



EMPLOYMENT LAW BULLETIN

ISSUE 3

Welcome to this issue of the Employment Law Bulletin produced by the Employment Law team at 3 Hare Court.

We have a growing reputation for our efficient and unstuffy approach, aiming to provide sensitive and commercial advice for both employers and employees. We particularly benefit from the breadth of experience within chambers and regularly advise and act as advocates in cases which intersect with personal injury, human rights, professional disciplinary and administrative proceedings as well as commercial actions in the High Court. At all times we strive to provide practical advice.

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CLARITY IN DISABILITY DISCRIMINATION, UP TO A POINT....

By Richard Samuel



Clarity from the EAT

In *O'Hanlon v Commissioners for HM Revenue & Customs* UKEAT/0109/06 at §§20-43, Elias J, President of the Employment Appeals Tribunal clearly summarised the differences in the law between: (1) direct discrimination to which there is no defence of justification, (2) disability-related discrimination, to which there is a defence of justification, and (3) failure to make reasonable adjustments. The article summarises that summary, and identifies an area which requires further clarification.

Direct Discrimination

Direct discrimination was introduced on 1 October 2004 by the insertion of s.3A(5) into the DDA 1995. Under it a person directly discriminates against another if:

“on the grounds of ... the disability [the discriminator] treats the [discriminatee] less favourably than he ... would treat a person not having that particular disability [i.e. the comparator], whose relevant circumstances, including his abilities, are ... not materially different from [the discriminatee].”

This wording mirrors the sex and race discrimination legislation. Interpretation of the provision must at present be by analogy with the case law on those areas. Points to note are: (1) the discrimination must be “on the grounds of” the disability itself, i.e. the reason for the detrimental action is the disability itself rather than something related to it (e.g. “we do not employ mentally ill people”). (2) The comparison exercise is undertaken with a (perhaps hypothetical) non-disabled person whose relevant circumstances are not materially different from the discriminatee.

Disability Related Discrimination

Under DDA 1995 s.3A(1) disability-related discrimination is defined as follows:

“for a reason that relates to [the discriminatee’s] disability, [the discriminator] treats [the discriminatee] less favourably than he ... would treat others to whom that reason ... would not apply, and [the discriminator] cannot show that the treatment was justified.”

This was the original wording of the DDA 1995. Points to note are: (1) the discrimination takes place because of a reason related to a disability rather than the disability itself (e.g. a refusal to employ a secretary because of her reduced typing speed induced by arthritis). (2) The comparison is undertaken with a (perhaps hypothetical) person to whom “that reason” does not apply (i.e. the reduced typing speed *simpliciter*, not a reduced typing speed because of disability). (3) Justification is defined at s.3A(3) as meaning the reason for the treatment is “material to the circumstances of the particular case and substantial”. This is a subjective test, so a Tribunal will only find discrimination where the subjective view of the discriminator is perverse, or outside the band of reasonable responses.

Failure to Make Reasonable Adjustments

Under the DDA 1995 s.4A the duty to make reasonable adjustments is as follows:

“Where a provision, criterion or practice applied by ... an employer ... places [the discriminatee] at a substantial disadvantage in comparison with persons who are not disabled [i.e. the comparator], it is the duty of the employer to take such steps as it is

reasonable, in the circumstances of the case ... in order to prevent the provision criterion or practice ... having that effect”.

This was also the original wording of the DDA 1995. Points to note are: (1) the provision, criterion or practice has to be identified with care; it may not always be obvious (e.g. becoming so ill that you cannot do the job at all involves such a provision: the implied term of the contract that you are thereby liable to dismissal). (2) “The comparator is readily identified by the disadvantage caused by the relevant arrangements” (e.g. a person who is so ill that he cannot do the job and therefore liable to dismissal is to be compared with someone who is not so ill that his is liable to dismissal). (3) The duty is to make reasonable adjustments. Therefore the test is an objective, not a subjective test (unlike disability-related discrimination.) (4) Under s.3A(6), where there is an objective duty to make adjustments, disability related discrimination cannot be justified subjectively unless it would still be justified once the adjustment has been carried out.

