



EMPLOYMENT GROUP BULLETIN



Statutory employment law, as always, is rapidly evolving. This year sees in the abolition of the 'default retirement age'. Consultation is taking place on extending the right to request flexible working and making it possible for parents to share their parental leave. The Government has also announced that it will consider putting a cap on awards in discrimination cases, reducing collective redundancy consultation periods and making the TUPE rules more flexible. It remains to be seen how far it will be restricted by EU law in the extent of any changes.

But case law can also transform the legal landscape. In this edition, Stephen Heath discusses recent cases on misconduct dismissals. Peter Linstead considers recent trends in appellate decisions on costs orders and asks what impact they have in practice.

SARAH STANZEL

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MISCONDUCT DISMISSALS: AN UPDATE

Conduct based unfair dismissals are perhaps the most familiar to the practitioner, but some recent Court of Appeal decisions prove that novel issues can arise in them, and that, despite their familiarity, outcomes can be difficult to predict. In this article, Stephen Heath sets out the most recent decisions and draws some helpful conclusions.

In **Orr v Milton Keynes Council [2011] IRLR 317** the Claimant, a black youth worker, was dismissed for gross misconduct in relation to i) an allegation of rudeness towards his manager, and ii) discussing a sexual assault with young service users contrary to specific instructions. The Claimant failed to attend his disciplinary hearing and thus failed to make the dismissing officer aware that the manager had himself behaved in an underhand manner, which had prompted the Claimant's outburst, and had further made racially discriminatory comments during the course of the argument. The ET upheld his complaint of race discrimination in respect of the comments, but dismissed his unfair dismissal claim. The Court of Appeal (Sedley LJ dissenting) rejected an argument that the employer, through the Claimant's manager who had made the comments and behaved in an underhand manner, as a matter of law knew of the provocation that would have mitigated the offence. The Court conducted a thorough review of the statutory history of s. 98(4) ERA 1996 and the attendant case law and concluded that *"the tribunal's task is confined to deciding whether in the light of information available at the time the employer's decision was reasonable in the sense of being one that a reasonable employer could have made"*.

Whether a dismissal is one that a reasonable employer could have made, or whether such dismissal was within *"the range of reasonable responses"* open to an employer was the matter at hand in the cases of **Bowater v Northwest London Hospitals NHS Trust [2011] IRLR 331** and **Fuller v London Borough of Brent [2011] IRLR 414**. In **Bowater** the Claimant, a nurse, had adopted an inappropriate

MISCONDUCT DISMISSALS: AN UPDATE

EASIER TO GET COSTS?

CONTINUED OVERLEAF



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Called in 1999, Sarah practises exclusively employment law and appears at all levels including Employment Appeal Tribunal and Court of Appeal. She is increasingly instructed in cases with a cross-border element. Her languages include German, French, Italian, Spanish and Portuguese and

she regularly advises foreign clients based in the UK and abroad in their respective language. She has recently been invited abroad to give talks to the Italian, Spanish and European Employment Lawyers Associations and has published legal articles in the ELA Briefing and in publications aimed at the French community in the UK. She regularly undertakes pro bono work, particularly as a volunteer at Latin American House and the French legal advice clinic.

restraining technique on a male patient having a violent seizure and made an inappropriate lewd comment during the course of it. By a majority decision the ET found the dismissal to be outside the band of reasonable responses as the employer had failed to take account of numerous mitigating factors including that the comment would have been regarded as “merely humorous” by a large proportion of the population (including the author!). The EAT overturned the decision in part as it felt that the relevant question was how such a comment would have been treated by a reasonable NHS Trust. The Court of Appeal restored the ET’s decision, commenting *“It is important that, in cases of this kind, the EAT pays proper respect to the decision of the ET. It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt sometimes, difficult and borderline decisions in relation to the fairness of dismissal”*.

“The Court of Appeal is giving out signals that the ET is the forum best placed to adjudicate on questions of fairness and that the EAT should not interfere unless an overwhelming case of perversity is made out.”

