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THIS MONTH'S CONTRIBUTOR

**Sara Ibrahim**

Click here for Sara's website profile.

**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 marketing manager, Mika Thom.

**Conferences**

We are often invited to speak at conferences in the UK and abroad.

# Employment Law Update - April 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 April edition!

## Rowstock Ltd v Jessemey UKEAT/0112/12/DM

In Rowstock Ltd v Jessemey, the EAT determined that s108(7) Equality Act 2010 did not provide a remedy for an employee who had been victimised after the employment relationship has ended. This means the current legislation is in breach of the obligations under the Equal Treatment Directive (2000/78/EC).

Mr Jessemey succeeded in his claim for unfair dismissal and unlawful discrimination (on grounds of age) but not post-termination victimisation. His post-termination claim for victimisation arose from a reference which prevented him from obtaining employment elsewhere after his employment with Rowstock had ended.

The Equality and Human Rights Commission was granted permission to intervene in the part of his appeal pertaining to the meaning of s108(7).

S108 is entitled "relationships that have ended" and subsection 7 states "(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A." At first instance the employment tribunal determined that post-employment acts of victimisation were not rendered unlawful by s108(7).

EHRC relied on the House of Lords decision of Rhys-Harper v Relaxion Group PLC which pre-dated the Equality Act. Lord Nicholls in Rhys-Harper had said of the pre-Equality Act position that:

"It would mean that retaliatory action taken by an employer before the contract of employment ends is within the scope of the legislation, but retaliatory action taken later, for instance, regarding bonus payments, is not. This cannot have been the intention of Parliament."

If you have a query concerning a conference then please get in touch with our marketing manager, Mika Thom.

**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 marketing manager, Mika Thom with any queries.

**Employment Law at 3 Hare Court**

We regularly appear in the employment tribunals and EAT. 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

Reference was also made to the explanatory notes of the Equality Act which indicated no intention to remove protection for post-termination acts in instances of victimisation.

However, the EAT determined that interpreting s108(7) in the manner suggested by EHRC would be in breach of the principle set down by Lord Nicholls in Ghaidan that the judicial role is not one geared to amendment of primary statutes.

Permission was given to Mr Jessemey to appeal if he so wished. If the matter is not clarified by the Court of Appeal or by an amendment to the Equality Act them this lacuna in the law is likely to continue for some time.

## Vaughan v London Borough of Lewisham UKEAT/0534/12

The EAT were asked to consider whether employment tribunals could refuse to admit covert recordings that had been made. This issue arose as the Claimant had made in the region of 39 hours of covert recordings of conversations between her and her managers and other colleagues.

In a preliminary observation the EAT said "the practice of making secret recordings in this way is, to put it no higher, very distasteful". However, they referred to the earlier case of Dogherty v Chairman and Governors of Amwell View School which held that that covert proceedings are not inadmissible because the way they were taken may be discreditable.

The Respondents made it clear that they intended to run arguments at trial about the Claimant's credibility and its impact on the trust and confidence between the parties. These matters were not considered relevant to determining the admissibility of the evidence itself.

Underhill J recommended a procedure for dealing with applications of this type. He stated that for a Judge to make any informed determinations about proportionality when detailing what evidence should be adduced that they needed sight of the transcripts. It was not necessary the recordings be independently transcribed.

Importantly, he cautioned against making a determination on such an application at a preliminary stage. He stated that the tribunal hearing the issues will be much better placed to decide the relevance of any evidence.

Often claims involving covert recordings can be burdensome for both parties as they require transcribing and can increase the length of hearings as a result. Despite this the EAT has indicated that while these burdens may be regrettable, of primary importance must be to avoid excluding noteworthy evidence.

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.

### About Us

For further information about chambers, please see our website.

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## Legislative Changes

On 14 March 2013, the government announced that it plans to take forward the following employment tribunal changes:

- new strike out powers to ensure that weak cases that should not proceed to full hearing are halted at the earliest possible opportunity;
- making it easier to withdraw and dismiss claims by cutting the amount of paper work required; and
- a new procedure for preliminary hearings that combines separate pre-hearing reviews and case management discussions.

In a footnote to the announcement the government said "It is intended that the new rules will incorporate the new rules on fees and the Enterprise and Regulatory Reform Bill (ERR) Bill measures on cost and increased flexibility of deposit orders. The rules will be issued by May to allow parties time to familiarise themselves with one set of rules and avoid the piecemeal revisions that the Underhill review was tasked to address."

These rules are due to be in force by summer 2013. All employment practitioners should be aware of the introduction of a costs regime and an increased focus on ADR (especially judicial mediation) and early strike outs of 'weak' claims.

We will provide more information in our coming monthly updates.

**On legislative reforms, April is a big month - this website is a good source of information on some of the upcoming changes.**

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The next edition of 3 Hare Court's Employment Law Update is due out in May 2013. Until then!



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