Hardwicke

# Employment Newsletter

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The members of Hardwicke's Employment Team have specialised skills and experience in all aspects of employment law including matters such as discrimination, unfair dismissal and redundancy, restrictive covenants as well as non-contentious work. We represent both employers and employees via conventional means in addition to direct access.

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**Welcome to the July edition of the Hardwicke Employment Newsletter. In this issue we include a mixture of news from our team members and from the world of employment law.**

**We welcome feedback on any of the items which feature in our newsletters and suggestions for future editions. If you have any comments, please contact our Marketing Manager Louise Poppelwell on louise.poppelwell@hardwicke.co.uk**

## Mostly this month we have been . . .

- We are delighted to welcome **Mohammed Zaman QC** to our ranks. Mohammed has expertise in the areas of employees' and directors' duties, wrongful termination of employment, restraint of trade and breach of confidence. His arrival further strengthens Hardwicke's Employment Team and his full profile can be found on www.hardwicke.co.uk/barrister-profile/_/117/mohammed-zaman-qc
- **Stephen Lennard** and **Zeeshan Dhar** have been taking on the unions in a TUPE information and consultation case at a tribunal in Liverpool. They successfully defended claims by all four leading unions, UNISON, UCATT, Unite and the GMB, made on behalf of 300 members seeking damages of circa £2,000,000.00. After two days of cross examination in an eight day listing, and a helpful yet fair indication from the judge, the unions withdrew their claims upon the threat of substantial adverse costs orders.
- **Sarah Malik** and **Simon Hale** gave a seminar at a leading London employment law firm, covering recent developments in whistle-blowing law and practice. They dealt with the affirmation of *Cavendish Munro* in ***Marks & Spencer v Goode***; the decision on "echoing" victimisation in ***BP v Elstone***, and the new regulatory

referral system in the Tribunal's ET1 form. They argued that these developments illustrate a shift in emphasis back to the goals of PIDA as originally passed, with increasing focus on whether a claim to protection is really based on a disclosure made in the public interest. **If this seminar would be of interest to you then please contact our Commercial Practice Team on 020 7242 2523.**

- **Simon Hale** has been working on a number of High Court breach of covenant claims arising from the acquisition by a large financial services provider of various medium sized IFA firms. The claims assert that the IFAs have engineered investment portfolio transfer requests from private and corporate investor clients in breach of non-solicitation and other restrictive covenants. The sums in dispute are calculated by reference to commission and management fees chargeable on the investments, and across the various actions, run into millions of pounds.
- **Stephen Lennard**, **PJ Kirby**, **Colm Nugent**, **Zeeshan Dhar** and **Sarah Malik** are now on the list for Employment Law Association Advisory Scheme.

## Cases that caught our eye recently

- In ***Northamptonshire County Council v Entwhistle*** **UKEAT/0540/09/ZT**, the EAT gave a salutary reminder of the strict limitation regime that applies to unfair dismissal claims. The case was concerned with the application of section 111 (2) (b) of the ERA 1996, which provides that a claim for unfair dismissal may be accepted outside the standard three month limitation period where it was not reasonably practicable for the claim to have been presented in time (and where the Tribunal finds the period of additional delay to have been reasonable).

  The Tribunal had to consider the effect of inaccurate advice from the employer about the deadline for presentation of a claim. The claimant had been dismissed on 13 November 2008, but by virtue of appealing the decision and having his dismissal confirmed orally on 20 March 2009, regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004 extended time by three months, until 12 May 2009.

  On 26 March 2009, the employer rejected the appeal in writing, and advised the employee that he had three months from receipt of that decision to go to Tribunal. The claimant had retained solicitors. They simply failed to identify this error in the employer's letter and considered that the employee had until 27 June 2009 to present his claim.

The ET held that it had not been reasonably practicable for the employee to present in time. It was notable that the employee's solicitor essentially conceded in his evidence to the Tribunal that he had been negligent.

The EAT reviewed the principles applicable to section 111 (2) (b). Underhill P referred *to* ***Dedman v British Building and Engineering Appliances Ltd*** **[1974] ICR 53**, as authority that it should be given "*a liberal construction in favour of the employee*". He drew on *Dedman* itself and on ***Marks & Spencer PLC v Williams-Ryan*** **[2008] ICR 193**, as authority that where an employee retains skilled professional advisors, whose negligence or error causes the time limit to be missed, it will generally not be possible for the employee to take advantage of section 111 (2) (b) – and that there was a principle of law to this effect established by the authorities.

The ET below had held that where there were "*wholly exceptional circumstances*", the consequences of a skilled adviser's negligence were not to be visited upon the client, because those exceptional circumstances meant that it was not reasonably practicable to lodge in time.

But the EAT held that on the authorities there was no basis for the ET to have so directed itself. Where a claimant has consulted skilled advisers the question of reasonable practicability was to be judged by what he could have done if he had been given "*such [advice] as they should reasonably in all the circumstances have given him*": ***Walls Meat Company Ltd v Khan*** **[1979] ICR 52.**

It was immaterial that the mistake would never have occurred but for the employer's misleading letter. Whilst that factor would probably have been "*decisive*" on the application of a just and equitable test under discrimination legislation, "*the test in section 111, as explained in the authorities reviewed in Williams-Ryan, is different and more restrictive*". Fundamentally, it could not be said that it was not reasonably practicable for the employee to lodge in time when, if his solicitors had given him the advice which they should have done, the employer's initial error would have had no effect.

