FREDERICK PLACE CHAMBERS

9 Frederick Place
Clifton
Bristol
BS8 1AS

Tel : 0117 9467059
E-mail : Rsp4593558@aol.com
www.frederickchambers.co.uk

Employment Law Cases Update and Newsletter

January 2012

This is the first Newsletter published by Frederick Place Chambers. It is intended that this should be a monthly publication, with the aim of keeping clients and fellow professionals up to date with recent developments in employment law. We will also include comments on these developments and news of Chambers progress.

It is hoped that this Newsletter will be of interest. Queries and comments should be addressed to the editor, Polly Lord, at pollylord@aol.com

R. H. Spicer

Head of Chambers

Newsletter Contents

Coping with....Redundancy

With the recent release by the Office of National Statistics that the rate of redundancy has risen to 6.6%, it is clear that more and more people are finding themselves in the difficult position of losing their job.
If you, or your client, find themselves in this position there are a number of key things that you must consider:

- Always make sure that you feel you have been adequately consulted. This means being informed at each stage of the process as to whether you are "at risk".
- Always consider any alternative employment offered; the role must be "suitable", but be aware that if you turn down a suitable alternative offer of employment, you may lose your redundancy pay.
- All employees that have worked for over two years and are made redundant are entitled to redundancy payment. If you have worked for less than two years, you may still be entitled under your contract. Always check.
- The Government's website has a lot of helpful tips, including how to calculate your entitlement to redundancy payment: http://www.direct.gov.uk/en/Employment/RedundancyAndLeavingYourJob/Redundancy/index.htm
- It's always wise to talk to a specialist employment lawyer as redundancy law can be very complicated.
- Above all else, don't let a redundancy situation affect your well-being. You are not alone.

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Employment Law Cases

Unfair Dismissal

Royle v Greater Manchester Police Authority [2007] ICR 281, Employment Appeal Tribunal

Constructive Dismissal
Fundamental breach of contract

Facts R was a welfare officer employed by G. She resigned and claimed that G's failure to take reasonable care for her health and safety amounted to a fundamental breach of contract for the purposes of constructive dismissal. It was also argued on her behalf that a meeting with G's representative had been badly handled and that this had been the "last straw" in a cumulative series of events which amounted to a fundamental breach of contract. Her complaint to an employment tribunal was dismissed. The tribunal found that G had supported R with regard to her difficulties with her working conditions and that R had not fully communicated her problems to G. The meeting with G's representative was not a "last straw" because there had been no continuing conduct. The tribunal also found that R had intended to resign in any event. R appealed to the Employment Appeal Tribunal (EAT).

Decision 1. The appeal would be dismissed.
2. The tribunal had properly considered the relevant matters and was entitled to conclude that the alleged breaches of contract did not collectively or individually amount to a fundamental breach of contract.
3. The tribunal had applied the correct test in its approach to the resignation and had been entitled to reach the conclusion which it did.

Comment Constructive dismissal arises when an employee resigns because of a fundamental breach of the contract of employment by an employer. The breach of contract must be "fundamental". This may be very difficult to prove.

Discrimination

Ruda v Tei Ltd [2011] EqLR 1108, Leeds ET

Race and sexual orientation

Facts R, a Polish man, was employed by T Ltd. Two of his colleagues used the nickname "Borat" for him. He asked them several times not to use this nickname. His colleagues also used the words "gay" and "wanking" in relation to R. He complained of discrimination and harassment on the grounds of sexual orientation to an employment tribunal.

Decision 1. The appropriate comparator in relation to sex discrimination was a person who had all the characteristics of R but was not from Poland or Eastern Europe. Such a comparator would not have been given the nickname of Borat and there was direct race discrimination.
2. The nickname also amounted to racial harassment.
3. The application of the word "gay" was intrinsically associated with the use of the word "wanking" and amounted to harassment on the grounds of sexual orientation.

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Employment Law Cases cont.

Aitken v Commissioner of Police of the Metropolis [2012] ICR 78, CA

Disability

Facts A was a police constable who was diagnosed as suffering from depression and obsessive compulsive disorder. He behaved aggressively towards his colleagues. He was moved to a CCTV unit and placed under direct supervision with close assessment. A was assessed as being permanently disabled from carrying out normal police duties. He appealed against this assessment and his appeal succeeded. He then complained of disability discrimination on the basis that his behaviour had been caused by his disability and that he had been wrongly assessed as being dangerous. His claim was dismissed. The employment tribunal found that the employer had acted as it did on the basis of A's conduct and not because of assumptions about mental illness. A appealed to the EAT. His appeal was dismissed. He then appealed to the Court of Appeal.