1. Clark v Novacold Ltd [1999] ICR 951 CA
2. Jones v Post Office [2001] ICR 814 CA
3. Archibald v Fife Council [2004] ICR 954 HL
4. Smith v Churchill Stairlifts plc [2006] IRLR 41 CA

Clarity from the Code of Practice... Mostly

The DRC Code of Practice: Employment & Occupation (2004) gives some helpful practical examples to flesh the above concepts out. It is well worth reading. However, on the issue of the dividing line between direct and disability-related discrimination it may cloud the issue. At §4.9 it gives as an example of a directly discriminatory reason for non-employment of an applicant the assumption that the applicant’s wheelchair will cause an obstruction in the office. But at first sight it would appear that the obstruction is not the disability itself, but a reason that relates to a disability. The distinction between the two will be an area of controversy. As yet there is no authority on this point . We may find that the guidance (and the law) is concerned with a prejudiced assumption that the wheelchair would cause an obstruction, rather than with any obstruction which may or may not exist. Watch this space.

GRIEVANCES TWO YEARS ON

By Tom Poole



S.32 of the Employment Act 2002 came into effect in October 2004. Its purpose was to encourage the use of grievance procedures prior to an employee lodging certain claims before a Tribunal. It now affects almost all potential claims and marks a new hurdle for the employee. This article summarises the basic requirements of s.32, its effect and draws together recent EAT decisions that assist in understanding how the courts approach the requirements of s.32.

Requirements

First, the employee must send to the employer a written statement of the grievance and wait until at least 28 days for the employer to respond. The Tribunal will not hear a complaint which has not first been raised in that way with the employer. If the grievance has been raised with the employer then in certain circumstances, which are to various to explore here, the time limit for lodging a complaint is extended by a further three months. But the overall effect is that the employee cannot register a claim with the Tribunal until at least 28 days has elapsed

from the time he raised the grievance, however, if he does so he may have a substantially longer period within which to present his claim than would otherwise be the case.

Further Requirements and Effects

If either the employer or the employee fails to pursue the grievance procedure further through their own fault, then that will have an effect on the ultimate award of any compensation: see s.31. If it is the employer who has failed properly to process the grievance then the compensation will be increased by between 10% and 50% depending on what is just and equitable in all the circumstances. Conversely, if it is the employee who has unreasonably frustrated the process then there is a parallel power to reduce the compensation in a similar way.

Shergold

In *Shergold v Fieldway Medical Centre* (2006) IRLR 76, the EAT gave the following general guidance:

- In keeping with the system of pre-action protocols in civil proceedings, the purpose of the new provisions is to encourage conciliation, agreement, compromise and settlement rather than precipitate issue of proceedings.
- The requirements of the procedures are relatively minimal and should not be interpreted in an overly technical and sophisticated way.
- The statutory requirements are minimal in terms of what is required. Under the Standard Procedure, it is simply that the grievance must be set out in writing. The Modified Procedure requires not only to set out the grievance in writing but also to set out the basis of it.
- A grievance can be set out in a letter of resignation.
- It is not necessary to make it plain in the writing that it is a grievance, or is an invocation of a grievance procedure.
- There is no requirement that an employee must comply with any company or contractual grievance procedure. It is simply a question of setting out the grievance in writing.

Canary Wharf

In *Canary Wharf Management Ltd v Edebi* (2006) IRLR 416, the new EAT President, Elias J, approved of the approach in *Shergold*, and gave further guidance:

- There is no maximum time limit prior to the lodging of the claim to the Tribunal in which the grievance must have been raised. There is the minimum period of 28 days which must be allowed for the employer to deal with it and go through the relevant procedures, but no maximum period. However, the grievance must still be extant. In other words, it must still be capable of amounting to an outstanding grievance.
- There is considerable flexibility about the form of the grievance. It may be raised in a grievance letter (*Shergold* and *Canary Wharf*), by a solicitor in a communication to the employer's solicitor (*Mark Warner Ltd v Aspland* (2006) IRLR 87) and even, it is suggested, after dismissal has taken effect.
- As to content, it is crucial that the complaint to the employer is essentially the same as the complaint that is subsequently advanced before the Tribunal.

