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Local Authority Employment Bulletin

Bulletin Editor
Dr Mirza Ahmad, LLD (*Hon*), LLM, MBA, Barrister
St Philips Chambers, Birmingham and Chancery House Chambers, Leeds.
Managing Director, MA (Law & Governance) Limited.

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INTRODUCTION

As with previous bulletins, this one signposts key employment law and practice issues since the last bulletin. Practitioners will need to consider the detail as and when required. These bulletins are now published on a quarterly basis.

Feedback on the bulletins is, as always, most appreciated and helpful in ensuring a dedicated service to subscribers. I can be contacted at St Philips Chambers on mahmad@st-philips.com, or at Chancery House Chambers on mahmad@chanceryhouse.co.uk.

LEGISLATIVE REVIEW

Protection of Workers Bill

The new Protection of Workers Bill has been introduced with the aim to reduce incidents of violence threats and abuse against workers whose jobs bring them into face to face contact with member of the public. The Bill is scheduled to introduce a new offence relating to assaults on public facing workers, with a maximum sentence of 12 moths and a £10,000 fine.

The Bill is expected to receive its second reading in February 2013 and there is no guarantee that it will obtain the necessary Government backing to receive Royal Accent, but definitely a Bill to watch in the New Year.

Potential whistleblowing changes

The Enterprise and Regulatory Reform Bill, currently going through Parliament, will change the UK's whistleblowing legislation by amending the

current requirements so that disclosures must be made in the public interest to be deemed a 'qualifying disclosure'. Such qualifying disclosures must be disclosed to a relevant person in good faith to become 'protected'. The Bill is expected to be in force sometime next year.

Harassment can also give rise to both civil claims and criminal offences under the Protection from Harassment Act 1997 ('the PHA') and employees could bring civil action against a third party directly. However, whilst employers could be vicariously liable for acts of its employees under the PHA, it will not be liable for acts of third parties.

Default retirement age

5 October 2012 was the final day for the default retirement age ('DRA'). Employers are no longer able to force workers to retire following the abolition of the DRA last year. Prior to April 2011, employers had to give staff between six and 12 months' notice of intention to make them retire, with an additional six months' possible extension if they were compelling them to retire under the rules.

Health and safety and National Minimum Wage

The following are effective from 1 October 2012:

- under the Health and Safety (Fees) Regulations 2012, those who break health and safety laws are liable for recovery of HSE's related costs for time spent inspecting, investigating and taking enforcement action; and
- National Minimum Wage for adults rose by 11p to £6.19 an hour. The rate for 18–20 year olds, remains at £4.98 an hour and the rate for 16–17 year olds also remains at £3.68 an hour.

CASE REVIEWS

Equal pay: Birmingham City Council v Abdulla & Ors [2012] UKSC 47 (24 October 2012)

The Supreme Court has ruled that workers have six years to make an equal pay claim in the High Court, if they miss the six-month employment tribunal time limit. This case is, therefore, bound to open the floodgates to backdated equal pay claims.

Pursuant to EU and UK equality legislation, 'equality of terms' includes contractual pay and other terms and conditions of employment, such as the provision of healthcare and other benefits. The comparative person must work with the same or associated employer and be employed on 'like work', 'work related as equivalent' or 'work of an equal value' basis.

The onus remains on an employer to prove a 'material defence' where it seeks to explain the pay differential by reference to geographical, market forces or other issues. In this case, Birmingham sought to have the claims struck out under section 2(3) of the Equal Pay Act, which allows cases to be struck out where the court considers that the claims 'could more conveniently be

disposed of separately by an employment tribunal'. This would have had the effect of ending the claims as they were way out of time for an employment tribunal.

By a majority decision (Lord Wilson, with Lady Hale and Lord Reed), the Supreme Court ruled that, since the effect of striking the cases out would mean that the claims were out of time, then it could not be said that the claims could be 'more conveniently disposed of' in an employment tribunal. Parliament had allowed these claims to be brought in the civil courts as well as in the tribunal and so must have accepted that the normal six-year time limit could apply to them. Lord Sumption and Lord Carnwath dissented, on the basis that such an approach would frustrate the policy underlying the limitation provisions of the Equal Pay Act.

Political affiliations: Redfearn v The UK [2012] ECHR 1878 (6 November 2012)

The European Court of Human Rights ('ECHR') has ruled that the laws of the UK, with regard political affiliations, do not give adequate protection to employees with short service who are dismissed. Unless the government successfully challenges this ruling, it will have no choice but to change UK employment law to implement the ECHR decision.

