

Employment Group Bulletin

Issue 3 - Spring 2008

The aim of this quarterly publication is to provide solicitors practising in employment law with a succinct and practical analysis of a selection of recent developments written by members of Tanfield Employment Group. In this issue, there is a helpful summary of the latest maternity and parental leave provisions, and we consider some of the most recent cases on automatic unfair dismissal, agency workers and the trust and confidence term. The final article provides a more light hearted view of a recent EAT case.

David Berkley QC

TRIBUNALS OBLIGED TO CONSIDER AUTOMATIC UNFAIR DISMISSAL

Back in March 2007 the Gibbons Review recommended sweeping reform of, among other things, the Statutory Dispute Resolution Procedures ("the SDRPs") brought in under the Employment Act 2002. The Department of Business, Enterprise & Regulatory Reform (or rather its predecessor the DTI) initiated a consultation over the following 3 months, and it is understood that a government response to the consultation is expected shortly.

While the likelihood is that there will be a significant overhaul, or even scrapping, of the SDRPs, this will almost certainly not be put on the legislative agenda until at least April 2009. The automatic unfair dismissal provisions of s. 98A ERA 1996 are "part of the fabric of unfair dismissal law" as the EAT remarked in the as yet unreported **Venniri v Autodex Ltd. UKEAT/0436/07/ZT** and will remain so for the best part of 2 years.

Venniri concerned the obligation of an employment tribunal to consider automatic unfair dismissal for breach of the Dismissal and Disciplinary steps of the SDRPs when the matter had not specifically been argued by the parties

Mr. Venniri was dismissed for gross misconduct by Autodex on 29 August 2006 at a disciplinary meeting which had taken place without the necessary letter satisfying Step 1 of the dismissal and disciplinary procedures having been sent to him. The EAT remarked that it was also at least arguable that the 29 August meeting itself did not comply with Step 2 either.

Mr. Venniri, appearing in person before the employment tribunal on his complaint of unfair dismissal, included material in the bundle relating to the SDRPs, and mentioned

in his witness statement that he had received nothing in writing before the 29 August meeting. However, he did not argue in terms that his dismissal was automatically unfair under s. 98A. The employment tribunal simply addressed the 'ordinary' unfair dismissal complaint advanced by Mr. Venniri, and found against him.

Before the EAT one of his appeal points was that the employment tribunal had failed to consider an automatic unfair dismissal complaint under s. 98A. Autodex sought to argue that the point had not been raised below and that it was thus not open to Mr. Venniri to raise it on appeal.

The EAT, presided over by HHJ Richardson, pointed out that the SDRPs are part of the fabric of unfair dismissal law and that "[w]hether there is an applicable procedure, whether there has been "non-completion" of that procedure, and whether that non-completion is wholly or mainly attributable to failure by the employer to comply with its requirements, are matters which the Tribunal should have in mind in every unfair dismissal case. It is not necessary for a claimant to raise s98A(1) explicitly; the Tribunal should have the matter in mind as an issue".

The EAT went on to point out that "[o]ften, particularly where a claimant is represented, a few moments of discussion at the beginning of a case will establish that it is conceded that the relevant procedure has been complied with by the employer. But in the absence of an informed concession on the question, the Tribunal should regard s98A(1) as an issue and deal with it in its reasons".

Points to note

The case only relates to dismissal and disciplinary procedures and not to grievances – it is still the employee's responsibility to raise non-compliance with the grievance obligation and wait 28 days before presenting an ET1. Additionally, the judgment is silent on the question of whether there is an obligation on the employment tribunal to consider the reverse-Polkey defence in s. 98A(2). It is certainly arguable that the defence is as much part of the fabric of unfair dismissal law as the matters under s. 98A(1). However, the EAT in **Software 2000 Ltd v Andrews [2007] IRLR 568** observed that "[i]f the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely". It is submitted that the likelihood is that the employment tribunal will not err if it fails to consider the s. 98A(2) defence when the employer does not raise it.