There is also helpful guidance in the following recent cases:

- In *Martin Lipscombe v Forestry Commission* (Unrep) UKEAT/0191/06/DA, the EAT held that the Tribunal had wrongly struck out the employee's claim after failing to construe correctly his resignation letter that, together with other documents, indicated that he had, indeed, submitted a grievance to his employer in compliance with the Regulations and the Act. It was significant that the Tribunal hearing took place before the EAT handed down judgment in *Shergold*, which was stated to advocate a flexible approach to the question of what constituted the submission of a grievance.

- In *Galaxy Showers Ltd v Wilson* (2006) IRLR 83, the EAT held that a grievance can be about an act or failure to act, and once a grievance is raised, an employee is not prevented from making a tribunal claim by failing to present the same grievance again before resigning, or failing to attend a meeting where he could have discussed the grievance but which was called as part of the disciplinary process, since the employer is expected by the provisions to convene a specific grievance meeting.
- In *BUPA Care Homes (BNH) Ltd v Cann* (2006) IRLR 248, the EAT held that when a grievance was outside the normal three-month limit since the incident, although the automatic three-month extension could not apply under Reg.15, if the Tribunal extended time for the presentation of the claim under their usual powers, s.32(4) did not block the claim even if the grievance was over four months after the incident.

Summary

The approach of the EAT clearly demonstrates that the new procedures do not require the grievance to be made in any unduly legalistic or technical manner. All that is required is for the grievance to be set out in writing and for it to be essentially the same as the complaint that is subsequently advanced before the Tribunal. The Modified Procedure also requires that the basis of the grievance also be set out in writing. This is not a terribly high hurdle, but nonetheless one that must be overcome if compensation is not to be reduced under s.31.

THE AGE-OLD QUESTION...

By Rupert Butler



Since 1st October 2006, the Equality (Age) Regulations 2006 have made it unlawful for all employers to discriminate against actual or former workers (including the self-employed), employees, office-holders, job-seekers, students, and trainees because of their age, whether in employment, or adult education.

The regulations cover the entire range of the employment relationship and apply to any age: young; or, old.

The regulations make it unlawful to:

- *discriminate* directly against someone by treating them less favourably on the grounds of their age (or the age they appear to be) - unless it can be justified objectively or an exemption applies
- *discriminate* indirectly against someone by applying a criterion, provision, or practice which tends to disadvantage people of a particular age - unless it can be justified objectively (this is unlawful even if unintentional) or an exemption applies
- *harass* an employee on grounds of age - that is to permit conduct that violates someone's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment
- *victimise* someone who has made an age-related complaint (or intends to do so) or who gives evidence in relation to an age-related complaint
- *discriminate* against someone once the once the employment relationship has ended (eg. in the provision of references)

Justification of discrimination

An employer can only justify discrimination if he can show that it is a proportionate way of achieving a legitimate aim. Proportionate means appropriate and necessary.

Justification might apply where an employer would need to invest in lengthy training of an employee and so a legitimate aim would be to ensure that a person recruited had a reasonable period of employment before retirement. It would be necessary for the employer to show that there was no less discriminatory way of achieving the aim.

