



JULY/AUGUST 2009 *** VOL 8 *** PART 1

EMPLOYMENT TEAM NEWSLETTER

Welcome to the summer edition of the Hardwicke Building Employment Team Newsletter.

Holiday time may have arrived but it's not the Working Time Regs that have been hitting the headlines recently but rather discrimination in its many and varied forms. Tight red cocktail dresses, prosthetic arms and Jewish mothers (or not) have all received prominent media attention - though not in the same case, thank goodness, just imagine.....

If you have any suggestions or ideas for our coming editions please contact Louise Poppelwell, Marketing Manager at Hardwicke Building on 020 7242 2523 or by email at louise.poppelwell@hardwicke.co.uk

Mostly this month we have been.....

- Dealing with yet more redundancies; no green shoots in the employment field
- While David Lewis has been on paternity leave – congratulations on his daughter
- Sarah Malik successfully represented an employer at the EAT in an example of the classic mistake of a Tribunal stepping into the arena and substituting its own view for that of the employer;
- Stephen Lennard and Sarah Malik participated in one of Odgers Berndtson's regular staff meetings – and Hardwicke are now pleased to be working closely with this leading executive search firm in offering its candidates employment advice on termination and contract issues at competitive rates;
- Sarah has negotiated a five figure settlement sum to include payment of legal fees for a Claimant in a protected disclosure claim. She has also been involved in advising a Partner in a City Firm in relation to exit terms and agreements
- Defeating grievance appeals for a local authority
- Trying not to get steamed up about Tribunals' obsession with listing targets
- Not yet getting swine flu.

Court of Appeal wades into selection policies for faith schools

Delivering the judgment of the court in *R v Governing Body of the Jews Free School* [2009] EWCA Civ 626, Sedley LJ confirmed in the Court of Appeal that Jewish schools can, if oversubscribed, give preference to Jewish children in their selection policies. But "eligibility must depend on faith, however defined, and not on ethnicity." The judgment of Mr Justice Munby in the High Court last year was thus overturned and the CA accepted that the school was responsible for direct race discrimination. This result has proved not a little contentious for the Orthodox community and the Office of the Chief Rabbi which represents the majority of Jewish people in the UK. The definition of Jewishness has always been determined by the status of a child's mother, not by the degree to which the tenets and practices of the Jewish faith are followed. So as the case now makes its way to the Supreme Court it is contended that legislation designed to defeat discrimination has itself become an instrument of discrimination.

And whilst on the subject of buckets and spades

As a result of the House of Lords' decision in *Stringer* noted in an earlier newsletter, several issues relating to holiday pay and long-term sick leave have been clarified:-

- a worker's right to paid statutory holiday accrues during a period of sick leave, however long its duration, even if the worker is absent on sick leave for the whole of the leave year;
- a worker may take statutory paid holiday during a period of sick leave;

- the WTR do not permit the carry over of statutory holiday;
- a worker who takes statutory holiday during sick leave for which he is not paid may bring a claim whilst employed, with time running from the date of the deduction or the last in a series of deductions.

Waitress in a cocktail bar wins tight red dress case

The cocktail waitress who refused to wear a tight-fitting dress at work has been awarded £3,000 compensation. She worked at the Rocket Bar in Mayfair for 8 days last year and was told female staff would have to wear a tight red dress in the summer. At the time the uniform was a black shirt and trousers for men and women. A Tribunal upheld her claim that bar owners had discriminated against her on the grounds of her gender.

Council fails in claim against employee who kept quiet about her stress

In *Cheltenham Borough Council v Laird* [2009] EWHC 1253 the High Court rejected the Council's claim that an employee's failure to mention her history of stress related depression amounted to fraudulent or negligent misrepresentations which induced the Council to enter into an employment contract with her. Cheltenham BC sued Christine Laird for having misrepresented her fitness for employment. When Mrs Laird was offered the job, it was expressed to be conditional upon medical clearance from the Council's Occupational Health adviser, after having reviewed a medical questionnaire filled in by Mrs Laird. The relevant questions in that questionnaire, and her answers, were:

- Q: Do you normally enjoy good health? A: Yes
- Q: Do you have either a mental and/or physical impairment? A: No
- Q: Date when you last had medical treatment and reason. A: Bruising to lower back following a fall at work 19/9/2001
- Q: Have you any ongoing condition which would affect your employment? A: No - I get occasional migraine but this does not affect my ability to work or usually require time off work.

Crucially, Mrs Laird's medical questionnaire did not reveal her depressive history, nor the fact she was taking anti-depressants. On this basis, occupational health approved her application and she began work. The Council argued that Mrs Laird was guilty of fraudulent or negligent misrepresentation and deceit because she had failed to disclose the fact that she had suffered from depression on 3 occasions since 1997. But the Court held that Mrs Laird's statements were not false, and therefore were not misrepresentations. The Court agreed with the Council that the contract was conditional on a satisfactory medical report, but held that her answer to each question was the, or at least a, correct answer, and her answers were therefore neither false nor misleading. The Court went on to say that even if Mrs Laird's answers had been false, they had not been fraudulent or negligent, as she honestly believed her statements to be true. The Court and both parties in the case agreed that the medical questionnaire was poorly drafted. This became the central point of the case; and the outcome of this claim could have been very different had the drafting of the medical questionnaire been less ambiguous.

And finally.....

- A 22-year-old law student told London Central ET she was forced off the floor at the hyper preppy Abercrombie & Fitch clothing store in Saville Row because of the firms "blatant policy of eugenics". She was born with her left forearm missing, and is claiming disability discrimination after being rebuked by one of her managers for wearing a cardigan to cover her elbow while working in the shop as a summer job last year. Judgment has been reserved.
- Unlike compensation for unfair dismissal, compensation for discrimination does not have a cap. A woman was recently awarded GBP £33,500 for injury to feelings in an age discrimination case - the highest compensation ever awarded in such a case.
- The Government has now confirmed that an increase in redundancy pay will take place on 1 October 2009. The maximum weekly wage used to calculate a statutory redundancy payment will be increased from £350 to £380. The introduction of this one-off increase in October 2009 means the annual increase of the limit in February 2010 will be suspended. The limit will therefore from October remain unchanged until February 2011.

Upcoming Seminars

On 18 September, we shall be presenting a seminar for South East Employers on a number of current issues. Further seminars, aimed at our solicitor-client base but open to all, are being planned towards the end of the

year. Formal invitations will be sent to everyone who receives this newsletter.

If you would like our members to provide you with in-house CPD accredited seminars on particular employment topics then please do not hesitate to contact Louise Poppelwell on 020 7242 2523 or email louise.poppelwell@hardwicke.co.uk for further information.

This newsletter was edited by Stephen Lennard. For further information on the Hardwicke Employment Law Team and the services we offer, please visit our website at www.hardwickebuilding.co.uk

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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| Nigel Jones QC | 1976 (1999) | David Lewis | 1997 |
| Stephen Lennard | 1976 | Zeeshan Dhar | 1999 |
| Barbara Hewson | 1985 | Sarah Malik | 1999 |
| Peter (PJ) Kirby | 1989 | David Lawson | 2000 |
| Colm Nugent | 1992 | Denis Edwards | 2002 |
| Christopher Camp | 1996 | Morayo Fagborun-Bennett | 2004 |

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