In **Fuller** the Claimant, a bursar in a school for children with emotional and social difficulties, was dismissed for gross misconduct after she intervened and made inappropriate allegations against a teacher restraining a child and refused to follow direct instructions from the head teacher. She had similarly intervened in a previous incident and had been spoken to by the head teacher. The ET found that no reasonable employer would have dismissed for what it found to be a “one-off” incident and that the earlier incident had been vastly overstated. The EAT found that the ET had substituted its own view for that of the employer. The Court of Appeal, by a majority, restored the decision of the ET. In the leading judgment Mummery LJ commented that in appeals on s. 98(4) ERA 1996 the appellate bodies should guard against themselves substituting their own view of the reasonable employer’s response for the view formed by the ET. The dissenting judgment of Moore-Bick LJ, who also sat in **Orr**, set out the importance of the ET understanding that it is concerned not with what *it* thought happened, but with what the employer thought happened.

These cases illustrate the fact that what is under focus in a misconduct unfair dismissal is not so much the behaviour of the Claimant, but the actions of the employer. The cases also, perhaps, indicate that the Court of Appeal is giving out signals that the ET is the forum best placed to adjudicate on questions of fairness and that the EAT should not interfere unless an overwhelming case of perversity is made out. Finally, the fact that in these cases there were majority decisions in both ET and Court of Appeal and disagreements between ET, EAT and Court of Appeal shows that, despite their familiarity, misconduct cases can be very difficult to judge for practitioners and judiciary alike.

STEPHEN HEATH

OUR AUTHORS



IT IS GETTING EASIER TO

In December 2009, Peter Linstead represented successful respondents who were ordered to pay the entirety of the respondents’ costs. Prior to this, costs orders are being sought more frequently and there are some who do not grant them. In this article, Peter Linstead considers the trends in costs orders and how they have on day-to-day practice.

LATE ACCEPTANCE OF REASONABLE OFFERS

The most striking recent decision is **G4S Services v Rondeau UKEAT 0207/09** in which the EAT (Burton J) held that accepting an offer to settle the appeal at the door of court on 13 October 2009, which had been turned down on 19 May 2009, constituted unreasonable conduct of the litigation.

There had been an ET judgment in the claimant’s favour and a significant award of damages. The respondent appealed. Settlement appears to have been reached on the basis that the appeal would be allowed by consent, but only to the extent that the lesser sum of £30,000 would be substituted for the sum awarded by the tribunal.

A full analysis of the impact of the decision is hampered by the lack of detail in the case report. However, it is fair to assume that the original offer was ‘without prejudice save as to costs’ (a “**Calderbank**” offer). It can also be assumed that the parties had not entered into a compromise agreement on the basis that there would be no order as to costs.

Despite the somewhat atypical facts, **Rondeau** contains some important observations by the former President of the EAT. He said that a party is entitled to resist an appeal unless and until there is an outcome or an offer which requires consideration. He described making and considering offers as “*part and parcel of any litigation proceedings*”.

It does not necessarily follow that the respondent would have obtained costs if the claimant had lost the appeal. **Kopel v Safeway Stores [2003] IRLR 753** established that the refusal of an offer can only lead to costs if it amounted to unreasonable conduct. But it is still worth noting the readiness of the EAT to highlight the claimant’s approach to settlement, from a costs perspective. That said, there is a difference between settling an EAT appeal and settling first instance tribunal claims because a claimant is entitled to a finding that s/he was unfairly dismissed, regardless of any financial outcome: **Telephone Information Services v Wilkinson [1991] IRLR 148**.



STEPHEN HEATH

Stephen Heath is an employment specialist, undertaking work for Claimants and Respondents alike in most areas of employment law. He is instructed by a number of local authorities and has a great deal of experience in their procedures and working practices. He has a particular interest in high value, high-stakes discrimination claims and has conducted numerous lengthy, document heavy tribunal claims in which he maintains an attention to detail without losing sight of the bigger picture. He conducts cases for the Bar Pro Bono Unit and in the EAT under the ELAAS scheme. Outside of work Stephen enjoys cricket, cooking, and trying to keep up with his 7 year old twin boys.