Venniri clearly states that in unfair dismissal claims employment tribunals will err in law if they fail to consider an automatic unfair dismissal claim under s. 98A even if this is not advanced by the employee. The question of automatic unfair dismissal should be an essential part of the practitioner's unfair dismissal case management checklist, and while the s. 98A(2) defence was not under consideration in **Venniri**, it would be prudent for Claimant and Respondent representatives alike to clarify at the outset of cases whether the employer is running the defence.

Stephen Heath

FAMILY RELATED RIGHTS AT WORK

Employment Rights for those with children are complicated and ever changing, most recently through the Work & Families Act 2006 (WAFAs), which came into force in two tranches in October 2006 and April 2007. This article seeks to summarise the basics only*.

Statutory Maternity Pay (SMP)

To be entitled a woman must have been continuously employed for at least 26 weeks ending with the week immediately preceding the 14th week before the expected week of confinement (EWC), and have ceased to work for her employer. She must still be pregnant at the 11th week before her EWC or have had the baby at that time. Her normal weekly earnings must be above the lower earnings limit for NI (£87). She must have notified the employer in writing by the 15th week before the EWC and have given at least 28 days notice of the proposed start date, and have provided a MATB1 certificate from her midwife / GP.

SMP is payable once she has stopped work and for up to 39 weeks. This can be any time from the 11th week before the EWC. First 6 weeks at 90% of average weekly earnings (AWE), subsequent weeks at the lesser of a flat rate of £112.75 p/w or 90% AWE.

Alternatively, Maternity Allowance is payable through the Job Centre for up to 39 weeks at a rate of £112.75 p/w to women not eligible for SMP for one reason or another.

Failure to pay SMP is enforceable in the ET as unlawful deduction of wages and / or application for an adjudication to HMRC.

Maternity Leave

A woman is now entitled to Ordinary Maternity Leave (OML) for 26 weeks and Additional Maternity Leave (AML) of a further 26 weeks *irrespective of length of service*. OML can start from the 11th week before the EWC, but if a woman has a pregnancy related absence in the last 4 weeks leading up to the EWC her OML will be triggered immediately. She must give written notice by the 15th week before her EWC (or as soon as reasonably practicable). Rights during

OML: all normal terms and conditions (except pay) remain in place.

Right to Return

After OML or AML a woman has a right to return to work on terms and conditions not less favourable than if she had not been absent. After OML the right is to return to the same job; after AML the right is to return to that job or if not reasonably practicable to a job which is both suitable for her and appropriate in the circumstances. There are specific provisions about redundancy during ML. A woman can work up to 10 'keep in touch' days without triggering the end of her ML.

Pregnancy Discrimination

It is unlawful to submit a woman to detriment on grounds of pregnancy, birth or the taking of leave. S3A Sex Discrimination Act 1975 also provides specifically for the prohibition of discrimination on grounds of pregnancy or maternity leave.

Automatically Unfair Dismissal

Any dismissal due to pregnancy or connected with it e.g. the taking of ML or assertion of the various maternity rights will be automatically unfair. The employer must first be aware of the pregnancy. Dismissal because of the absence caused by the pregnancy or economic loss arising from it is connected to the pregnancy and thus prohibited.

Paternity Leave

2 consecutive weeks following the birth of a child / adoption with 26 weeks service as at the 14th week before the EWC. Statutory paternity pay is payable at the lesser of £112.75 / 90% of AWE. Can be taken by men or women providing they are the partner of the adopter / mother.

Adoption Leave

Leave of up to one year following adoption to be taken by either parent (not both). Statutory adoption pay for up to 39 weeks at up to 90% of average earnings. Requires 26 weeks continuous service to qualify.