Exemptions

There are a number of exemptions including:

- *Length of Service Benefits*: policies which link pay and benefits to an employee's length of service will be permitted:
 - if the service required is greater than 5 years then the employer must show that it is expected to meet a business need (such as generating loyalty, or rewarding experience)
 - if the service is less than 5 years it will be automatically lawful
- *Genuine Occupational Requirement*: an employer can set an age requirement for a job so long as there is a genuine need for a person to have a characteristic related to a certain age.
- *Positive action*: taking positive action to prevent or compensate for disadvantages experienced by people of a certain age group is permitted in 2 areas:
 - access to training and education
 - to encourage people to take up employment opportunities
- *Statutory Authority*: discrimination is permitted on grounds of age if this is required by law.
- *Recruitment over 65*: employers can refuse to hire someone who is over 65, or over the employer's normal retirement age, whichever is the higher.

Relationship with existing employment law

There is now no upper age limit for bringing unfair dismissal and redundancy claims.

Age and length of service will still be used to calculate statutory redundancy pay (and compensation for unfair dismissal).

It will be unlawful for an employer to use age as a factor when considering who to select for redundancy.

There is no upper age limit for payment of *Statutory Sick Pay*.

The national retirement age

Retirement age is different to pension age. There is a national default retirement age of 65 for men and women, which will apply to all workers in the absence of agreement or objective justification.

There is nothing to prevent voluntary retirement below the age of 65, but if an employer forces a worker to retire before the age of 65 then the worker can claim for both age discrimination and unfair dismissal.

It will normally be lawful for an employer to oblige retirement over the age of 65 but only if the correct procedure has been applied.

Employers must tell workers, no less than 6 months and no more than 12 months, in advance of their intended retirement date to assist forward planning. At the same time the worker must be informed of his right to request to continue working.

A failure to give adequate notice of retirement will lead to an award of compensation of up to 8 weeks pay, currently limited to a maximum of £290 per week. If less than 2 weeks' notice is given this is unfair dismissal.

If the worker is dismissed without being informed of the right to ask to carry on working then the dismissal will be automatically unfair.

So long as 6 months notice has been given then the Employment Tribunal will accept retirement as the actual reason for dismissal.

Duty to consider

Under the '*duty to consider procedure*' the employer must consider the worker's request to carry on working, which request should be in writing and specify how long the worker wishes to continue working.

The employer must hold a meeting with the worker within a reasonable period of time and must notify the employee of the decision as soon as reasonably practicable. The worker has a right of appeal.

The employer's obligation is only to consider the request.

Both parties are at liberty to agree different terms and conditions for working beyond 'retirement'.

Recruitment

Recruitment must be based on skills for the job and not age, which means that employers may be liable for discriminatory advertising and interviewing.

However, it is permissible to specify an age range in an advert if that is done to encourage an age range to apply that would not normally do so.

CLAIMS FOR WRONGFUL DISMISSAL: THE EMPLOYMENT TRIBUNAL OR THE HIGH COURT? WHICH IS IT TO BE?

By Clara Johnson



The potential danger for claimants in bringing claims for both unfair dismissal and wrongful dismissal in the employment tribunal has been highlighted in a number of recent cases. This danger arises out of the fact that recovery of damages for wrongful dismissal in the employment tribunal is capped at £25,000. What can and often does happen is that a claimant will issue proceedings for unfair and wrongful dismissal in the employment tribunal and either concurrently or subsequently, issue further proceedings in the High Court to claim the balance should the tribunal assess damages for wrongful dismissal above £25,000. However, if the employment tribunal makes a determination on the claim for wrongful dismissal, a claimant will not be permitted to bring the second set of proceedings: *Fraser v HLMAD* (2006) IRLR 687; [2006] EWCA Civ 738; *Enfield v Sivanandan* [2005] EWCA Civ 10; *Times*, January 25, 2005; *Sajid v Sussex Muslim Society* [2002] IRLR 113; [2001] EWCA Civ 1684; *Soteriou v Ultrachem* (2004) IRLR 870; [2004] EWHC 983.