PETER LINSTEAD

Peter Linstead's recent instructions have included: appearing in the Court of Appeal arguing about the burden of proof in race discrimination (**St Christopher's Fellowship v Walters-Ennis [2010] EqLR 82**) and about public sector equal pay (**Ebbs v Oxford Brookes University and Secretary of State for Education**); acting for a local authority in a multiple claimant equal pay claim; and, acting for a company against four defendants in the Mercantile Court in a trial based on unlawful competition. He speaks regularly on employment law issues and also writes in this area, one of his articles appearing in the ELA Briefing in July 2011. He is the Head of Tanfield Chambers' Employment Group.

DO GET COSTS?

Respondents in an employment tribunal in which the claimant was successful. In **Verma v Harrogate NHS Trust UKEAT/0155/09**, these were valued at over £6,000. In **Rondeau v Harrogate NHS Trust UKEAT/0155/09**, these were valued at over £6,000 since 2004 but our experience at Tanfield Chambers is that there are some indications of an increasing willingness by tribunals to award costs. In the most recent EAT decisions on costs and what impact they have on the parties.

RESISTING STRONG EAT APPEALS

Rondeau is not the only case in which an EAT respondent has had a costs order made against him for seeking to resist a strong appeal. In **Verma v Harrogate NHS Trust UKEAT/0155/09**, the respondent made a written response to the EAT appeal instead of attending, and had made offers to settle of £1,791 and £3,500 respectively. The employee was awarded just over £6,000 after successfully appealing the ET's decision on costs. The respondent was ordered to pay the employee's costs of the appeal on the basis that there was "no realistic prospect" of the EAT upholding the tribunal's order.

In some respects, this sounds like an application of the **Calderbank** principle, given that the appellant achieved more than the amount offered in settlement. But it might be better to view this as an application of the discretion to award costs following unreasonable conduct by the respondent in resisting an appeal which was bound to succeed. Nevertheless, the Judge took account of the respondent's offers to settle, and non-attendance, as recognition of the weakness of his position.

Advisers should be re-assessing the reasonableness of the position adopted by their clients at all stages of proceedings, including in relation to questions of settlement.

WITHDRAWAL

Late withdrawal of a claim can give rise to a claim for costs. However, in **Yerrakalva v Barnsley 0231/10** the President of the EAT clarified that there should be no general rule to the effect that the withdrawal of a claim constitutes, or is tantamount to, an acknowledgement that the claim was misconceived, not least because such a rule would be a powerful disincentive to a party taking a decision to withdraw. The crucial question, as stated in **McPherson v BNP Paribas [2004] IRLR 558**, is not whether withdrawal of the claim is in itself unreasonable but whether, in all the circumstances of the case, the applicant has conducted the proceedings unreasonably.



LYING TO THE TRIBUNAL

Recent EAT decisions confirm that lying on oath is unreasonable conduct. Express findings of dishonesty are relatively rare as tribunals more often say they prefer the evidence of one person over another. However, in these decisions the EAT has shown a willingness to discover findings of dishonesty, supporting costs claims, in decisions where the tribunals have not expressly said so.

In **Daleside Nursing Home v Mathew 0519/08** the tribunal did not state in terms that there had been dishonesty but did not accept the claimant's evidence that her manager had called her a "black bitch" saying that they "preferred" her manager's evidence, and it was "incomprehensible" that the claimant had not complained about the matter until 3 weeks later when disciplinary charges were brought against her. The Tribunal declined to make a costs order on the basis that the claimant had a genuine belief in her claim. However, the EAT found that their decision had necessarily involved a finding that her allegation was a deliberate lie and it was an error of law not to find this unreasonable.

In **Dunedin Canmore HA v Donaldson 0014/09** the issue in the relevant proceedings was whether the claimant had breached a compromise agreement by divulging its content to colleagues. The claimant denied making disclosures to two people, but the tribunal found that she had, having heard evidence from one of them. The EAT (Lady

Smith) said that they had "in effect found that the claimant had not been telling the truth... she had lied under oath..".

In **Nicholson v Nicholson [2010] IRLR 859** the claimant had been dismissed for gross misconduct amounting to a fraud on the company and he was found to have been untruthful in evidence, but he succeeded purely because of a breach of the statutory dismissal procedures. However, the EAT's decision to overturn the ET's decision not to award the respondent costs is questionable, given the claimant's entitlement to pursue an order for unfair dismissal (see above).

HOW RELEVANT ARE THE CLAIMANT'S MEANS TO THE AMOUNT OF COSTS AWARDED?

