



EMPLOYMENT GROUP BULLETIN



"It gives me great pleasure to introduce our new re-styled Employment Bulletin, produced by barristers in the Tanfield Employment Group. We have used a fresh approach, offering just two in-depth articles, which I am sure you will find both informative and useful. Information about the writers appears on the next two pages. This edition coincides with the launch of our new website: www.tanfieldchambers.co.uk. Please do visit the site and let us know what you think."

David Berkley QC, Head of Tanfield Employment Group

ISSUE NO 4: SPRING 2009

AGE EQUALITY?

Is a job advert seeking newly or recently qualified applicants discriminatory on grounds of age? Recently, 23 companies became respondents to age discrimination claims after allegedly rejecting a 49 year old accountant who had applied to on-line job advertisements containing such terms. Peter Linstead, who acted for 5 of those respondents in *Keane v Ellis Fairbank & Ors*¹, considers the decision and the question of objective justification under the Employment Equality (Age) Regulations 2006.

The claimant, who had qualified in 1991, brought multiple tribunal claims against recruitment agents claiming direct and indirect age discrimination. All the adverts included terms such as "newly qualified", "newly qualified to two years qualified" and "dream job for someone with 1 to 3 years PQE". Although some of the claims settled or were withdrawn, 5 were heard in London Central ET in April 2008 and 5 in Watford in November 2008.

The direct discrimination claim was based on her apparent age as her actual age was not stated in the CV. As to indirect discrimination, she contended that under regulation 3(1)(b) EE(A)R the agents had applied a provision, criterion or practice ("PCP") which put people of her age group at a particular disadvantage compared with other persons and which put her at that disadvantage.

THE DECISION

Watford Employment Tribunal found there had been no direct discrimination and they rejected the indirect discrimination claim because she had not been disadvantaged, for two reasons. First, the respondents had actually considered the claimant's applications and rejected them on grounds other than her age. The terms had been put into the adverts in error or there were other deficiencies in the applications. Secondly, the applications were not bona fide, in that the claimant had not made them with an intention of obtaining the relevant jobs but of pursuing a claim.

IMPLICATIONS OF THE EMPLOYMENT ACT 2008

JUSTIFICATION DEFENCES TO AGE DISCRIMINATION

TANFIELD EMPLOYMENT GROUP FORTHCOMING EVENTS

CONTINUED OVERLEAF



PETER LINSTEAD

Peter joined Tanfield in 2006 but has specialised in employment law from 1999. He has a practical and commercial approach with clients, and is also noted for his robust advocacy style. Peter has a particular interest in cases with a commercial angle, including restrictive covenants, but is also very experienced in discrimination, transfer of undertakings and civil personal injury claims based on stress at work. He appears regularly in the EAT and acted for the successful respondent in *Lewisham v Colbourne* (Lawtel), the first EAT case on time limits for grievances under the statutory procedure. He is currently instructed in the Court of Appeal on a public sector equal pay case. Outside work, Peter is involved in leadership training with a charity and also sings in a choir.

COSTS

In *Watford*, all five respondents obtained orders for the entirety of their legal costs of the action, totalling more than £140,000, subject to assessment. This decision may be appealed.

JUSTIFICATION

Age discrimination can be justified under r.3(1)(b) if it is a proportionate means of achieving a legitimate aim. Although they did not need to, the *Watford* tribunal went on to consider the respondents' justification defences. Justification had been central to the decision to reject some of the claimant's claims in *London Central*. However, the *Watford* tribunal decided the use of these criteria was not justified.

The tribunal has to make a "fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary" (see **Hardy v Hanson Lax [2005] ICR 156**). The *London Central* decision placed particular reliance on EC Framework Directive 2000/78 which states that differences of treatment might be justified if they involve "the fixing of minimum conditions of... professional experience". They found, in one case, that a reference to "an ambitious graduate and recently qualified accountant" was a minimum condition. By contrast, the *Watford* tribunal held that a proper minimum condition would be seeking someone "qualified"; "newly qualified" could not be a minimum condition. Further, the Respondents had not produced sufficient evidence to satisfy the test of justification.

