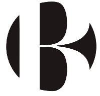

EMPLOYMENT LAW BULLETIN

WELCOME

The annual employment tribunal statistics for 2010-2011 have just been published. They show an 8% decrease in employment tribunal claims in the last twelve months. Not only is this good news for employers, it is surprising in the light of the continuing economic climate and large numbers of redundancies.

Interestingly, but unsurprisingly, the number of age discrimination claims has increased. This will probably rocket in the next 12 months, once employers who do not know they can no longer compulsorily retire employees at 65 after 1st October find themselves at the wrong end of age discrimination claims (and please don't use that as an excuse to forcibly retire people this month; there are some serious consequences of doing so in the run-up to October – speak to us first).

Caroline Mitchell
Beers LLP

PAY CUTS

We start this month with three cases in which employers have made various attempts to cut pay. In Driver v Air India an employment contract provided for shift work and overtime, but didn't specify payment amounts. When the employer stopped paying overtime at time and a half, and asserted it should be unpaid because the contract did not provide for payment, the Court of Appeal decided that although he did not have a contractually agreed payment, this did not mean that he had to work unpaid. Instead, it meant that he was entitled to a 'reasonable' sum.

An employer's decision not to pay a bonus was upheld in Hellewell v AXA Services, where the bonus was stated to be discretionary and provided for conditions to be met before a bonus would be paid. The EAT was clear that there was no contractual obligation to make the payment, which in turn meant that there was no deduction of wages. This is a good example of an employer having a clearly worded bonus provision. If you pay bonuses, you should always make sure there is something in writing which makes it clear whether they are discretionary, whether conditions must first be met and whether there are any special factors relating to payment of bonus on termination of employment or during a notice period.

Of interest to many will be a case where an employer dismissed an employee for refusing to accept a pay cut, and it was found to be a reasonable dismissal – Garside and Laycock Ltd v Booth. Before you rush to follow suit, it is worth noting the details of this case. Mr Booth was the only one of all the employees who refused to accept a 5% pay cut at the request of the management, who took a cut themselves.

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The company was in financial difficulties and the employees were allowed a vote on the cut before it was put into effect. Several meetings were held with Mr Booth to try and persuade him to agree and he was offered a review in six months. He held out and was eventually dismissed. The fact that the management had also taken the cut, and had not tried to simply impose the measure on the work force without consultation, were strong factors which led to this being a fair dismissal.

CAN YOU ACT BADLY IF EVERYONE ELSE DOES?

Can it ever be a defence to an employee's claim of bad behaviour that such bad behaviour was the norm for the industry? In McBride v Falkirk Football and Athletics Club, Mr McBride resigned from his role as coach of the U19 team because he had been told – without any prior discussion – that he would no longer be able to pick the team.

The Club argued that the lack of communication and autocratic management style was the norm within the football industry, which meant that there was no breach of contract. The Employment Appeal Tribunal did not agree: every employer, no matter what the 'norm' may be, has a duty not to act in a way that seriously damages their relationship with their employee.

RACIAL HARASSMENT

The issue of what constitutes harassment has been before the courts recently. In the first case, a child resident in a children's council run home regularly directed racially abusive language towards an Iranian employee, mocking his accent. In response to his claim for harassment on the basis that the council had done nothing to protect him from the child's behaviour, the council argued that the child was not motivated by the employee's race; his motive was just to upset the employee. Although this might be a contender for the 'cheekiest argument of the year' award, the argument was rejected by the Employment Appeal Tribunal, which found that to mock a racial characteristic such as an accent was analogous to racial abuse.

On similar lines, a tribunal has recently ruled that using the name 'Borat' to refer to someone from Eastern Europe (in this case, Poland), amounted to discrimination. Mr Ruda worked for Tei, an engineering company in Wakefield. His nickname, 'Borat', was given to him because of his national origin, and a tribunal held he had been subjected to racial harassment.

Other past examples that have been found by tribunals to be discrimination include calling an Irishman a 'thick Paddy', and references to Hitler and making Nazi salutes to a German worker.

