltd ET/2802731/2009)

9. A warning about warnings

In *Davies v Sandwell Metropolitan Borough Council*, Miss Davies, a teacher, was given a final written warning following an allegation of inappropriate conduct in her classroom. She had sought to submit new evidence that disproved the allegations but her employer refused to hear that evidence as she had submitted it late. She initially appealed the final written warning but later withdrew this appeal on the advice of her union representative who was fearful that a harsher sanction would be imposed. Some time later, further allegations were made against her, and taking into account the final written warning, the Council dismissed her. The employment tribunal rejected her claim for unfair dismissal

(Continued on Page 4)

holding that the earlier warning could be relied on as she had not raised an appeal. The EAT however, has overturned that decision. It held that it was not correct to say that the final written warning was unquestionable because it had not been appealed.

When considering the fairness of any subsequent dismissal, it is important to consider whether the warning has been issued in good faith and whether a fair procedure has been followed. When contemplating dismissal, current final written warnings should only be taken into account where they have been issued in good faith following the completion of a fair procedure.

(*Davies v Sandwell Metropolitan Borough Council* [2011] UKEAT/0416/10)

10. Be clear about the reason for dismissal

After joining North Glamorgan NHS Trust, Mr Ezsias raised concerns regarding the clinical standards of his colleagues. The Trust believed that the manner in which he did so antagonized his colleagues and affected his working relationships to such an extent that it dismissed him for some other substantial reason due to the breakdown of those relationships. Mr Ezsias brought a claim for automatic unfair dismissal claiming that he was dismissed because he had made a protected disclosure and, in the alternative, his dismissal was unfair because the Trust had not followed its contractual disciplinary procedure.

His claim was dismissed by the employment tribunal and that decision was upheld on appeal by the EAT. The disclosures he had made were not protected disclosures and were not the reason for his dismissal. The reason for his dismissal was some other substantial reason, namely, the breakdown in working relations. Although his conduct had caused that breakdown, it was the poor relations that resulted, rather than his conduct in causing them, that was the reason for his dismissal. The Trust was therefore entitled to take the view that no formal disciplinary procedure was necessary. Employers should ensure that they are clear on the reason for dismissing an employee. If they are not, it will be difficult to show that an appropriate and fair procedure has been followed.

(*Ezsias v North Glamorgan NHS Trust* UKEAT/0399/09)

News Update

OUT WITH THE OLD (or perhaps not anymore)

- Abolition of default retirement age: On 6 April 2011, the default retirement age and the statutory retirement procedures were abolished. As a result, employers are no longer able to lawfully dismiss an employee simply because they have reached the age of 65. They can opt to maintain their own compulsory retirement age which applies to either the workforce as a whole, to particular groups of the workforce or to particular individuals provided they are able to objectively justify it, in other words, provided they can show that maintaining a compulsory retirement age is a proportionate means of achieving a legitimate aim. How easy or difficult this will be remains to be seen. If, on the other hand, employers choose to work without a normal retirement age, the concept of retiring employees will disappear and dismissals will need to fall within one of the other potentially fair reasons for dismissal or an agreement will need to be reached with the employee.

  For those employees who have or will reach the age of 65 by 30 September 2011 transitional provisions apply but to take advantage of these, employers will have to have commenced a statutory retirement procedure by issuing a notice of intention to retire on or before 5 April 2011.

IN WITH THE NEW

- **Rights to additional paternity leave:** Additional paternity leave is now available for employees with babies born or children matched for adoption on or after 3 April 2011. The intention is to encourage parents to share caring responsibilities by providing for between two and twenty-six weeks' additional paternity leave to new fathers, husbands, partners and civil partners provided the child's mother or primary adopter has returned to work without exercising their full entitlement to maternity leave. Some of that additional paternity leave may also be paid if it is taken during the mother's maternity pay period. For a summary of the key changes see our previous newsletter In Brief Volume 2, No.1 Spring.
- **Equality Act 2010:** The implementation of the Equality Act 2010 continues with the introduction of the public

(Continued on Page 5)

sector equality duty and the positive action in recruitment and promotion provisions last month. Additionally, an Employment Statutory Code of Practice and Equal Pay Statutory Code of Practice providing guidance on how to comply with the Act have been brought into force and are available here.