In *Fraser v HLMAD* the claimant issued proceedings for unfair and wrongful dismissal in the employment tribunal subject to the express reservation, set out in his ET1, of the right to issue

proceedings in the High Court should damages for wrongful dismissal exceed £25,000. Mr Fraser took the precaution of issuing proceedings for wrongful dismissal in the High Court shortly after proceedings were issued in the employment tribunal but did not take the extra precaution of withdrawing his wrongful dismissal claim from the employment tribunal.

The tribunal found that Mr Fraser had been unfairly and wrongfully dismissed and assessed his damages for wrongful dismissal at £80,000. HLMAD applied to strike out Mr Fraser's subsequent claim for the shortfall. The application was successful and the decision was upheld by the Court of Appeal. The Court of Appeal found that in failing to withdraw the claim for wrongful dismissal from the employment tribunal, which had subsequently been determined by the tribunal, meant that it had been 'merged', i.e. been replaced by the rights created by the judgment. The cause of action for wrongful dismissal had thus been extinguished and a further claim in the High Court could not be brought. This finding was not affected by the fact that Mr Fraser had reserved his right to do so.

In the earlier case of *Sajid v Sussex Muslim Society* the claimant had taken the precaution of formally withdrawing his wrongful dismissal for the specific reason that the tribunal did not have jurisdiction to make an award for the level of damages he was seeking. The Court of Appeal found that in such circumstances, the withdrawal could not be taken to have been, or intended by either of the parties or tribunal to constitute a final and binding determination dismissing the claimant's claim. Rather the effect was to move the claim to a different forum and was not an attempt to re-litigate the same cause of action.

As the Court of Appeal in *Fraser* made clear, these cases reveal a nasty potential trap for the litigant who decides to add a wrongful dismissal claim to his unfair dismissal claim in the employment tribunal and pursue both claims to judgment in the tribunal. The clear message is that proceedings in respect of wrongful dismissal must be formally and unequivocally withdrawn from the employment tribunal if a claimant wishes to pursue the same claim in the High Court: see also *Enfield v Sivanandan* [2005] EWCA Civ 10; Times, January 25, 2005.

In *Fraser* the Court of Appeal issued guidance which helpfully clarifies the approach to be adopted by claimants and by the courts for such claims:

- (1) claimants should confine claims in the employment tribunal to unfair dismissal unless they are willing to limit the total damages to £25,000 or less;
- (2) If the claimant wishes to recover more than £25,000 the wrongful dismissal claim should only be made in High Court proceedings;
- (3) The findings of the employment tribunal in its judgment on the unfair dismissal claim will provide assistance to the claimant as they will give rise to an issue estoppel in any subsequent proceedings for wrongful dismissal, but the claimant will not be prevented by success in the employment tribunal claim for unfair dismissal from pursuing an action for wrongful dismissal;
- (4) An application for summary judgment in the High Court for the wrongful dismissal claim will be appropriate in straightforward cases.

By Dan Clarke



In *Prakash v Wolverhampton City Council*, UKEAT/0140/06 (LTL 19/9/2006, unreported elsewhere) the EAT (HHJ Serota QC presiding) decided an important practical point. This was that the ET has jurisdiction to exercise its discretion to allow a claim to be amended so as to include a complaint that arose after the ET1 was originally presented. Thus it is not, as was previously thought, necessary in such circumstances for a fresh originating application to be made.

The issue arose in the following way. The Claimant was employed by the Respondent on a 3-year fixed term contract. Complaints were made about him to the Respondent alleging bullying and sexual harassment and, following a disciplinary hearing, the Claimant was dismissed a year before the end of his contract. He promptly presented an ET1 in which he asserted that he had been unfairly dismissed and then appealed under the Respondent's internal procedure. However, his appeal was finally determined – in his favour – a full four months after his fixed term contract would have expired in any event. Therefore he was “re-engaged” as an employee, but as his job was no longer available his name was placed on a re-deployment register for 6 months and received no pay. By the end of that period his employer had still not found him work, so his name was then removed from the register.