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PROTECTION FOR PHILOSOPHICAL BELIEFS

Employees have a right not to be discriminated against on the grounds of their philosophical belief. This raises the question of what is meant by a 'philosophical belief'. Perhaps surprisingly, some beliefs that tribunals have held are protected include anti fox hunting views, a deep belief in environmental issues and in the ethos of the BBC.

A philosophical belief must have cogency, consistency and personal importance – all of which were held by an un-named midwife who was banned from wearing a silver collar to work symbolising her belief in BDSM (Bondage, Discipline and Sado-Masochism). While accepting that her views did have those required trademarks, the tribunal drew the line at accepting that a way of life involving 'consensual slavery' could be legally recognised in a democratic society and refused to accept BDSM as a belief which should be protected.

A pro-life belief held by two nurses at a London hospital was asserted to be a protected philosophical belief, forcing the hospital to back down from its insistence that the two undertake work in an abortion clinic after their lawyer cited the Equality Act 2010 in their defence. Their duties were changed, avoiding a claim and so the argument will clearly have to wait for another day.

WHEN IS A SELF EMPLOYED CONTRACTOR REALLY AN EMPLOYEE?

The Supreme Court has made it clear that when deciding whether someone is a self-employed contractor or an employee, the focus of the question must be to discover the actual legal obligations of the parties, and that this is done by examining not only the written terms but also how the parties acted in practice and what their expectations of each other were.

In the case, Autoclenz Ltd v Belcher, car valets were paid on a piecework basis, submitted weekly invoices, paid their own tax and NIC, and had written agreements stating that they were self employed contractors. Nonetheless, in practice, some aspects of the actual relationship negated what the contract documents said; for example a term that the valets did not have to carry out work personally. The Supreme Court held that actual practice overrode what the parties had written down, and that the individuals were accordingly employees.

What about the situation where an individual who has always been categorised as self employed then claims to be an employee so that they can claim unfair dismissal? If there has been some kind of deliberate misrepresentation (normally for tax avoidance purposes) then the contract may be ruled illegal and the individual will lose their claim by default.

In Connolly v Whitestone Solicitors, while the claimant solicitor originally saw himself as self-employed, over the three years he worked for the firm, he realised that he was actually an employee but in the absence of any review, he had no choice but to keep submitting invoices. The Employment Appeal Tribunal decided that in the absence of misrepresentation to HMRC, that is, deliberately representing himself as self employed in the knowledge that it was unsustainable to do so, the employment contract (for such it was) could not be ruled illegal.

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REVENGE IS SWEET... BUT PRICEY

Recent dismissals which have been judged to be unfair or dscriminatory provide salutary lessons for employers. In one, Ufuoma Obahor ran a dry-cleaners in Cookstown, Northern Ireland. When, in 2010, he commented to his member of staff Anna Stirrup that, at age 50, she was "too old to work five days a week", she felt understandably harassed, brought a claim and was awarded £6,000.

Six weeks later Mr Obahor dismissed Ms Stirrup for gross misconduct. The tribunal was not convinced about the reasons he gave – it concluded that in all the circumstances and given the timing, this was actually an act of victimisation. Ms Stirrup has now been awarded a further £24,147.

AND FINALLY...

Virgin have just been found to have unfairly dismissed four former employees after they were sacked for gross misconduct on the grounds that they allegedly distributed links to a video clip claiming to show a Taliban fighter having sex with a donkey. One of the sacked employees said: "It's a night vision clip so all you can make out is green with black blobs, it's really very tame... When we were dismissed I showed the video to my mother and she wasn't offended by it".

Offensive or not, the four pointed out that more senior Virgin staff – allegedly regularly sent pornography to the airline's staff (and were able to produce a substantial amount of evidence to suggest that this was accepted practice). They also claimed that they had not been made aware of Virgin's email and IT usage policy.

The tribunal found in their favour although they decided that the employees had contributed to their dismissal. But the judge also reportedly rebuked the airline for relying on the company's internet policy in the case of one of the employees who was dismissed for sending an email from home, on a day off, using a personal email account.

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