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## Note from the editor

In the last Update we mentioned the proposed replacement of the Statutory Disciplinary and Grievance Procedures. To that end the Government published an Employment Bill at the end of 2007.

The Bill does indeed propose the wholesale repeal of the statutory dismissal and grievance procedures. In place of the statutory dismissal procedure tribunals will be given the discretion to increase awards of compensation by up to 25% if an employer unreasonably fails to comply with a relevant code of practice.

Whilst the simplicity of the new regime will be welcomed by employers, the indications are that, although the Bill is expected to receive Royal Assent by Summer 2008, it is unlikely to come into force before April 2009. This means that employers must continue to follow the current procedures with all their attendant complexities until that date.

This edition's topic takes a look at some of the first cases on age discrimination. Whilst they are all first instance decisions and so are not binding on other tribunals they give an idea of the type of claims that are being decided.

Looking ahead, we will be running the usual short series of round-the-table briefings in the Summer, split between morning and afternoon sessions and we will let you have more details nearer the time.



Janet Simpson, Editor

A BALANCE MUST BE STRUCK BETWEEN AN EMPLOYER'S INTEREST IN MANAGING HIS BUSINESS AND THE EMPLOYEE'S INTEREST IN NOT BEING UNFAIRLY AND IMPROPERLY EXPLOITED.

## Cases

### Alternative employment in a redundancy situation

Redundancy is a complicated area of employment law. Two areas of redundancy procedure where employers regularly come unstuck are the adoption of appropriate criteria when selecting for redundancy and the obligation to consider other available posts within the organisation for those at risk of redundancy. A tribunal had to consider both these issues in the case of *Ralph Martindale & Company Ltd v Harris*.

The employer M, decided to remove a layer of management due to a down-turn in the business. H and E were put at risk of redundancy. A single position was created which was open to internal competition. H and E both applied for the position, along with another candidate who was not at risk of redundancy. E was selected for the job on the basis that he had the "less insular" management style and H was made redundant. A tribunal, upheld by the EAT, decided that the dismissal was unfair. The tribunal first held that the decision to appoint E to the job was based on the view of one director as to who was best for the job, and this was clearly subjective. The tribunal also held that when employees are at risk of redundancy and a vacancy arises or is created as a consequence then the vacancy should not be open to other candidates until it is established that no-one who is at risk of redundancy is suitable for the job. H's dismissal for redundancy was accordingly unfair.

### Comment

Although most employers are aware that selection for redundancy should be done by applying objective criteria, all too often those in HR are put under pressure to ensure that certain people are not selected and this can give employees who are not retained valid grounds to complain. This case reinforces the fact that selection for redundancy must be capable of being objectively justified. In addition it is quite common for those at risk of redundancy to be told to take their chances for alternative jobs with all the other candidates (sometimes even external candidates). Whilst this decision does not say that those at risk must be appointed to any alternative position, it does make it clear that they must be considered first. There would, however, perhaps be circumstances where it would not be appropriate to consider a person at risk of redundancy for another job, for example, where the alternative position required qualifications that the person at risk did not have.

### Implied duty of trust and confidence

A mutual duty of trust and confidence between employer and employee is implied into all contracts of employment. If the employer breaches this term, it entitles the employee to resign and claim constructive dismissal. Unfortunately, there is little guidance on what amounts to a breach of this duty with most cases being judged on their own particular facts. The High Court was, however, prepared to offer some guidance on this topic in the case of *RDF Media Group plc v Alan Clements* (where the defendant was the husband of Kirsty Wark of Newsnight).

C was employed by RDF and his employment was subject to restrictive covenants. C resigned to work with the Scottish Media Group Plc (SMG) in a similar role. He sought a reduction in his notice period to enable him to take up the new post immediately. C was placed on garden leave and RDF made it clear that it considered that C was bound by his non-compete clause. Both sides briefed the media about what was happening. C claimed that some of the comments were: "poisonous, untrue and highly damaging to his reputation" and so resigned and claimed constructive dismissal. RDF denied he had been constructively dismissed and tried to carry on paying him. C refused the remuneration and RDF stated that they accepted C's repudiatory breach of contract. During this time C asked his secretary to secretly gain access to the emails of one of the directors of RDF. RDF brought proceedings against C to enforce the non-compete provisions. It was accepted that if C had been constructively dismissed then the period of restriction would be reduced.

The High Court gave the following guidance on how to decide whether a breach of the duty of trust and confidence had taken place:

- The implied obligation of trust and confidence requires that the employer shall not "without reasonable and proper cause" conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
- A balance must be struck between an employer's interest in managing his business and the employee's interest in not being unfairly and improperly exploited. The implied duty adds more to the employer's obligations than to the employee's existing obligations.
- In deciding whether there is a breach, what is relevant is the impact of the employer's action or actions upon the

...TWICE DURING THE INTERVIEW PROCESS M WAS ASKED WHETHER HE HAD THE DRIVE AND THE MOTIVATION FOR THE JOB; A QUESTION THAT WAS NOT PUT TO THE YOUNGER CANDIDATES.

employee, rather than what the employer intended.

- The burden lies on the employee to prove on the balance of probabilities that there was a breach. So if the employer establishes good grounds for the conduct, the employee must prove the absence of reasonable and proper cause.
- In deciding whether an employee has been constructively dismissed it is not enough that there is a breach of contract or that the employer is “out of order”. The conduct of the employer has to be sufficiently serious for the employee to be allowed to leave without notice.
- A communication between Board members cannot provide the foundations of a constructive dismissal complaint. This is the company “thinking aloud”. This also applies to communications with external advisors.