Parental Leave

Entitlement for employees with one year's service and who have or expect to have Parental Responsibility to take up to 13 weeks unpaid leave (in blocks of one week or more) for each child under 5 (or up to 18 if the child is disabled, or 5 years after an adoption if relevant). Each parent has separate entitlement. 21 days notice of the proposed dates must be given. In limited circumstances the employer may postpone the proposed dates. The right to return applies, but if the leave period is more than 4 weeks the modified right to return applies (as for AML).

Dependants Leave

A right to unpaid time off for dependants in cases of (broadly) illness, death, school emergency or breakdown of caring arrangements. A dependant can be a child, parent, spouse / civil partner or member of the same household (not lodgers etc).

Flexible Working

A right to request *in writing* flexible working, not necessarily a right to work flexibly. Limited grounds on which an employer may reject a request, essentially operational grounds.

Proposed changes

The Government proposes to eventually raise the length of time for which SMP is payable to one year. WAFAs gives power to provide by regulations for Additional Paternity Leave of up to 6 months (unpaid or by taking over the Mother's SMP). This is still under consultation.

NB: This area of law is detailed. You should refer to the primary and secondary legislation to assess applicability in individual cases. Relevant Legislation includes: Social Security Contributions and Benefits Act 1992, Employment Rights Act 1996, Employment Relations Act 1999, Employment Act 2002, WAFAs, and the Maternity and Parental Leave Regulations 1999.

Lucy Reed

*applicable to an EWC after 31 Mar 07

FRESH CLARITY ON THE TERM OF TRUST AND CONFIDENCE

The judgment of Bernard Livesey QC in **RDF Media Group and RDF Media Ltd v Alan Clements** [2008] IRLR 207 provides an illuminating analysis of the issue of breach by an employer of the implied term of trust and confidence. The decision provides comfort for directors and managers as authority that they can 'think aloud' amongst themselves about the poor conduct of an employee without breaching the obligation to maintain trust and confidence.

In December 2005 the defendant entered into a service agreement to work as

Director of the claimant company for an indeterminate period terminable on 6 months notice. It was a term of the agreement that he would not work for a business competitor for a period of 3 years.

The dispute arose following an article published in the Scottish Sunday Herald on 18 March 2007 in which the defendant publicly committed himself to the claimant 'for the foreseeable future'. The following day the defendant met with the Chief Executive of Scottish Media Group (SMG), a direct competitor of the claimant, and was offered employment by him. The

defendant met him again on 21 March and disclosed information confidential to the claimant. On 22 March the defendant sent his CV to SMG and met the Chairman, who made a written offer of employment.

On 30 March the defendant told his colleagues that he wanted to leave the company to join SMG and sought a reduction in his notice period to allow him to take up work within weeks. The claimants responded that they intended to hold the defendant to the full term of the covenant and put him on gardening leave for the period of his notice. His colleagues

were shocked, especially after his assertions that he was going to stay. There were internal emails within IWC describing the defendant as a 'c**t' and a 'cheeky f*****'. On 3 April the claimant's Chief Executive, David Frank, sent an email to members of the Board saying that 'Alan's a bit dim' because he had not read the Share Purchase Agreement. Johnathan Slow, a Development Director, wrote to the company's Broker to inform him of the defendant's departure, stating that it was felt that his 'conduct was pretty dishonourable' and 'we either want our money back or him out of the market for the full term plus his reputation in pieces'. The claimant decided to give an interview to the Sunday Herald in which the Managing Director was quoted as saying "he has reneged on his deal" and "If you take the money you do the bloody job. It's just so dishonourable". The article was published on 8 April. The defendant alleged that the remarks were poisonous, untrue and highly damaging to his reputation and in breach of the implied term of trust and confidence.

The defendant asserted constructive dismissal in letters dated 13 April and 27 April. The claimants accepted the letter of 27 April as a repudiatory breach.

