

Employment Bulletin

● Page 2:

Asylum seekers and discrimination

Suits You?

Right to private life - employee takes a beating

● Page 3:

Working abroad - the cases continue

Constructive dismissal - foul language

Changes to compensation limits and maternity pay

New ACAS guidance on bullying

● Page 4:

Globalaw - International Section

Immigration Laws for the US

Injured feelings of bullied worker compensated in unfair dismissal case

For thirty years the law has been that an employee cannot be awarded compensation for hurt feelings arising from the manner of his or her dismissal. All attempts to challenge this proposition have failed. That is until now. In a groundbreaking decision of the Court of Appeal the last thirty years of case law have been overturned and a new avenue of compensation has been opened up at least for now.

The case concerned an employee who was subjected to a sustained campaign of bullying by a colleague and a former line manager, which the employers failed to deal with. The employee resigned and claimed unfair constructive dismissal. Ignoring the previous case law, a tribunal awarded £10,000 for injury to feelings plus a sum for financial loss. On appeal the Employment Appeals Tribunal took a more orthodox approach and overturned this decision. The employee appealed to the Court of Appeal.

The Court decided that the previous cases were wrongly decided. An employee's loss was not limited to pecuniary loss and in principle non-economic loss arising from the manner of an employee's dismissal should be recoverable.

The judges went on to decide that by reference to discrimination cases, where awards of injury to feelings are routinely

made, the sum of £10,000 awarded by the Tribunal was not unreasonable. The employee in question had been humiliated and distressed by the manner of his dismissal. His family life had been affected and his professional status diminished.

So does this case open the floodgates, with employers facing a deluge of claims? The answer to that question is probably not. But there will be repercussions. The Court themselves noted that compensation would only be awarded for 'real injury to... self respect' and would apply principally in constructive dismissal cases where the employee has resigned due to his or her employer's behaviour. It would not apply to the run of the mill unfair dismissal case. The top band for injury to feelings awards in the most serious discrimination cases is £15,000 to £25,000 and it has to be remembered that there is a cap on awards in unfair dismissal cases (currently £55,000 - see further below for recent changes to compensation limits).

A final point to note is that the case is being appealed to the House of Lords in May. In the meantime perhaps one important lesson that employers can draw from the case is the need to confront and deal with bullying in the workplace. It is the failure to tackle these issues that could lead to an employee being forced out of a job and claiming for his or her injured feelings as well as economic loss.

In a groundbreaking decision of the Court of Appeal the last thirty years of case law have been overturned



Asylum seekers and discrimination

It is a general principle of law that an illegal contract is unenforceable. This principle has been relaxed in certain employment cases, in particular to allow claims of discrimination to proceed even where an employee has participated in the illegality (most commonly defrauding the Revenue by being paid cash in hand). In a recent case the Appeal Tribunal has decided that such relaxation of the rules cannot apply where the employee has been entirely responsible for the illegality.

The case concerned an asylum seeker who sought work in breach of the terms upon which the Home Office had allowed him to remain in the country pending a decision on his asylum application. In obtaining a job, the asylum seeker falsely stated on his application form that he did not need a work permit. When he was later dismissed he made a claim of race discrimination. The Appeal Tribunal refused to allow such a claim. The illegality affected the entirety of the contract, creating an employment relationship that was not entitled to exist at all.

Employers should note the risk of committing an offence under the Asylum and Immigration Act 1996 if they fail to check whether a job applicant has the right to work in the United Kingdom. The Government is currently tightening up the rules concerning what documents are acceptable for this purpose. It is likely that documents simply containing the prospective employee's National Insurance number will no longer be sufficient. We will report further when the new regulations become law.

Suits You?

The delicate issues of employee clothing and appearance were raised in a recent case before the Appeal Tribunal. The case concerned a male employee who worked at a Job Centre who objected to the introduction of a new dress code requiring staff to dress in a 'professional and businesslike' way. Men were required to wear a collar and tie and women were asked to dress appropriately and to a similar standard. The male employee refused to wear a collar and tie and claimed direct sex discrimination.

An Employment Tribunal upheld the employee's claim and awarded him £1,000 compensation. The employer, the Department for Work and Pensions, soon found itself facing 6,950 similar claims! However, these claimants were to be disappointed. The Employment Appeal Tribunal overturned the Employment Tribunal as the Tribunal had not considered whether the employer's overriding requirement that staff dress in a professional and businesslike way could only be achieved by requiring men to wear a collar and tie. This was the crucial question, which was sent to another Tribunal to consider.

It remains to be seen whether the new Tribunal will follow the lead of a Tribunal considering a similar issue in relation to the prison service. This Tribunal decided that a dress code requiring men to wear a collar and tie did nothing more than reflect the conventional views of society that smart dress for a man constituted the wearing of a shirt and tie.

Right to private life - employee takes a beating

We reported in the last newsletter that an employee dismissed after being cautioned by police for engaging in sexual activity with another man in a public toilet had unsuccessfully tried to invoke Article 8 of the European Convention on Human Rights - the right to a private life - in his unfair dismissal case. This bulletin sees another employee, this time a probation officer specialising in the treatment of sex offenders, failing to persuade an Appeal Tribunal that Article 8 could assist him.

