

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 September edition of the Hardwicke Employment Newsletter. We hope you had an enjoyable summer break. In this issue we include a mixture of news from our team members and case summaries which may be of interest to you.

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 . . .

- **Paul Reed QC** and **Zeeshan Dhar** have been involved in a four day High Court hearing seeking to enforce an injunction preventing an Independent Financial Advisor from soliciting the clients of his former employer who are a well recognised wealth management firm. The issue at the heart of the case related to whether the Defendant had entered into a contract which incorporated the restrictive covenant. Central to the case was the decision of the Court of Appeal in *Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397, in which the Court held that where an employer purports unilaterally to change terms of an employee's contract, the fact that the employee continues to work does not automatically mean that the employee has accepted that variation in the contract.
- Also in the High Court, **David Lewis** has had a busy month battling to secure injunctive relief for a well known insurance brokerage to prevent various breaches of competition related restrictive covenants.
- **Sarah Malik** was interviewed by the publication People Management in relation to the Equality Act 2010 and how it affects the public sector. She continues her

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involvement in defending a Midlands authority in multi-party equal pay claims and has recently been instructed to advise a London local authority in relation to multiback dated pension claims. **Sarah** was a speaker at the annual *Butterworth's Hot Issues in Employment conference* where she gave her views on whistleblowing and changes in the law relating to it.

- **Chris Camp** has been advising agency clients on just how badly drafted pieces of the Agency Workers Regulations are, contemplating, in connection with a forthcoming EAT, whether volunteers who help out at weekend camps for forces' cadets can possibly be "workers", and trying not to get too irritated by various tribunals reluctance to order costs against litigants in person.
- **PJ Kirby** has been up to his virtual reality eyes in a huge e-disclosure exercise on a high value, multi-party pensions claim brought by employees against a household name. The case concerns undertakings given to employees in the distant past prior to their take over. **PJ** is being led by our Head of Chambers **Nigel Jones QC**. The rest of his time has been spent covering several types of discrimination claims including disability, race and sex.
- Hardwicke has devised a range of client training and seminars for 2010 – 2011. These cover areas such as TUPE, Whistle blowing, the Equality Act, Restrictive Covenant and Privilege. All seminars are CPD accredited and designed to be delivered in-house to your team. We are also happy to tailor training to meet the specific needs of our clients. For more information on our Employment Seminar Series or to discuss in-house training for your team, please contact the Senior Practice Manager **Helen Burness** on 020 7400 2376 or email helen.burness@hardwicke.co.uk

Imminent changes ahead...

The Equality Act

The Equality Office announced the coming into force of the Equality Act on 1st October 2010. As expected the first tranche of implementation will include the vast majority of the acts provisions. Whilst we know that the act will generate much debate and review of internal policies, as a starter, it is worth pointing out the main changes brought about by the act:

- The re-introduction of the old concept of 'disability related discrimination' as 'discrimination arising from disability' to restore the protection which was lost as a result of the House of Lords' decision in *Mayor and Burgesses of the London Borough of Lewisham v*

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Malcolm 2008 IRLR 700.

- Preventing employers asking job applicants questions about health and disability before making a job offer, except in certain specified circumstances.
- Extending the protection of indirect discrimination to the area of disability.
- Extending protection to those who are perceived to have or are associated with person with protected characteristics.
- Enabling dual discrimination claims to be brought by individuals who have a combination of protected characteristics.

We anticipate a number of queries on the above changes, so, please do not hesitate to call any of the team for a chat. We expect that we will be discussing, training and advising many of our clients on these changes in the months ahead.

The National Minimum Wage

The Government has published the National Minimum Wage Regulations 1999 (Amendment) Regulations 2010 SI 2010/1901, which will raise the rate of the national minimum wage from £5.80 to £5.93 per hour from 1 October 2010.

In addition, the age from which the rate becomes payable will drop from 22 to 21 and those aged between 18 and 20 will now be entitled to £4.92. The rate to be paid to workers aged below 18 who are no longer required by law to attend school will see their rate rise from £3.57 to £3.64 per hour.