R was summarily dismissed in 2004 because of his affiliation with the BNP, when he was elected as local councillor. He did not have enough service to bring an unfair dismissal claim so claimed race discrimination. The Court of Appeal rejected his claim and he brought a claim before the ECHR.

R argued that his right to freedom to associate with others (Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) was violated by the lack of any legal protection against dismissal on account of his political affiliation. By a majority of four judges to three, the ECHR upheld R's complaint, saying:

> '… the Court considers that it was incumbent on the respondent State to take reasonable and appropriate measures to protect employees, including those with less than one year's service, from dismissal on grounds of political opinion or affiliation, either through the creation of a further exception to the one-year qualifying period [for unfair dismissal] or through a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation. As the United Kingdom legislation is deficient in this respect, the Court concludes that the facts of the present case give rise to a violation of Article 11 of the Convention.'

The Government may seek the referral of this case to the Strasbourg Court's Grand Chamber. If the judgment remains unaltered, one option open to the Government might be to allow unfair dismissal claims in relation to membership of a political party from those without the usual qualifying service (ie one year for those engaged before 6 April 2012, otherwise two years). The outcome will be known in the New Year.

CASE REVIEWS

Volunteers: Supreme Court case of X v Mid Sussex Citizens Advice Bureau

The Supreme Court has heard the case of Ms X, who was an unpaid volunteer at Mid Sussex CAB. She signed a volunteer agreement on 12 May 2006, which was described as being 'binding in honour only … and not a contract of employment or legally binding'. Ms X alleged that she was told that her services were no longer required when she made the Bureau aware that she was HIV positive and duly claimed disability discrimination.

As a preliminary issue, an employment tribunal held that Ms X was not within the scope of the Disability Discrimination Act's definition of 'employment' because the definition did not cover voluntary work. The Court of Appeal (in *X v Mid Sussex Citizens Advice Bureau & Ors* [2011] EWCA Civ 28 (26 January 2011)) also rejected the point and concluded that the relevant EU Directive was not intended to apply to volunteers.

If the Supreme Court decides in favour of Ms X – ie she has the same rights not to be discriminated against as if she was an employee – it would signal an important beginning of employment rights for volunteers. The Equality and Human Rights Commission intervened in this case arguing that volunteers were protected against discrimination.

The judgment is likely to be handed down early in the New Year, unless the Supreme Court decides to remit the issue to the Court of Justice of the EU for an Opinion.

Redundancy: Asif v Elmbridge Borough Council [2012] UKEAT 0395/11 (26 September 2012), [2012] All ER (D) 137 (Oct)

The Employment Appeal Tribunal ('EAT') considered whether it was reasonable for an employer not to offer a redundant employee an alternative job. In a redundancy process, three employees were selected from a pool of four to fill three posts. The claimant scored considerably less than her colleagues and was therefore given notice of her dismissal, whilst her three colleagues were offered the new posts. During her notice period, one of the three colleagues resigned but the claimant was not offered the vacant role arguing it was not suitable alternative employment.

The EAT rejected A's appeal on the basis that the criteria and process had been fair and properly applied, and it was reasonable not to appoint A to the vacant post, as she had not met the essential criteria of the role.

Disability: Government Communications Headquarters v Bacchus [2012] UKEAT 0373/12 (6 August 2012)

After a case management discussion, B refused to attend a medical examination with any of the three medical experts proposed by GCHQ. At the full hearing, B lodged his own medical report but GCHQ were unable to lodge theirs due to B's refusal to cooperate.

GCHQ applied for B's claim to be struck out or for a stay of the disability discrimination proceedings on the basis that it was an unreasonable failure of B not to attend for examination with any of its chosen experts. The tribunal proceeded with the merits hearing without either party being permitted to rely on expert medical evidence.

The EAT upheld GCHQ's appeal and said that in proposing three experts to B, GCHQ had gone beyond what was required of it and quite exceptional reasons would have been required for B to refuse all GCHQ's choices of expert. In light of B's unreasonable refusal to cooperate, the EAT ordered an 'unless order' requiring B to present himself for examination by a certain date, with the consequence that his case will be struck out if he did not do so.

Redundancy Pool of One: Wrexham Golf Club Co Ltd v Ingham [2012] UKEAT 0190/12 (10 July 2012)

The EAT overturned an employment tribunal ('ET') decision and held that a 'pool of one' may be reasonable, depending on the circumstances, and the ET should consider whether the decision to use a 'pool of one' falls within the 'range of reasonable responses'. The EAT remitted the case to an ET to determine whether it was within the range of reasonable responses for the Club.