Given these opposite conclusions of two tribunals in almost identical cases, how might employers be able to justify a requirement for junior staff? The Court of Appeal has said there is no rule of law that the justification must have consciously and contemporaneously featured in the mind of the employer (**Cadman v HSE [2005] ICR 1545**) and in **CC West Yorks v Homer (EAT 0191/08)**, the EAT held that an employer might be justified in imposing requirements which he genuinely considers will improve the standard of his workforce, even if, with the benefit of hindsight, this has not been realised.

These cases might indicate a softening of approach to the issue of justification. But in **Rainbow v Milton Keynes (ET no.1200104/07)**, a justification defence failed where an advert asked for a teacher "in the first five years of their career" to whom they could pay a lower salary. The stipulation was not adequately justified on grounds of cost and insufficient consideration had been given at the time to alternatives which might achieve the same result.

The decision in **Keane** suggests that an employer will face a risk if it has not carefully considered the business need for newly qualified staff, and any possible alternatives, before recruiting. This consideration should include a balancing exercise between the business need and the discriminatory effect of the provision.

¹Watford ET Case No: 33011676/2007

OUR AUTHORS



NON-STATUTORY DISPUTE

The statutory dispute resolution procedures are on their way out and so counter-productive. Provisions designed to reduce Tribunal complexity and complex points of law have been argued, frequently so remote from the Chancery lawyer conjured up by the imagination of a Charles D. Scamption and Louise Mankau consider how the employment law

The Gibbons Report recommended the Regulations be replaced by something "much simpler and more flexible". Gibbons presented a "suite of complementary recommendations", such as a greatly increased role for mediation. On 13/11/08 the Employment Act 2008 ("the Act") received Royal Assent. It is due to come into force on 6 April 2009. The Act removes the statutory procedures in their entirety. What follows is a brief description of the main changes and their potential impact.

THE CHANGES

(A) GRIEVANCE PROCEDURES

- The three-step grievance procedure will no longer apply. An employee will not be obliged to submit a grievance prior to bringing an ET claim. There will no longer be any confusion regarding whether the standard or modified grievance procedures are applicable, and no issues regarding whether an employee has actually raised a grievance relating to the claims being made.
- There will no longer be an automatic three month extension to the time limit in which to bring a claim if a grievance is lodged. Extensions will once again need to be sought under "reasonably practicable" and "just and equitable" principles.

(B) DISCIPLINARY AND DISMISSAL PROCEDURES

- The three-step DDP procedure will no longer need to be followed. There will consequently no longer be any automatically unfair dismissals for failure to follow the statutory procedures.
- The so-called "Polkey Reversal" in ERA96 s.98A(2) is repealed. If an employer fails to follow a fair procedure when dismissing an employee, such failure will render the dismissal unfair even where the failure would not have affected the outcome. Where a dismissal has been found to be unfair, a tribunal will in all cases be able to reduce the compensatory award by any amount up to 100% to reflect the likelihood that dismissal would have occurred in any event, even if the correct procedure had been followed.
- There will no longer be an automatic 10% to 50% uplift for failure to follow the statutory procedures. The punitive principle isn't lost

¹In *Arnold & others v. Sandwell MDC* (UKEAT/0366/08, 6/11/08)



LOUISE MANKAU

After training at Tanfield, Louise has become an important player at the junior end of the employment team and is noted by solicitors for being a very down-to-earth and client-friendly barrister. Shortly after gaining tenancy, she was retained by the London Borough of Southwark for 4 months to provide

assistance to their employment team. As such, she has particular experience and knowledge of local authority procedures and policies. Already a very experienced employment tribunal advocate, she has begun to take cases in the Employment Appeal Tribunal and acts for both Claimants and Respondents. Outside work, Louise is a keen Hull City fan and still thinks they will win the Premiership in their first year as a Premiership team. In her more lucid moments, she also enjoys playing the guitar and overeating.