The tribunal "may" have regard to the paying party's ability to pay under Rule 41(2). Although on the face of it this discretion is unfettered, the EAT in **Jilley v Birmingham NHS Trust UKEAT 584/06** held that if a tribunal does not take account of means, it needs to say why, and if it does, it needs to give reasons.

This means that in practice it is difficult to argue that means should be ignored, unless the paying party has not attended or has given unsatisfactory evidence. Nevertheless, tribunals are often willing to enquire into the detail of a person's financial circumstances. The employment tribunal in **Keane v Investigo** took into account that the claimant, although on low income, owned a property with equity in it, before ordering her to pay a six figure sum in costs.

THE AMOUNT OF COSTS

It is generally impossible to advise clients as to the level of costs likely to be awarded, in the event that an order is made. It is not uncommon for a party applying for costs to receive somewhat less than the amount sought, or indeed, just a few hundred pounds, without understanding why. The tribunal should be giving clear reasons and recent EAT decisions emphasise the need for a rational basis for the level of award.

For example, in **Yerrakalva v Barnsley Metropolitan Borough Council UKEAT/0231/10** para 16 the EAT confirmed that, whilst there does not have to be a precise causal relationship between that and the costs claimed, any award of costs must, at least broadly, reflect the conduct in question even though there is no requirement to that effect in the rules.

In **Verma v Harrogate NHS Trust UKEAT/0155/09** the EAT held that where a costs order is made pursuant to dismissal of a "hopeless" strike out application made by the Respondent, it is perverse to allow recovery of Counsel's fees for attending the PHR and drafting a skeleton argument, whilst excluding recovery of the Solicitor's costs of preparation for the PHR and attendance on Counsel at the hearing.

CONCLUSION

Evidence that more costs orders are being made is anecdotal, but there is a significant practical development in the willingness of the EAT to explain or re-interpret ET findings on the basis that parties have been deliberately untruthful. This may provide greater scope for the successful party, where the other side's case relied on untruths, to apply for a costs order. In addition, the EAT's exercise of its own costs jurisdiction, in cases such as **Rondeau** and **Verma**, suggests, at the very least, that advisers should be re-assessing the reasonableness of the position adopted by their clients at all stages of proceedings, including in relation to questions of settlement.

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EMPLOYMENT BARRISTERS:

David Berkley QC (1979)

Iain Mitchell QC (1976)

Andrew Thompson* (1969)

Paul Staddon (1976)

David Daly (1979)

Simon Cheves (1980)

Robin Howard (1986)

Christopher Bamford (1987)

Stephen Heath (1992)

Catriona MacLaren (1993)

Peter Linstead (1994)

Martina Murphy (1998)

Sarah Stanzel (1999)

Laura Robinson (2001)

Andrew Sheftel (2004)

Louise Mankau (2005)

Paul Stevenson (2006)

Gemma de Cordova (2006)

Cecily Crampin (2008)

* Joint Editor of Harvey on Industrial Relations and Employment Law

CLERKING TEAM



KEVIN MOORE

Kevin Moore has been a barristers' clerk for 37 years and joined Chambers in 1999 having previously been senior clerk in a highly regarded commercial set. He is a member of the Institute of Barristers' Clerks.

Kevin is responsible for the overall clerking of Chambers and is happy to discuss any aspect of the service with clients. His flexible and pragmatic approach to the job is appreciated by solicitors who instruct Chambers and has been recognised in the Legal 500.

Kevin is married with 3 grown up children who still manage to be a drain on resources. In his spare time Kevin is a long suffering supporter of West Ham United FC.



DAVID WRIGHT

David has been clerking for 12 years in leading commercial and employment sets. David is a qualified barristers' clerk and is a member of the Institute of Barristers' Clerks.

In 2007, David joined Tanfield Chambers as the Principal Clerk to the Employment, Commercial and International Dispute teams within Chambers where he has put his wealth of experience to good use. His combination of hard-work, organisation and practice development skills has proved a real asset to Chambers. When agreeing fees and liaising with Solicitors, David always strives to remain client focussed and fair.

In his spare time David plays squash and badminton and has been a Scout Leader at his local Troop for 14 years.

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.