Taking the above matters into account the High Court held that, although the comments made to the press by RDF could be a repudiatory breach of contract, C had discussed confidential information with his new employer. It was therefore held that that C was bound by the full period of restriction.

#### Comment

The facts of this case are a common example of what happens when a senior employee wishes to leave to join a competitor, but is bound by restrictive covenants. The judgment is therefore a useful guide for employers on how to deal with the situation where the employee decides that the way out of the impasse is to find (or manufacture!) grounds of complaint, resign and claim constructive dismissal.

## This edition's topic - Current issues

### Age discrimination claims round-up

The trickle has yet to become a flood, but there have been a number of first instance decisions on claims of age discrimination. It may be that age discrimination will not be as rich a source of claims as other strands of discrimination, but it is probably more likely that the number of claims will increase as employees become more aware of the implications of the legislation. We have divided the cases into two categories.

#### Claims based on retirement policy or retirement age

In the most widely publicised claim, *Bloxham v Freshfields*, a partner at the law firm Freshfields lost his claim of age discrimination which arose out of changes to the firm's retirement policy. As the number of partners at the firm increased, a review was undertaken as to how the retirement policy could be reformed, and the effect of the new policy that was proposed was to disadvantage those nearest to retirement.

A tribunal held that Freshfields' general aim in the reform of its pension arrangements was to provide a pension arrangement that was more sustainable in the long-term and to reduce the effect of current intergenerational unfairness to younger partners. Therefore a change to the retirement policy was, although indirectly discriminatory against the claimant, a proportionate means of achieving a legitimate aim.

The following two cases were concerned with the retirement of two individuals who were not employees and to whom the default retirement provisions in the Regulations did not therefore apply. In *Seldon v Clarkson Wright and Jakes* a tribunal held that the compulsory retirement of a partner at the age of 65 was not an act of age discrimination as it was a proportionate means of achieving a legitimate aim, which was the maintenance of a congenial and supportive culture and of encouraging associates to remain within the firm. In a case on similar facts, *Hampton v The Lord Chancellor*, H held the judicial office of recorder. He too was compulsorily retired from his position at the age of 65. It was accepted that he suffered less favourable treatment on the grounds of age and the question then was whether this retirement policy could be justified. The tribunal accepted that maintaining a reasonable flow of new appointments was a legitimate aim, but then had to consider whether the retirement policy was a proportionate means of achieving that aim. The tribunal held that it was not, as it was not satisfied that allowing Recorders to work beyond the age of 65 was actually stifling the promotion prospects of younger office holders.

#### Too young or too old

In a case from Northern Ireland, *McCoy v James McGregor and Sons Ltd*, an industrial tribunal (as they are still called in that province) held that M had been subjected to unlawful age discrimination. The job advert to which he responded stated that the company was looking for someone with “youthful enthusiasm” and twice during the interview process M was asked whether he had the drive and the motivation for the job; a question that was not put to the younger candidates. At the opposite end of the spectrum, in *Thomas v Eight Members Club* a 20 year old membership secretary lost her job because, she claimed, that she had been told that she was not mature enough to handle the members. T won her claim, although it should be noted that the club she worked for strongly disputed the reason for dismissal and said that she was sacked for poor performance.

THERE WAS NO EXPLANATION UNRELATED TO  
AGE TO REBUT THE PRIMA FACIE CASE OF  
AGE DISCRIMINATION

In *Lawrence Court v Dennis Publishing Ltd* the claimant, C, alleged that there was a bias against older workers at D Ltd which led to him being unfairly selected for redundancy. A tribunal upheld his claim after it heard evidence that all the members of the team in which C worked were at least twenty years younger than he was and that all employees were given a copy of a book written by the founder of the company which stated that one of the ways to get rich was to underpay young talent and then get rid of them. With regard to his selection for redundancy, out of a pool of five people in which he was the oldest the tribunal held that there was no explanation unrelated to age to rebut the prima facie case of age discrimination and D Ltd was unable to offer any explanation for the discriminatory treatment.

In one case where the claimant was not successful, *Rains v CRE*, the tribunal held that R's age discrimination claims failed, even though he had been told over the telephone that he might be too senior for the role. The tribunal held that this was just the remark of one individual and was not the view of the CRE as a whole. An individual in the same age bracket as R had been short listed. R also alleged indirect discrimination on the basis that the CRE were looking for someone with "recent hands on experience". R claimed that this criteria put older employees at a disadvantage. The tribunal disagreed with that argument, and so R lost the case, but it did make a finding that if they had found that this requirement was discriminatory, they would not have found that it could be justified. The tribunal did not accept the CRE's arguments that they wanted to avoid employing someone whose skills were under-utilised and who would, therefore, be more likely to leave. These, according to the tribunal, were unfounded assumptions, unsupported by any evidence.

### Comment

Looking to the future, it seems unlikely that employers will continue to be misguided enough to authorise job adverts that stress that either youthfulness or maturity is a prerequisite of the job. Most employers will also not have to worry about justifying the retirement of their employees, if they follow the default procedure (and provided the Heyday challenge to the implementation of the Regulations is not successful). It seems more likely that claims such as those raised in the Dennis Publishing and the CRE cases will be more common. It is also likely that age will be raised in cases where the employee or prospective employee has no other grounds on which to bring a claim.

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