NIC SCAMPION

Nic regularly appears in the ET, EAT, High Court and County Court. He has experience of most areas of employment law and has lectured and written articles on various areas. Nic includes in his experience advisory and advocacy work for government departments, plc's, NHS Trusts, banks, local authorities, sports agencies, and football clubs. He has a growing interest in mediation. Before coming to the bar, Nic worked in the Commercial Group at the Treasury Solicitor, dealing mainly with employment matters. He dealt with cases involving matters of political sensitivity, public interest and legal importance. When not at work, Nic enjoys playing football, the piano, and with his one-year old son, although not necessarily all at the same time.

RESOLUTION

As Elias P recently said: "Rarely can legislation have been so dispiriting. Disputes have spawned satellite litigation in which arcane and technical details have become a reality that they would surprise even the most desiccated Dickens"¹. They probably won't be missed. In this article, Nic will look at the new landscape will look from April 2009.

though. Under the new regime, a tribunal will be able to increase or reduce any award made, up to a maximum of 25%, for an unreasonable failure to follow the ACAS Code (see below) by either the employer or employee.

Employers and employees will in future be guided by what has been described as a "lighter touch" regime based around a new, shorter ACAS Code of Practice. The final version of the Code will also come into force on 6/4/09 (although at the time of writing it has yet to be formally approved by Parliament). The Code is short (10 pages) and uncontroversial. It is "concise and principles-based" and is intended to provide "the standard of reasonable behaviour in most instances". It should not have significant implications for employers in terms of how they handle disciplinary and grievance issues on a daily basis.

POSSIBLE ISSUES

FORMALITY / INFORMALITY

The wide definition of "grievance" meant that employers invoked the formal procedure in response to all expressions of discontent, not wanting to risk a breach of the statutory procedures. We can anticipate that the removal of the requirement to raise a grievance in order to bring a claim will reduce the number of formal grievances.

The Code may, however, mean an increased number of informal grievances. The foreword to the Code states that "employers and employees should always seek to resolve disciplinary and grievance issues in the workplace". The Code states that, where "it is not possible to resolve a grievance informally employees should raise the matter formally". Even though the Acas council chose not to suggest in the main

"Although some general principles may emerge to determine when and how any award will be increased or decreased, the current provisions have failed to achieve this in four years..."

body of the Code that grievances first be raised informally, as this would be difficult for Tribunals to apply and could lead to uncertainty², it remains unclear whether or not a failure to resolve a problem informally might matter (for example, an employee may request that a serious matter be dealt with formally in the first instance).

²Indeed the initial wording of the Code stated that employers and employees should do "all that they can" to resolve disciplinary and grievance issues in the workplace and that "recourse to an employment tribunal should only be a last resort".



AWARD ADJUSTMENT

The Code is much more detailed than the 'simple' three-step procedures. For example, the right to be accompanied, keeping periods of suspension

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"as brief as possible", and trying first to resolve matters informally go beyond the three-step procedures. There will therefore be plenty of new opportunities for parties to seek adjustments of awards. Added to this, Acas has issued 70 pages of (non-statutory) guidance. According to the Code itself, Tribunals will not be required to have regard to this guidance when considering complaints, but some have expressed concern this could happen in any event, given the lack of detail in the Code.

Although some general principles may emerge to determine when and how any award will be increased or decreased, the current provisions have failed to achieve this in four years, and Acas have not produced guidance to assist. It remains, for example, unclear whether an employer's ignorance of the code justifies keeping an uplift to a low level or whether it requires the imposition of a higher one. Local "rules" may develop with the higher courts being reluctant to intervene except in cases of perversity.

The Code imposes relatively few obligations on employees (for example as regards the duty to co-operate). The low rate of award reductions is therefore likely to continue, particularly as the previous requirement to adjust an award is replaced by a discretion (if it is just and equitable to do so). There is also no sanction imposed on the unsuccessful employee - there will be no mechanism for punishing him for not trying to resolve his grievance in the workplace.

MEDIATION

Gibbons' vision was of "a greatly increased role for mediation". The Code's foreword and guidance urge employers and employees to consider early mediation if an informal resolution is not possible, but there is no reference to mediation in the Code itself. This is because the Acas council felt there was a danger that, if mediation were to be mentioned in the Code, a failure to use mediation might be penalised, and that this would be undesirable, given that mediation is an entirely voluntary process. It is perhaps regrettable that Gibbons' recommendation appears to have been ignored, particularly given that in some jurisdictions (for example New Zealand) mediation has become accepted as essentially mandatory in every potential claim.