Cases that may be of interest to you . . .

Employee Status

Just when you think it's safe to look away, the vexed question of employee status raises its head yet again. In ***Community Dental Centres v Dr. G. Sultan-Darmon*** – Appeal No. UKEAT/0532/09/DA (12th August 2010), the EAT held that the Claimant was not a “worker” as he did not “undertake to do or perform personally any work or services” as required by section 230(3) because there was no obligation on the Claimant to do work as he could delegate his duties. It would appear that a provision in a contract between the parties, which allows substitution of the workers services for another, is fatal to the existence of a contract of employment.

The EAT referred to cases such as *Tanton*, *Premier Groundworks*, *Archer-Hoblin* and *Yorkshire Windows* to support its conclusions that an unfettered right of a contractor to send a substitute to do his or her work shows that the contractor is neither a “worker” or an “employee”.

The EAT reached the view that the opinion of the EAT in *Redrow Homes (Yorkshire) Limited v Buckborough* [2009] IRLR 34[56],

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that the provision of a substitute worker clause did not prevent the provider from being a ‘worker’, was not to be embraced as it did not decide the case and was merely an obiter statement.

In our view, subject to any appeal to the Court of Appeal, it appears that the EAT has reviewed all the relevant authorities and reached a settled view on the impact of substitution clauses on the question of employee status.

TUPE

Is it a ‘measure’ or not?

A question frequently at the forefront of the mind of a HR Manager who is unlucky enough to be tasked with drafting the measures letter for the next company transfer and the lawyer tasked with advising. We now have greater clarity on the kind of transitional or administrative changes that are likely to constitute ‘measures’ requiring consultation under the TUPE Regs.

In ***Todd v Strain & Others – Appeal No. UKEATS/0057/10/BI***, the EAT reiterated the definition of ‘measures’ provided by Millet J in *IPCS* as being ‘a word of the widest import which includes any action, step or arrangement’.

In relying on the *IPCS* definition, the EAT concluded that as the measures related to the way in which *T* would make payments to staff for work done in the days up to the date of transfer, including a change to their normal payment date, they amounted to ‘measures’ within the meaning of regulation 13 TUPE Regs 2006.

The EAT went on to comment that even though the arrangements were administrative and of a kind usually necessary in the context of a transfer, since they were not an inevitable consequence of the transfer they fell within the definition of ‘measures.’ The EAT took the view that consultations were substantially concerned with enabling transitional arrangements and not just long term changes and to that extent needed to be the subject of notification and consultation.

Procedural Issues

In ***New Star Asset Management Holdings Limited v Patrick Evershed [2010] EWCA Civ 870***, the Court of Appeal held that where the proposed amendment to a set of pleadings added a claim of unfair dismissal by reason of whistleblowing to one of simple unfair dismissal, but raised no materially new factual allegation, and, where the thrust of the complaints remained essentially the same, the EAT’s decision to allow the amendment was correct.

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The Court of Appeal went further and commented that although the amendment was not a mere 're-labelling' and specific findings would now have to be made about the individual components of the public interest disclosure claim, as there was still a substantial overlap in the issues, the EAT's decision was not incorrect.

In our view, the case should be considered authority for the proposition that adding a public interest disclosure claim to an unfair dismissal claim with broadly similar facts should be allowed provided it does not seek to introduce wholly different evidence.

Nigel Jones QC	1976 (1999)
Mohammed Zaman QC	1985 (2009)
Ken Craig	1975
Stephen Lennard	1976
Barbara Hewson	1985
Peter (PJ) Kirby	1989
Colm Nugent	1992
Christopher Camp	1996
David Lewis	1997
Zeeshan Dhar	1999
Sarah Malik	1999
Morayo Fagborun-Bennett	2004
Ajmal Azam	2006
Simon Hale	2006

This newsletter was edited by Zeeshan Dhar.

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