- **Small business exemption:** Businesses with fewer that ten employees and genuine start-up businesses are, from 1 April 2011, exempt from new domestic regulations for three years.
- **Permanent migration caps introduced:** Last month also saw the introduction of permanent migration caps on skilled and highly skilled non-EEA migrants coming into the UK. The cap restricts the number of skilled professionals entering under Tier 2 (General) to 20,700 per year and visas under Tier 1, the highly skilled category, being restricted to just 1,000 per year for entrepreneurs, investors and people of exceptional talent. Full details of the cap are available from the UKBA website here.
- **Taxation of termination payments:** From 6 April 2011, employers are obliged to deduct the appropriate rate of tax from any payments made to an employee on termination of employment regardless of whether the payment is made before or after the P45 is issued. Employees are therefore no longer able to enjoy the cash-flow advantage of receiving such payments after the P45 has been issued with deduction of basic rate tax only.
- **Statutory rates:** These increased last month in respect of maternity, paternity, adoption and sick leave and from February in respect of the statutory cap on a week's pay. Set out below are all of the current rates and maximum awards.

Statutory Payment	Amount
Statutory Maternity, Adoption & Paternity Pay	£128.73 per week
Statutory Sick Pay	£81.60 per week
National Minimum Wage	£5.93 workers 21 years and over, £4.92 for workers aged 18 to 20
Type of Claim	**Amount/Award**
One week's pay (where capped)	£400
Compensatory award for unfair dismissal*	£68,400
Redundancy payment	£12,000
Discrimination	No limit
Breach of contract in employment tribunal	£25,000
Failure to inform/consult in redundancy	90 days' actual pay (no cap)
Failure to inform/consult in TUPE transfer	13 weeks' actual pay (no cap)
Failure to inform/consult in TUPE transfer	£500 minimum for each employee (no maximum)

**Compensatory awards for unfair dismissal claims where dismissal for health & safety or for making a protected disclosure are unlimited.*

(Continued on Page 6)

EXPECTED CHANGES NO LONGER COMING INTO FORCE

The Government recently announced that it will no longer be seeking to:

- Extend the **right to request time off for study and training** to employees of small employers, the right therefore continues to apply to only employees of companies with 250 or more employees.
- Implement the **dual discrimination provisions of the Equality Act 2010**, which would have allowed employees to bring claims of discrimination based on two combined characteristics.

AND A LOOK AT WHAT'S ON THE HORIZON

- The **Employment Law Reform** announced earlier this year by the Government which includes plans to increase the qualifying period for unfair dismissal claims from one to two years' continuous service, introducing a fee for lodging tribunal claims and making mediation compulsory for all tribunal cases has been the subject of consultation. That consultation closed on 20 April 2011 and we await the outcome.
- A **Consultation on Modern Workplaces** was launched on 16 May 2011 by the Department for Business Innovation and Skills (full details available here).
- The consultation is open until 8 August 2011 and proposes to:
  - introduce new flexible parental leave rights. Being suggested is a plan to limit maternity leave to 18 weeks and to reclassify the remaining time as parental leave to be taken by either the mother or the father or both;
  - extend the right to request to work flexibly to all employees and not just those with children under 17 (or under 18, where the child is disabled). The Government only recently announced that it would no longer be seeking to implement plans to extend this right to those with children under 18 and so this proposal marks a substantial change of direction;
  - amend the Working Time Regulations 1998 to allow employees to carry over untaken holiday where they were unable to take it due to sickness absence or maternity/parental leave; and
  - introduce a duty for employment tribunals to require employers to conduct a pay audit if they have been found to be in breach of equal pay legislation.
- The **Bribery Act 2010** is now expected to come into force on 1 July 2011. In the meantime, the Ministry of Justice has published guidance about procedures that organizations can put in place to avoid liability for bribes made by associated people and a non-statutory quick start guide aimed at small businesses. For further information regarding the key provisions of the Act, please see our previous Client Alert 31 March 2011.
- The **Agency Worker Regulations 2010** are expected to come into force on 1 October 2011. Final guidance has now been published and is available here.