At that point the Claimant applied to the ET to amend his original unfair dismissal claim to allege that the effective date of termination was the not the date of the disciplinary hearing (as originally pleaded) but rather when his name was removed from the re-deployment register.

The ET held that the claim of unfair dismissal a year before the end of the contract, contained in the original ET1, was bound to fail, there being no dismissal on that date. The effect of a successful internal appeal and re-instatement was to revive the original fixed-term contract of employment. They further held that the effective date of termination was not the date that his name was removed from the register, but the date of the expiry of his fixed term contract. The ET went on to hold that it had no jurisdiction to entertain an application to amend the ET1. This was because there was no existing claim in respect of the dismissal at the end of his fixed term contract to amend. Any amendment would not be an amendment but the creation of an entirely new cause of action which was impermissible. The application to amend was therefore dismissed.

The Claimant appealed to the EAT on two points: the effective date of termination and the refusal to entertain an application to amend the original claim. The EAT upheld the ET's reasoning on the first point, but allowed the appeal on the second.

As to the second point, the EAT held that an amendment could be allowed to add or substitute a cause of action which was not available when the ET1 was first presented. There was nothing in the relevant rules of procedure expressly preventing such amendments (para 61), nor was there any objection in principle. The ET1 could still serve as a vehicle for the amendment even if the original cause of action was bad. The EAT drew some assistance from the remarks of Mummery LJ in *Chaudhary v Royal College of Surgeons* [2003] ICR 1512 (a case involving discrimination on grounds of race) that it would have been open

to the ET (had such an application been made) to permit amendment of the complaint to raise allegations post-dating the original complaint (para 62). The EAT added that it saw no reason why the term “present” in s.111 Employment Act 1996 should have any technical meaning. A claim could be “presented” as much by amendment as by the issue of a separate ET1 (para 63). Accordingly, the matter was remitted to the ET to determine whether the amendment was to be allowed, in accordance with the well-known principles set out in *Selkent Bus Co v Moore* (1996) ICR 836.

From a practical point of view, the decision has much to commend it since it removes the need for the presentation of a fresh originating application and consolidation of actions with all the attendant costs. However, as such an amendment depends on the exercise of discretion under *Selkent* rather than on strict compliance with the relevant time limits, it would also seem to have the effect of making it a little easier to bring late claims.

WITHOUT PREJUDICE NEGOTIATIONS IN DISCRIMINATION CASES

By Sarah Crowther



Courts and tribunals are generally quick to protect the sanctity of the privilege which attaches to ‘without prejudice’ communications between parties. As Simon Brown LJ said in *Fazil-Alizadeh v Nikbin* (unrep CA 25 Feb 1993, cited with approval by Rix LJ in *Savings & Investment Bank Ltd (in liquidation) v Fincken* [2004] 1 WLR 667),

“Unless this highly beneficial rule is most scrupulously and jealously protected, it will all too readily become eroded. Not least requiring of rigorous scrutiny will be claims for admissibility of evidence advanced by those...who have procured their evidence by clandestine methods.”

There is considerable force in this proposition, because it is the cornerstone of open and unfettered negotiations. If parties suspect or fear that anything they say will be used in court then it can fatally undermine the trust and confidence necessary to achieve settlement. Recent decisions have tended to uphold the strictness of the rule: in *Rush & Tomkins v GLC* [1989] AC 1280 it was made clear that without prejudice communications were not disclosable in a second set of court proceedings (for the purpose of proving the facts contained an admission therein: see *Muller v Linsley and Mortimer* [1996] PNLR 74) and in *Reed Executive and Reed Business* [2004] EWCA Civ 837 [2004] 1 WLR 3026, the Court of Appeal refused to allow the use of without prejudice material in an argument concerning costs of an action.

One of the few narrow exceptions to the without prejudice rule is where the party wishing to adduce the evidence can show that there would be ‘unambiguous impropriety’ in allowing the other party to hide behind the veil of privilege. This requires more than mere inconsistency between an admissions and a pleaded case, it must amount to an abuse of the privilege itself (see *Fincken*).