The claimant sought a declaration that the defendant voluntarily resigned and an injunction requiring him to abide by the non competition covenant in his contract of

employment. The defendant counter claimed seeking a declaration that the implied term of trust and confidence had been breached by his employer and he was therefore entitled to accept the repudiation and resign.

The judge relied on *Boston Deep Sea Fishing and Ice Co v Ansell* (1889) 39 Ch D 339 for the proposition an employee may rely on a breach of the implied obligation even though he was unaware of it when employed and where his employment came to an end for reasons other than the discovery of the breach. He found that where representations are expressed between members of the Board of Directors of a company which is the employer it is difficult to conceive of circumstances which can give the employee the right to complain of breach of the obligation because the Board is the controlling mind of the company and representation between individuals is merely equivalent to the company thinking aloud to itself.

Where representations are made between the executive members of a company (or between manager and personnel officers) it will usually be a reasonable and proper cause unless the representation went well beyond what was reasonable and proper and that the same may be said of representations to an external adviser such as a company broker. The judge

found that the representations between board members could not amount to a breach and that on the facts the representation to the broker although going further than was reasonable did not achieve the degree of seriousness required to breach the implied term.

Representations to the press fall into a different order of significance and the truth of such a representation may not be a good defence since there are many things which may be true about each one of us which would greatly hurt us if published in the media. If the employer's conduct in publishing the information has caused damage to the employment relationship the employee is entitled to claim the implied obligation has been breached. The judge found the remarks made by the managing director went far beyond what was acceptable whether true or not and amounted to the requisite degree of seriousness to constitute a breach.

However, the judge found that despite the breach by the employer, the defendant's own behaviour in disclosing confidential information at the meeting on 21 March disqualified him from relying upon that breach. The employer was entitled to terminate the contract based on the defendant's repudiation and in the circumstances, they were permitted to rely on the restrictive covenant.

Robin Powell

AGENCY WORKERS REVISITED

In our last issue we dealt with the impact of the Court of Appeal decision in *Cable & Wireless plc v Muscat* [2006] IRLR 354, a case which found that the agency worker was an employee of the end user. The Court endorsed the guidance in *Brooke St. Bureau v Dacas* [2004] IRLR 358 which held a contract of service between worker and end user might be implied as a necessary inference from the conduct of the parties and the work done. However, *Muscat* has not been followed by the expected rush of cases finding an implied contract in these circumstances.

Bean J had called for the whole area to be the subject of legislation in *Craigie v Haringey* UKEAT0556/06/JOJ. The matter has now been given further impetus by the warning given by the TUC on 21st November 2007 that agency workers face a "skills divide" which prevents their ever obtaining full time employment. Meanwhile, discussion over an EU Temporary Agency Directive continues following the Social Affairs Council in December 2007.

In *Wood Group Engineering (North Sea) Ltd. v Karen A. Robertson* LTL 13/8/2007

the Scottish EAT (Lady Smith) allowed an appeal from the ET which had found that an agency worker who had been placed with the same end user for some years was an employee. The ET had proceeded upon the basis that *Dacas* displaced the standard principles previously applied, and applied the test that a contract was to be implied because there was sufficient control over the worker and mutuality of obligation. The EAT held that that was wrong in law: it was not enough that those two elements were present, although they were the "irreducible minimum". The ET had failed to consider whether or not the arrangements were capable of being explained by the agency contract, or to address the question whether it was necessary to imply a contract between worker and end user.

There is an interesting twist in *Consistent Group Ltd. v Kalwak and Welsh Country Foods Ltd* [2007] IRLR 560. In that case the agency workers were held (despite the ratio of *Dacas*) to be employees of the employment agency. This interesting result came about on unusual facts: the EAT said that it was an

"exceptional case". The workers were recruited in Poland, provided with transport to the UK, and signed contracts purporting to make them "sub-contractors". The employment agency provided them with accommodation (for which the workers paid as much as £56.40 per week deducted from their pay) and transport. The contracts required them to provide their services to the agency (save in certain restricted circumstances). The ET said: "Here were seekers after work who could not adequately speak English, ... for whom any purported freedom to work or not work, to work for anyone other than one employer, were unreal". Certain clauses in their contracts were "a sham inserted into the documents to give the appearance of relieving [the agency] from the burden of being employers, not seriously to reflect the real relationship...". The EAT held that the ET was entitled to make the findings of fact that it did, and, on the basis of those facts, to find that in reality the workers were employees of the agency.

