CONTENT

THIS MONTH'S CONTRIBUTORS

Sara Ibrahim

Click here for Sara's website profile.

Employment Law Update - December 2012

Welcome to the first 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 December edition!

Case: X v Mid Sussex Citizens Advice Bureau [2012] UKSC 59

This week the Supreme Court determined whether volunteers are protected from discrimination under the Framework Directive. They concluded that workers were not encompassed by these provisions. The Supreme Court upheld the decision of the Court of Appeal below.

Lord Mance, giving judgment, held that the scope of equality law was limited and that volunteers did not fall within it.

He also addressed at some length the concept of occupation, which the Claimant had submitted was analogous to being 'employed' or 'self-employed'. He endorsed the interpretation of Lord Clarke in Hashwani v Jivraj [2011] UKSC 40, *"the expression 'access . . . to self-employment or to occupation' means what it says and is concerned with preventing discrimination from qualifying or setting up as a solicitor, plumber, greengrocer or arbitrator."* Once occupation was understood in this sense, it was therefore contradictory to view it as the same status as 'employment' or 'self-employment' as the Appellant had argued. He stated that this view was re-affirmed by the absence of the concept of 'occupation' in Article 3(1)(c), which dealt with

"employment and working conditions".

Further at a meeting of the General Conference of the ILO in Geneva at its 42nd Session on 4 June 1958, they addressed the meaning of commonly used terms which were recorded in Report IV(1). Examining the appendix where the agreed meaning of terms was contained, Lord Mance said,
"This specific, but very limited, extension to unpaid workers, and the language of the appendix as a whole, demonstrate a clear intention not to embrace volunteers generally". This was consistent with the Commission's original proposal that led to the Framework Directive, which had not considered voluntary activity in any shape or form.

When the European Parliament suggested an amendment to include *'unpaid or voluntary'* work, the Council of Ministers did not accept this addition to article 3(1) (b) of the directive. No enforcement action had been taken against the UK or any other member state for failing to include voluntary activity.

He noted that the approach of the Appellant and the Equality and Human Rights Commission was inadequate and would fail to provide legal certainty. Finally he concluded that remunerated workers and volunteers were not in a comparable position and it would be in contravention of the directive to treat them as such.

A reference to the Court of Justice was rejected.

This decision will be of much relief to numerous organisations who will not have to expend money on compliance with the directive for volunteers.

Author: **Sara Ibrahim**

Case: Bryant v Sage Care Homes UKEAT/0453/11/LA

The EAT in very striking terms revisited the principle that it was not for the tribunal to determine whether a dismissal was or wasn't fair. Although this is a well-established principle, it is one that tribunals can wear too lightly.

Mrs Bryant was an experienced nurse who was dismissed by the Respondent after she had delegated the administration of a drug to a care assistant in the

Alexander Halban

Click here for Alexander'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. 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. Alternatively, do contact the individual barristers responsible for this update, Sara Ibrahim or Alexander Halban.

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

Respondent's care home. The care assistant gave the wrong drug to the patient but no harm was caused. In breach of the Nursing and Midwifery Council's guidelines, the Claimant neither recorded nor reported the drug error. It was on the basis of her failure to report that she was dismissed for gross misconduct. Part of the Claimant's case at the tribunal was that the error had been used as a pretext to get rid of her.

In their judgment, the EAT had regard to the Court of Appeal guidance given by Mummery LJ in Fuller v London Borough of Brent [2011] IRLR 414, *"The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct."*

Revealingly the Claimant's representative submitted that he was looking for fairness in the decision. Whilst the decision to dismiss his client may have appeared harsh in light of the circumstances, this approach received short shrift. HH Jeffrey Burke QC said in unequivocal terms,

*"When Mr Sinclair, on behalf of the Claimant, began his submissions at the original hearing he submitted that paragraph 31 of **Fuller** "set the agenda" for the appeal and that, based on that paragraph, he was on the Claimant's behalf, "looking for fairness" It is important for us to make it clear that it is not our task, as an Appellate court, to decide what was or was not fair. Nor was it the Employment Tribunal's task so to decide. The Employment Tribunal's task, on the issue of the reasonableness of the dismissal, once a genuine belief in misconduct and a reasonable investigation had been proved, was to decide whether the dismissal of the Claimant fell within the band or range of reasonable responses and not whether it was fair."*

This guidance will remind representatives to avoid inviting tribunals to comment on general 'fairness' in dismissals.

Author: **Sara Ibrahim**

Simmons v Castle: the increase in general damages and its effect on discrimination cases

General damages, compensating non-pecuniary loss, are awarded daily in county courts, but rarely in the employment

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.

tribunal. The exception is discrimination cases, where the employment tribunal can compensate injury to feelings: Equality Act 2010, ss. 119, 124.

In *Vento v C.C. West Yorks* [2002] EWCA Civ 1871, [2003] IRLR 102 at para. 65, the Court of Appeal gave brackets for damages for injury to feelings: (i) £15,000 – £25,000 for the most serious cases, involving lengthy campaigns of discrimination; (ii) £5,000 – £15,000 for serious cases; (iii) £500 – £5,000 for less serious cases, usually an isolated discriminatory act. In *Da'Bell v NSPCC* [2010] IRLR 19, the EAT adjusted these bands for inflation: (i) £18,000 – £30,000, (ii) £6,000 – £18,000; (iii) up to £6,000.

The most recent update to personal injury general damages is the decision in *Simmons v Castle* [2012] EWCA Civ 1039 and [2012] EWCA Civ 1288. It has implications for all general damages awards, including for discrimination.

The background to the case is found in the Jackson report on civil litigation costs. As part of his reforms on conditional fee agreements (CFAs), Jackson LJ proposed that general damages be increased by 10 percent. Many recommendations are enacted in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), Part 2, which comes into force on 1 April 2013.

In *Simmons*, the Court was asked to approve the settlement of an unremarkable personal injury appeal, but used the case to implement the 10 percent damages increase. In its first judgment ([2012] EWCA Civ 1039), the Court declared that the increase would apply to all cases where judgment was given after 1 April 2013. This increase applied to damages for: (i) pain, suffering and loss of amenity; (ii) nuisance; (iii) defamation; (iv) all other torts which cause suffering, inconvenience or distress. The fourth category arguably includes damages for distress in discrimination cases, since discrimination is a 'statutory tort'.

The judgment was challenged by insurers on a specific point concerning CFAs, and the Court reheard the case ([2012] EWCA Civ 1288). It considered which awards should be covered by the increase: paras. 45-50. It recommended *McGregor on Damages* (18th ed.), chapter 3, which discusses non-pecuniary damages under four heads: (i) pain, suffering and loss of amenity; (ii) physical inconvenience and discomfort; (iii) social discredit; (iv) mental distress. *McGregor*, para. 3-011 refers to damages for injury to feelings in discrimination cases under mental distress. The Court's recommendation of *McGregor* makes it highly likely that the

damages increase applies to discrimination cases.

The Court of Appeal has effectively updated the *Vento* bands. The increase produces the following awards as from 1 April 2013: (i) £19,800 to £33,000, (ii) £6,600 to £19,800; and (iii) up to £6,600. It remains to be seen whether employment tribunals apply these increased awards. This partly depends on practitioners bringing the *Simmons* judgments and the discussion in *McGregor* to the tribunal's attention.

Author: **Alexander Halban**

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

Chambers of James Dingemans QC

3 Hare Court
Temple
EC4Y 7BJ
DX: 212 LDE
T: 020 7415 7800