However, the recent decision in *Vaseghi and Webster v Brunel University and Schwartz* (UKEAT030706DA) affirms what appears to be a new-found exception to this strict rule where a claimant wishes to base factual allegations of discrimination on the respondent’s alleged conduct in settlement negotiations.

Professor Vaseghi had brought tribunal proceedings for race discrimination against the University. Following the dismissal of his action (and that of Ms Webster) by employment tribunals, the Vice-Chancellor of the University circulated a newsletter expressing regret at the costs incurred in defending the claims and referring to 'unwarranted demands for money' made by the claimants in the course of proceedings.

Professor Vaseghi raised a grievance in relation to the newsletter alleging that in fact it was the University which had mentioned money as part of a proposed (and rejected) settlement offer in negotiations outside the tribunal. The grievance committee heard evidence of the settlement negotiations.

The EAT (HHJ Ansell presiding) ruled that both the grievance committee evidence and findings and also witness statements from those involved at the actual settlement negotiations were admissible in evidence. Although clearly within the ambit of the without prejudice rule, it determined that there had been a waiver by both parties of any privilege in their conduct of the grievance before the committee.

However, the EAT also held, in reliance on the decision of the EAT (Cox J sitting alone) in *BNP Paribas v Mezzotero* [2004] IRLR 508, that defeating the 'very great evil' of discrimination created a public interest which potentially competed with that of protection of privilege. The EAT in *Vaseghi* rejected the argument that Cox J in *Paribas* had merely been applying the 'unambiguous impropriety' exception but concluded that on a proper interpretation that Cox J had conducted a balancing exercise between the two competing public interests on the facts of that case. The EAT in *Vaseghi* then concluded in light of the facts that it was the Respondents who in publishing the newsletter had put matters into the public arena and that there had been a 'mini-trial' of these matters at the grievance hearing that it would amount to an abuse to preclude the Claimant from relying on the evidence.

It should be questioned whether this is a correct interpretation of the decision of the EAT in *Paribas*. Cox J in that case analysed the case law and concluded at paragraph 38 of her judgment that the case fell within the well established rule in *Re Daintrey* (1893) 2 QB 116 upon which the foundations of the more modern 'unambiguous impropriety' exception rest. Cox J did not seek to conduct any factual balancing exercise, indeed, her decision implicitly rejects argument by counsel for the appellants that she would be required to weigh up prejudice in the individual case against the wider public policy considerations. However, the EAT in *Vaseghi* have interpreted her reasoning very differently.

One interpretation of the decision in *Vaseghi* therefore is that it creates a discrete exception to the 'without prejudice' rule in relation to evidence upon which a Claimant seeks to rely in support of a later discrimination claim. This creates a potential minefield for Respondents and their representatives, even after the conclusion of a claim. It seems more than a little harsh even on the facts of *Vaseghi*, as compensation was one of the powers of the Tribunal, presumably had been sought as a potential remedy by the Claimants in their pleaded cases and one of the Claimants admitted to seeking some (albeit relatively modest) compensation as part of her claim.

Whether this interpretation of *Vaseghi* is correct or not, it highlights the need for employers to consider carefully and take advice on their conduct in grievance proceedings and so-called 'without prejudice' meetings with employees concerning a grievance, disciplinary proceedings or potential termination of employment. Matters said and done are quite likely to come back to haunt them in court.

Employment Practice Group

Members of the employment practice group at 3 Hare Court undertake all kinds of employment work, and at all levels, on behalf of employers, employees, employment agencies and trade unions. We have particular expertise in the following areas:

- unfair dismissal, redundancy, victimisation, transfers of undertakings;
- all aspects of discrimination and equal opportunities law;
- wrongful dismissal and all kinds of contractual disputes;
- restrictive covenants and confidentiality/privacy claims;
- other areas including disciplinary proceedings, commercial agency and employee pay and benefits disputes

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