Decision 1. The appeal would be dismissed.
2. A could not raise for the first time on appeal, the argument that his employer's treatment of him was on the ground of his disability because his conduct was part of his disability. This was not a pure point of law. It had to be supported by evidence about the relationship between A's disability and his conduct. There was no such evidence, because the point had not been raised in the employment tribunal.
3. The employment tribunal had not erred in finding that the employer's treatment of A was not on the ground of his disability. In identifying a hypothetical comparator, the tribunal did not exclude A's conduct, because that conduct had not been alleged or proved to be part of his disability.
4. Users of the tribunal system in discrimination cases, and professional advisers, need evidence to prove facts. They need facts on which to base legal submissions. They need real, not imaginary, questions of law for appeals.

Employment Tribunal

Jackson v Cambridgeshire CC [2011] PNLR 32, EAT

Wasted costs
Representative acting in pursuit of profit

Facts J, a solicitor, acted for his cousin who had brought proceedings against a local authority for constructive dismissal, sex and disability discrimination. His cousin died and J acted for his mother who continued the proceedings. J posted material concerning the case during an adjournment of the hearing. He also supplied documents to the press which he alleged to show wasted costs incurred by the local authority which had made no attempt to settle the case. The tribunal made a wasted costs order against J on the basis that his behaviour during the proceedings had the aim of putting maximum pressure on the local authority to settle. J appealed to the EAT.

Decision 1. The appeal was allowed.
2. Sched 1 para. 48(4) of the 2004 Regulations provided that a wasted costs order could only be made against a representative who was acting in pursuit of profit. This included acting on a conditional fee arrangement.
3.There was no reason to believe that J was acting in pursuit of profit. It was the sort of case where, because of the family element, he might be expected to be acting pro bono.
4. J's own application for wasted costs was based on researchers' fees.
5. The evidence of his cousin's mother and a researcher confirmed that J had not been acting in pursuit of profit.

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Opinion

Proposed employment law reforms

Anyone giving legal advice in Bristol, and more specifically those providing employment law advice, needs to be aware that the scope of their expertise is likely to be significantly affected by the proposals put forward by the government in November 2010. If, or perhaps when, the proposals are put into effect, employment protection for workers will be drastically curtailed. The proposals include:

- An increase in the qualification period for unfair dismissal claims from one to two years.
- The introduction of fees for employment tribunal claims.
- Amendment of the whistleblowing legislation to exclude claims arising from personal work contracts.
- A requirement that all employment disputes are referred to ACAS before they proceed to an employment tribunal.
- Compromise agreements to be simplified and known as settlement agreements.
- Witness statements in employment tribunal proceedings will be taken as read, expenses for witnesses will no longer be allowed and the powers of employment judges to sit alone will be extended.
- The maximum amount of costs which an employment tribunal can award will be increased from £10,000 to £20,000.

How are we to react to these proposals? On the one hand, they can be seen as a comprehensive attack on workers' rights, secured after years of struggle. It also appears that the main motivation behind the proposals is to save money.

It can also be argued that the proposals mark yet another step towards the Americanisation of the English legal system, exemplified by the abolition of legal aid and the introduction of conditional fees. America has no law of unfair dismissal – this "hire and fire" philosophy clearly has its attractions for those who wish to make a bonfire of workers' rights.

Another point worth making is that, although the proposals may look like bad news for lawyers, because the number of unfair dismissal claims will be sharply reduced, the reality is that the proposals mean further "legalisation" of employment tribunals. These tribunals, created to deal quickly and cheaply with employment disputes, have become increasingly the haunt of specialist lawyers. We may soon see the day when m'learned friends have to don fancy dress before they can be heard by an employment judge.

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Chambers & Legal News

Occupation Update

For the past few weeks, Chambers has been involved with Occupy Bristol, providing ad hoc advice as and when necessary. Unfortunately, following the Council's court application, the occupiers have lost their argument to remain on College Green and are currently winding down the camp.
On January 25th, we held a well-attended and fascinating Chambers' seminar in which we debated the legality of the Occupation and the Council's move.
We now wait and see as to whether Occupy Bristol might consider challenging the decision.

Website Update

We are now up and running with our weekly blog and Employment Law Cases Database! With more content, regularly updated, we are hoping that the website will become a useful tool for those interested in what we do, while providing a gateway for discussion over the most relevant issues in the law affecting us today.

Case Update

We have recently secured a settlement for one our ongoing clients in relation to a professional negligence dispute, without having to engage in formal litigation.

If you, or your client, need professional advice don't hesitate to get in touch!

Dates for your Diary

February 29th 2012	Seminar on Proposed Employment Law Reforms. All welcome. Please confirm with Emma or Robert by calling or emailing Chambers.

For weekly updates, follow our blog www.frederickchambers.co.uk