The employee in question was dismissed after his employers discovered that he was a director of a company that sold sadomasochistic products via its website. The Tribunal decided that the employee's activities were in the public domain and that Article 8 was not relevant. The Tribunal went on to hold that Article 10 - the right to freedom of expression - could not assist the employee either. The employer's decision to dismiss the employee was proportionate in view of the risk of damage to the reputation of the probation service that the employee's activities posed. The dismissal was therefore fair.

Working abroad - the cases continue

Our last two bulletins have reported on the confusion over whether British nationals working overseas can pursue unfair dismissal claims before a UK Employment Tribunal. The confusion has arisen since the repeal of the provision that previously excluded employees who ordinarily work outside the UK from making claims.

In their latest judgment on the subject the Appeal Tribunal have decided that they could not hear a claim of unfair dismissal brought by a British national employed in the United States by a US company. The Tribunal felt that Tribunals do not have unconditional extraterritorial jurisdiction. In their view, the repeal mentioned above was made to extend protection in limited cases to workers who had worked in the UK for years but 'ordinarily' worked outside the UK. It was also repealed to allow the UK to fulfil its obligations under the Posted Workers Directive so that European workers based in the UK temporarily could make claims.

The Employment Appeal Tribunal concluded that employees who could show a proper and substantial connection with Great Britain would be protected. They declined to elaborate further and gave leave to appeal to the Court of Appeal. It is to be hoped that once the Court of Appeal have considered the matter we will have a bit more clarity on these murky waters.



Constructive dismissal - foul language

There are many different styles of management, some more effective than others. The question of when management style becomes a problem for employers is a hot topic in the current climate of increasing claims related to bullying and psychiatric illness. In a recent case the High Court had to decide a case concerning a high-earning broker who was subjected to a campaign of bullying by his manager. The manager in question, the President of the employing company, regularly used foul language. He had a dictatorial management style and regularly threatened the broker with the sack.

The judge took into account the large salary paid to the employee because of the inherent stress levels involved in his work. However, the judge found that the employee was still entitled to proper treatment in accordance with the contract of employment. The employee's role and status as a senior manager had been severely undermined and he had been entitled to walk out and claim constructive dismissal. Damages for the employer's breach of contract were calculated on the basis of the remainder of the broker's fixed term contract and amounted to just short of £1,000,000. This case represents a reminder, should one be needed, that good employment practice begins at the top.



Changes to compensation limits and maternity pay

From 1 February 2004 the weekly rate for the unfair dismissal basic award has increased to £270 and the maximum compensatory award for unfair dismissal has risen to £55,000. The standard rate of statutory maternity pay, statutory adoption pay and statutory paternity pay will increase from £100 per week to £102.80 per week from 4 April 2004.



New ACAS guidance on bullying

The Advisory, Conciliation and Arbitration Service have updated its guidance on bullying and harassment at work. There are two guides, one for employees and one for managers, which are available via the ACAS website - www.acas.org.uk.



Globalaw - International Section

As you know the firm is a member of a global network of lawyers, Globalaw, the website address of which is www.globalaw.net. Our employment team is the European Coordinator for the Employment and Immigration initiative in Globalaw, which aims to formalise the network of Employment and Immigration Lawyers in Globalaw. This is clearly important as we are seeing more and more of our clients moving their business and therefore their people around the globe. We are therefore keen to present a seamless service in all jurisdictions.

As part of this initiative we thought it would be of interest for you to hear about "hot topics" in other jurisdictions and we have therefore invited our global members to include features in the bulletin. We hope this will be of interest to you.



Immigration Laws for the US

James Prappas - Jackson Walker - Texas

The US Citizenship and Immigration Services recently announced that it has received enough H-1B petitions to meet this year's congressionally mandated cap of 65,000 new workers. This type of visa allows US employers to employ overseas nationals on a temporary basis in professional positions for speciality occupations, such as engineers, professors, researchers, teachers, accountants and lawyers.

As of February 17, 2004, the USCIS is not accepting any new H-1B petitions for first-time employment subject to the Fiscal Year (FY) 2004 annual cap.

The USCIS has implemented a new procedure for the remainder of FY 2004. In part, the procedure states the earliest date of petitioning employer may file an H-1B petition requesting FY 2005 H-1B employment with an employment start date of October 1, 2004, would be April 1, 2004. Petitions for current H-1B workers do not count towards the congressionally mandated H-1B cap.



Media, Entertainment and much, much more...

DAVENPORT LYONS

This Bulletin is designed to provide a summary of the subject matter. It does not purport to be comprehensive or a substitute for specialist legal advice in individual circumstances.

If you would like any further information on these or any other employment-related topics please contact one of the Partners in our Employment Department:

Kathy Pavey
020 7468 2668
kpavey@davenportlyons.com

Marie Van Der Zyl
020 7468 1620
mvanderzyl@davenportlyons.com

Tony Gould
020 7468 2667
tgould@davenportlyons.com

Michael Hatchwell
020 7468 2647
mhatchwell@davenportlyons.com

Alon Domb
020 7468 2684
adomb@davenportlyons.com

Davenport Lyons
1 Old Burlington Street
London W1S 3NL
Tel: 020 7468 2600
Fax: 020 7437 8216
Web: www.davenportlyons.com