CONTENT

- Employment Law Update - June 2013
- Cost awards
- Victimisation under the Equality Act
- New Employment Tribunal Rules

THIS MONTH'S CONTRIBUTOR

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Seminars & workshops

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate to contact our Senior

Employment Law Update - June 2013

Welcome to the next edition of 3 Hare Court's Employment Law Update. 3 Hare Court's employment practice group provides commercial and sensitive advice to employers, employees and employment agencies. In these monthly email updates we highlight recent developments in employment law and provide analysis on recent noteworthy cases. We hope you enjoy this June edition!

Cost awards

In **Vaughan v London Borough of Lewisham et al UKEAT/0533/12/SM** the Employment Appeal Tribunal handed down a judgment that will assist receiving parties on the assessment of cost awards.

Ms Vaughan brought three sets of proceedings claiming discrimination and harassment on grounds of race and/or disability and of detriments suffered as a whistleblower. Her claims were brought not only against the Council and the previous employer but also against a number of individual colleagues. The claims culminated in a 20-day hearing following which they were rejected in their entirety.

The tribunal found that the claims were misconceived and ordered the Claimant to pay one-third of the Respondents' costs. The costs amounted to around £260,000 in total. Ms Vaughan challenged both the making of the costs order as well as the quantum.

The EAT held that the tribunal applied the correct two-stage test. The tribunal's conclusion that the case was misconceived was unimpeachable. The EAT rejected Ms Vaughan's arguments that a costs order should not have been made given that the Respondent did not seek a deposit order and the Tribunal made no observations prior to its judgment that the claims appeared weak. It was also irrelevant that the Respondents offered to settle for £95,000 as the offer was specifically stated to be for commercial reasons only. It did not matter that the case was "fact-sensitive" and that the Claimant genuinely believed in it.

Second Junior, Darren Whitbread

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with Senior Second Junior, Darren Whitbread

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively please contact the Senior Clerk, James Donovan.

Feedback

As always at 3 Hare Court we welcome your feedback. In particular, any feedback or suggestions on this and forthcoming updates will be gratefully received.

Please contact our Senior Second Junior, Darren Whitbread with any queries.

Employment Law at 3 Hare Court

We regularly appear in the employment tribunals and EAT.

The tribunal was not wrong in awarding the Respondents one-third of their cost. The EAT accepted that the currently unemployed Claimant would find it difficult to pay and it may take her several years to satisfy the order in full. Nonetheless, the tribunal was entitled to hold that there was a realistic prospect of the Claimant returning to employment and making a payment of costs.

This is a useful decision to be relied on when making costs applications. The EAT showed little sympathy to the paying party who caused the Respondent to incur extremely high legal costs. It should be noted that under the new employment tribunal procedural rules as of 29th July 2013 tribunals will be allowed to conduct detailed assessments of costs themselves, rather than having to refer any costs assessment over £20,000 to the county court.

Victimisation under the Equality Act

In **Woodhouse v West North West Homes Leeds Ltd UKEAT/0007/12** the EAT reached a decision that employers will feel is extremely harsh on them.

Mr Woodhouse was a black employee. Over a period of four years, he lodged ten internal grievances alleging race discrimination and brought seven employment tribunal claims against his employer. The Tribunal observed that the rejection of one set of grievances would lead to the next one. Almost all of them were found to be "empty allegations without any proper evidential basis or grounds for [the Claimant's] suspicion".

Eventually Mr Woodhouse wrote to his employer stating that "he had lost faith in the organisation, that he was only staying in order to fight his cases". The employer felt that there was a breakdown in trust and confidence and dismissed him.

The employment tribunal rejected Mr Woodhouse's victimisation claim, because they found that the employer would have treated any other employee the same way who had brought a similar number of meritless grievances and claims leading to a similar breakdown in trust. In other words, the Tribunal used a hypothetical comparator.

The EAT disagreed with the Tribunal's approach. Mr Woodhouse's grievances and tribunal claims were indisputably 'protected acts'. There was no suggestion or finding of bad faith on his part. He was dismissed for making those protected acts. His victimisation claim was therefore made out. It was erroneous for the Tribunal to use a comparator when considering Mr Woodhouse's claim. He was dismissed because of his protected acts and it mattered not how the employer would have treated someone who had not brought those protected acts.

Silks in chambers have experience of employment and discrimination issues in the High Court and Court of Appeal.

Members deal with a range of work from straightforward issues of unfair dismissal and redundancy to issues of equal opportunities, discrimination and human rights. This includes the seminal case of Bull & Bull v Hall & Preddy & Hall [2012] EWCA Civ 83 where the Court of Appeal determined whether it was discrimination not to provide goods and services on the grounds of sexual orientation.

Additionally, members regularly deal with the full range of discrimination claims under the Equality Act 2010 including direct and indirect discrimination, whistleblowing, victimisation and harassment in multi-day hearings for both Claimants and Respondents.

For more information and examples of cases, please visit our Employment Law page.

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The EAT's legal analysis is undoubtedly correct. Having said that no employer will be keen to retain an employee who spends their time making grievances about protected characteristics and bringing expensive and time-consuming discrimination claims especially when they explicitly state that that is all they intend to do! Employers must ensure that they do not dismiss because the grievances/claims have been made but for some other permissible reason. Employers should also consider whether the employee is making the allegations in bad faith – although subjective bad faith is notoriously difficult to prove.

New Employment Tribunal Rules

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013/1237 have been published. The new rules will come into force on 29 July 2013 and BIS's intends them to apply to all proceedings irrespective of when the claim was lodged subject to certain transitional provisions in Reg 15.

The rules, amongst other things, set out how tribunal fees will operate (this is now subject to a Judicial Review challenge); deal with changes to the rules on default judgments; establish an initial paper sift by an employment judge of all Claim Forms and Response Forms; merge CMDs and PHRs into 'preliminary hearings' and increase employment judges' case management powers.

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