Christopher Coney

ADVOCACY BEST PRACTICE – DON'T SET OFF THE FIRE ALARM

This decision in *Haque v Greene & Co.* UKEAT/0616/06, posted on the EAT website on 4th November 2007, provides examples of a number of unorthodox persuasive techniques which did not succeed.

Ms H was summarily dismissed when she responded to a request that she answer the telephone by saying "F... off you white bitch." She brought an application claiming racial discrimination, unfair dismissal and wrongful dismissal.

In the ET some of her claims were struck out by a Chairman who allowed others to proceed. The EAT found that "to contend that [the Chairman] was biased in part and not in others is a very difficult, and, we suggest, illogical proposition".

A second Chairman dealt with certain striking-out issues and also costs. Among his orders which were brought up to the EAT was one that both Ms. H and G, her MacKenzie friend, desist from corresponding with the tribunal. This followed receipt by the Regional Chairman of a letter on paper headed "Consumer Einsatzgruppen, Sword Investigations" with the slogan "Defenders of Truth and Justice" which complained of "scandalous, vexatious and racist behaviour". Other correspondence from G compared the Respondents' behaviour to "Israel's racist disproportionate massacres of innocent civilians".

Another order raised with the EAT involved the costs of part of the case in which G was involved. Among disruptive conduct identified by the Chairman was shouting by both G and Ms H as judgment was given and while the tape was running, which required more than one warning.

The appeals, against four decisions altogether, were based on bias.

Unusually for appeals against decisions made by a Chairman alone, a full panel sat for a preliminary hearing. Came the day, the EAT received "Notice of Picketing" and, as the judgment records "All the Judges and lay members that day were decanted onto the Embankment for a fire alarm." There the panel were leafleted by Ms H's supporters, some of whom they recognised, including G the MacKenzie friend below, D a vexatious litigant so declared both by the Court of Appeal and subsequently the EAT, and S, recently released from custody under the Mental Health Act from whom the EAT refused to receive evidence.

Ms. H may not have created a favourable impression on HHJ McMullen QC when she failed to remember that she had appeared before him in a previous case. "She should. She succeeded." She certainly made an unfavourable impression by misinforming him as to what happened to a subsequent application in the Court of Appeal.

None of which, of course, will have had any bearing on the EAT's decision to dismiss all her appeals, which was based on studious application of the well-known principles set out in *Locabail, Ansar and Bennett*. She was refused permission to appeal further.

The Respondents may have considered themselves a little unlucky to have been awarded no more than counsel's brief fee for the day: only about a third of their costs of the appearance.

Robin Howard

THE EMPLOYMENT GROUP

- ▷ David Berkley QC (1979)
- ▷ Andrew Thompson (1969)*
- ▷ Paul Staddon (1976)
- ▷ David Daly (1979)
- ▷ Christopher Coney (1979)
- ▷ Simon Cheves (1980)
- ▷ Robin Howard (1986)
- ▷ Michael Bailey (1986)
- ▷ Stephen Heath (1992)
- ▷ Catriona MacLaren (1993)
- ▷ Robin Powell (1993)
- ▷ Peter Linstead (1994)
- ▷ Martina Murphy (1998)
- ▷ Nicol Scampion (1999)
- ▷ Lucy Reed (2002)
- ▷ Andrew Sheftel (2004)
- ▷ Louise Mankau (2005)

*Joint Editor of *Harvey on Industrial Relations and Employment Law*

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