TUPE: The Manchester College v Hazel & Anor [2012] UKEAT 0642/11 (9 July 2012), [2012] All ER (D) 46 (Sep)

The EAT upheld the decision by an ET that the dismissal of two employees for failing to agree to new terms following a TUPE transfer was unfair. Although the dismissal was for an economic, technical or organisational reason, it did not entail changes in the workforce and the two employees were therefore unfairly dismissed. The ET also found that the redundancy process had been concluded before the changes to terms and conditions were introduced – i e the two were separate and unconnected processes on the facts of this case.

Dismissal: Nejjary v Aramark Ltd [2012] UKEAT 0054/12 (31 May 2012), [2012] All ER (D) 03 (Oct)

The EAT held that when considering whether a dismissal was 'within the range of reasonable responses' to an employee's conduct or capability, an ET must confine itself to the specific issues relied on by the employer in dismissing the employee and not any wider grounds.

The EAT found that N's dismissal letter set out three incidents and that the dismissal appeared to be justified by the employer by these three events. However, the dismissal letter did not justify N's dismissal on any of the other warnings and reprimands which he had received during the course of his employment. Instead, the employer only relied on one of these incidents during the subsequent internal appeal of N relating to the failure to check the booking sheet.

The EAT overturned the decision of the ET on the basis that it should only have considered whether N's dismissal was 'within the reasonable range of responses' based on N failure to check the booking sheet and could not also examine the other two incidents originally set out in the dismissal letter.

OTHER RELEVANT ASPECTS

Whistleblowing cases increase

Whistleblowing cases reported to the Financial Services Authority ('FSA') have increased by 276% in four years, according to information obtained under the Freedom of Information Act 2000 by Kroll Advisory Solutions.

Kroll found that between June 2011 and May 2012, the FSA received 3,733 contacts to its whistleblowing helpline. This was a 189% increase on the 1,293 calls to the helpline in the same period three years earlier (June 2008–May 2009) and a 276% increase on the 994 calls made in the same period four years earlier (June 2007–May 2008).

The firm put the increase in whistleblowing down to three key factors:

- an increase in the level of financial crime within businesses, probably stemming from the growth of investments into developing overseas markets, which often have less stringent controls on criminal activity;
- the ease of creating electronic identities, which can make it easier for individuals to perpetrate fraud; and
- the development in recent years of clearer and more established procedures for handling whistleblowing cases and protection for whistleblowers.

Kroll recommend the following 'dos and don'ts' over a whistleblower incident:

DOs

- Respond fast – the first 24 hours is critical. Form a senior response team and ensure that the incident is considered by staff who are independent of the management team whose conduct has been questioned. This is often why external consultants are useful.
- Assess the situation and credibility and gravity of the alleged issues before launching a full investigation.
- Keep a lid on it! Discretion is essential to minimise damage.
- Identify and secure evidence.
- Consider office and information security.
- Prepare and activate communication plans (internal and external).

Dont's

- Tamper or contaminate potentially important evidence.

- Make announcements either internally or externally before knowing the full facts.
- Start interviewing people too early.
- Jump to conclusions and take action too early; remember many whistle-blower allegations are incorrect.

Figures display low unfair dismissal payouts

The latest Ministry of Justice Employment Tribunal statistics show that the average compensation payout for unfair dismissal is just £4,560 and only 2% of unfair dismissal awards exceed £50,000.

During the period from 1 April 2010 to 31 March 2012, there were 186,300 employment tribunal claims, which is a 15% decrease on the figures from the previous year. During 2011–12, 59,200 single claims and 127,100 multiple claims were accepted, falls of 2% and 19% respectively.

Potential repeal of employment laws

The Government has announced it will repeal several sections of the Equality Act 2010, including those protecting employees from third-party harassment from a customer or supplier covered by section 40. In addition, the Government will scrap the power of Employment Tribunals to make wider recommendations to employers in workplace discrimination cases.

Managing redundancies

ACAS, in association with the Equality and Human Rights Commission, has published a Good Practice Guide on:

http://www.acas.org.uk/media/pdf/r/f/Managing-redundancy-for-pregnant-employees-or-those-on-maternity-leave-accessible-version.pdf

ACAS has also updated its redundancy guidance on:

http://www.acas.org.uk/media/pdf/1/1/Redundancy-handling-accessible-version.pdf, which includes a new section on how to break the news to redundant employees.

Subscription and filing enquiries should be directed to LexisNexis Customer Services Department, LexisNexis, PO BOX 1073, BELFAST, BT10 9AS. Tel (0)84 5370 1234.

Correspondence about the content of this Bulletin will be welcomed and should be addressed to Helen Bolton, LexisNexis, Halsbury House, 35 Chancery Lane, London WC2A 1EL. Tel 020 7400 2500.

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