



FEBRUARY 2009 ... VOL 5 ... PART 1

## EMPLOYMENT TEAM NEWSLETTER

It seems like a while ago now but happy New Year to you all. We trust that you're refreshed and ready for the packed year ahead, in which you'll have to get to grips - if you've not done so already - with the Employment Act 2008, which to everyone's great relief sweeps away the statutory dismissal, disciplinary and grievance procedures – more of that later.

Historically January is a quiet month at the Bar but, fortunately, not this year. We're finding that instructions have increased generally, and the continued success of Direct Access keeps us busy. But there is a benefit for you too, as there are a number of Direct Access clients that we believe would be best served by solicitors. If you are interested in receiving referrals then please call Danny O'Brien - our Employment Senior Clerk to discuss on 020 7242 2523 or by email on [danny.obrien@hardwicke.co.uk](mailto:danny.obrien@hardwicke.co.uk)

### Mostly this month we have been ...

- Immersed in compromise agreements. Redundancies are ever increasing and certainly at the Director level there is significant compensation to be had. In December David Lewis compromised a Director's redundancy claim in excess of £125,000
- David Lewis also secured costs in a tribunal last week, on grounds of unreasonable and vexatious conduct in bringing and conducting proceedings. In summary, the Claimant in a constructive dismissal claim was found by the tribunal to have manufactured documents (a minute of a meeting) and lied on oath. David successfully argued that the premeditated act of manufacturing evidence is entirely different than embellishing evidence during cross examination, and is precisely what the costs provisions are for. The tribunal agreed and awarded costs. The motto is, if you don't ask you don't get!
- Sarah Malik obtained a successful judgment in a 10 day race discrimination claims brought against an officer of the Metropolitan Police.
- Sarah also successfully defended 8 claims of race discrimination, harassment, victimisation and constructive dismissal in a multi party claim against a leading motor group. There is a costs application to be heard in the matter in early February 2009.

### New ACAS code – only a few months to go

As of 6 April 2009 the new ACAS Code of Practice is in force. Are you prepared?

The key changes are:

- Replaces 2004 Code
- Not applicable to redundancies or termination of fixed term contracts
- 45 paragraphs designed to provide "basic practical guidance" and "set out principles" for handling disciplinary and grievance situations in the workplace
- Aims for greater flexibility in dealing with workplace disputes
- Mandatory 3 step process abolished
- Replaced by 'fair and reasonable' approach
- Employees will not have to raise a grievance before bringing an ET claim
- Employers will no longer be subject to the 10-50% uplift for failure to follow the statutory procedure,

instead they face a 25% uplift where a tribunal considers that their failure to comply with the new ACAS Code was unreasonable.

We take the view, by and large that the new Code is a good thing. Whether or not it serves to decrease litigation remains to be seen and we welcome your views on the Code generally, or its application.

Don't forget though, there is going to be a cross over period. In the case of discipline/dismissal, the old system continues to apply if, on or before 5 April, the employer has (i) complied with the Employment Act 2002 Sch 2 para 1,2 or 4; (ii) taken relevant disciplinary action against the employee ; or (iii) dismissed the employee.

## ECJ Decided annual leave

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The ECJ has reached its long awaited decision in the joined cases of Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund and Stringer & ors v Her Majesty's Revenue and Customs.

The ECJ has decided, inter alia, that:

- Annual leave does accrue during periods of sickness absence;
- Member States are free to decide whether annual leave can or cannot be taken during a period of sickness absence;
- However, workers must either have the chance to take annual leave during the relevant annual leave year (even if they are absent for all or part of that year through sickness) or to carry it over to the next annual leave year;
- Workers have a right to payment in lieu of annual leave that they were not able to take due to sickness absence. Such payment in lieu should be made at the worker's normal remuneration rate.

The House of Lords will now give a final judgment, and is most likely to overturn the Court of Appeal's decision from April 2005 that the right to paid holiday leave did not accrue during periods of sickness absence. Whilst this decision is not one employers will embrace, on the up side it creates more work for all of us, because employers will need to reconsider their policies for long term sickness absence and allow either for annual leave to be (a) taken during sick leave; (b) carried over to the next leave year or (c) paid in lieu. The ECJ does have its uses then!

## And finally..... free champagne anyone?

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A City law firm had a sense of humour failure this month on learning that an associate in one of its offices was posting an erotic novel on her personal website. Her serialization about a bed-hopping ex-pat has now been stopped. Has her employee's right to freedom of expression been infringed? A bottle of champagne will be given for the best answer!

## Upcoming Seminars

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Over the coming months the Hardwicke Building Employment Team will be providing seminars for members of the Chartered Institute of Personnel and Development (CIPD) at various venues in the UK. Look out for us near you...!

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](mailto:louise.poppelwell@hardwicke.co.uk) for further information.

## Any interesting news?

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If you have any suggestions or ideas for our coming editions please contact Louise Poppelwell, Marketing Manager at Hardwicke Building on [louise.poppelwell@hardwicke.co.uk](mailto:louise.poppelwell@hardwicke.co.uk) or phone Louise on 020 7242 2523 .

This newsletter was edited by David Lewis (as you can tell from his unashamed self publicity). For further information on the Hardwicke Employment Law Team and the services we offer, please visit our website at [www.hardwickebuilding.co.uk](http://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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**Clerks:** Danny O'Brien & Daniel Kemp

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

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