This case is a reminder to legal advisers that the limitation regime applicable to unfair dismissal claims is unforgiving. The EAT clearly viewed the employee's proper route to redress in this case as being a professional negligence claim against his solicitors – even where the employer's own 'negligence' was in lay terms the original cause of the confusion.

- In ***Aitken v Commissioner of Police of the Metropolis*** **UKEAT/0226/09**, the EAT held that an employer cannot directly discriminate, or commit disability-related discrimination, where its treatment of an employee is based on a mistaken perception that an employee is suffering from a particular disability.

  The claimant police officer suffered from obsessive compulsive disorder (OCD). His behaviour at a Christmas social event with colleagues in December 2005 was aggressive, unpleasant and he appeared to be unstable. The claimant was subsequently assessed by the respondent's occupational health advisers and his GP, and it was concluded that he had a serious mental disorder, though the respondent was unsure of the precise parameters of this condition and/or of the claimant's OCD.

  There were further incidents of aggressive behaviour during 2006. The claimant's duties were altered such that he would have no contact with the public at all. However, the claimant continued to suffer additional health problems and was ultimately retired on grounds of ill health.

  The claimant argued that he had been subjected to less favourable treatment on the grounds of by reason of a fear, belief, perception or assumption that he had a type of mental illness or impairment which, in the event, he did not have. Section 3A of the Disability Discrimination Act 2005 should, he argued, be interpreted so as to include discrimination on the grounds of perceived disability, which he contended would follow the ECJ's reasoning in ***Attridge Law LLP v Coleman*** **[2008] IRLR 722**. Therefore, he argued, his alleged treatment was unlawful.

  On the facts, the ET had found that the respondent had not acted on the basis of an assumption that the claimant had a dangerous mental illness, but on the basis of how the claimant actually presented himself (in particular at the Christmas social event).

  But in any event, the EAT did not accept the legal contention that action taken on the basis of a mistaken perception that a claimant is suffering from a particular disability is prohibited by Council Directive 2000/78. *Attridge* was concerned not with perceptions, but with the disabilities of an employee's relations being the reason for less favourable treatment. Therefore, the EAT's judgment in ***HM Prison Service v Johnson*** **[2007] IRLR**

**951** was good law: the DDA requires an actual disability.

The message of this case is unequivocal: advisers contemplating a disability discrimination claim should satisfy themselves that the employer's treatment was amenable to an actual, particular disability – a perception or mistake as to the employee's condition will not found the cause of action.

- In ***Heaven v Whitbread Group Plc,*** the EAT gave guidance on "conditional" resignations by employees.

  The employee tendered what the EAT described as a conditional resignation letter on 29 August 2009. After the employer sought clarification of his position, the employee sent an email on 3 September 2009 which was unequivocal, but which asserted that his resignation had been effective from the date of his original letter.

  The ET rejected the claim as being out of time, having been presented outside three months from 29 August 2009. But the EAT applied ***Fitzgerald v University of Kent*** **[2004] EWCA Civ 143**, which made clear that the effective date of termination is a statutory construct. The establishment of that date was a matter of what had objectively passed between the parties – not what the parties (or one of them) wishes or asserts was the case.

  On an application of that principle, the Tribunal should not have had regard to the wishes of the employee as purportedly expressed in his clarification of 3 September 2009. His earlier letter was equivocal – he only effectively resigned by his latter email when his position was made clear. A contract of employment cannot be brought to an end by an equivocal or conditional resignation. For this reason the claim was in time and the Tribunal's decision was overturned.

  For practitioners who may be instructed to conduct termination negotiations on behalf of an employee, the decision is encouraging: advisers should have the confidence that their client's position on limitation will not be prejudiced by a carefully drafted conditional letter of resignation. Where further aspects of the termination remain to be agreed, such as pay in lieu, the employee can apply the leverage of clearly stating his intention to leave without actually doing so until there are no conditions attached to his resignation.

- Finally, in ***Woodward v Santander*** **UKEAT/0250/09/ZT**, the EAT considered the exception to the 'without prejudice' rule where there has been 'unambiguous impropriety'. The EAT held that this exception was only applicable in the very clearest of cases.

The EAT rejected the contention that ***BNP Paribas v Mezzotero*** **[2004] IRLR 508** created a wider exception to this rule where discrimination is alleged. The without prejudice rule was to be construed in light of its purpose: to protect genuine attempts to negotiate a settlement. The exception would only operate where without prejudice discussions would act as a cloak for perjury, blackmail or other clear and unambiguous impropriety regardless of the nature of the dispute.

Given the vital and consistent importance of without prejudice discussions in employment disputes as a means to avoid tribunal litigation, this decision will probably be welcomed by advisers wishing to conduct negotiations without fear that their letters will ultimately end up under the beady eye of an employment judge.

## Upcoming Events

Sarah Malik will be discussing 'Whistleblowing: how the law is being interpreted' on the 24 September 2010 at the *Hot Issues in Employment Law* two-day conference. For more information please go to www.conferencesandtraining.com/employment-law-issues

**This newsletter was edited by Simon Hale.**

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|---|---|
| Nigel Jones QC | 1976 (1999) |
| Mohammed Zaman QC | 1985 (2009) |
| Charles Calvert | 1975 |
| Stephen Lennard | 1976 |
| Barbara Hewson | 1985 |
| Peter (PJ) Kirby | 1989 |
| Colm Nugent | 1992 |
| Christopher Camp | 1996 |
| David Lewis | 1997 |
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| Sarah Malik | 1999 |
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| Morayo Fagborun-Bennett | 2004 |
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