TRANSITIONAL PROVISIONS

The current statutory procedures will continue to apply in cases where "the act" leading to the grievance has started or taken place and / or the employer has contemplated taking or started disciplinary action prior to 6/4/09. The aim is that this will deliver certainty. Although this is probably the "least worst option", Tribunals and practitioners may be dealing with parallel regimes into 2011. It is also doubtful whether the approach will deliver certainty, as it will not always be easy to be sure when an "act" relied on occurs.

Where there are cumulative breaches of the implied term of mutual trust and confidence straddling the transition date, it remains unclear whether conduct occurring prior to 6/4/09 will require a grievance while a "last straw" after 6/4/09 will not. It might be thought that where an act is clearly a 'continuing act', an act 'commencing' prior to 6/4/09 will be dealt with under the statutory procedures (cf. Smith v. Network Rail Infrastructure³). But what if the acts are severable? Will some acts fall to be dealt with under the old regime, and some under the new? It remains to be seen.

For disciplinary action the key date will be the date on which "the employer has contemplated taking or started disciplinary action prior to commencement day". Evidence may therefore be required as to when an employer first "contemplated" such action, allowing savvy employers to carefully 'position' their evidence in order to determine which regime should apply, particularly as the timing will have significant differences as to the adjustment to be calculated / the application of the Polkey principle.

OTHER CHANGES IN EA 2008

Although, understandably, the death of the statutory procedures has generated the most interest and publicity, it is important not to forget that other changes are being made by the EA2008. Such changes include:

- an overhaul of the National Minimum Wage procedures and the introduction of an alternative method of calculating how much should be paid under the National Minimum Wage Act 1998; and
- changes to trade union law concerning exclusion/expulsion of members which brings it in line with the European Court of Human Rights' decision in *Aslef v UK*.

As to dispute resolution, here at Tanfield, we will continue to monitor the situation, and will provide updates on the effects of the new legislation in future editions of this Bulletin. In the meantime, let us breathe a sigh of relief that the statutory procedures were so short-lived and let us hope that what replaces them is indeed "much simpler and more flexible".

DIARY DATES

Thurs 30 April 6.15pm Seminar: "Age Is Catching Up With Us"

The Employment Equality (Age) Regulations have now generated a significant amount of case law. Simon Cheves and Peter Linstead provide an update and consider some of the grey areas, including justification.

CPD Seminar at Tanfield Chambers. This will last 1.5 hrs (approx) followed by refreshments. Registration is from 6pm.

To book places email dhaigh@tanfieldchambers.co.uk

TANFIELD CHAMBERS



For further information or to instruct a barrister, please contact **David Wright**, Employment Clerk or **Kevin Moore**, Senior Clerk, on 02074215300 or clerks@tanfieldchambers.co.uk

Tanfield Chambers' dedicated conference facilities are readily accessible by the mobility-impaired. Please contact the clerks to agree fees in advance, whether on a fixed or hourly rate. Feedback on our service is welcomed and should be directed to the Senior Clerk, Kevin Moore. A copy of Chambers Complaints' Procedure is available on our website or on request.

EMPLOYMENT BARRISTERS:

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|------------------------------|-------------------------|
| * David Berkley QC (1979) | * Peter Linstead (1994) |
| * Andrew Thompson* (1969) | * Martina Murphy (1998) |
| * Paul Staddon (1976) | * Nicol Scampion (1999) |
| * David Daly (1979) | * Laura Scott (2001) |
| * Christopher Coney (1979) | * Andrew Sheftel (2004) |
| * Simon Cheves (1980) | * Louise Mankau (2005) |
| * Robin Howard (1986) | * Paul Stevenson (2006) |
| * Christopher Bamford (1987) | |
| * Stephen Heath (1992) | |
| * Catriona MacLaren (1993) | |

* Joint Editor of Harvey on Industrial Relations and Employment Law

³EAT/0047/07: where a Claimant submits a grievance relating to a continuing discriminatory act he is not required to serve a further grievance in respect of the same continuing act.