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Polkey principle not easy way out warns employment head

BP Collins Employment partner, Jo Davis, has warned firms not to disregard statutory dismissal procedures despite a Court of Appeal decision to uphold a case using the 'Polkey Principle'.

The point of law – from the case *Polkey v A E Dayton Services Ltd* – refers to the practice in an unfair dismissal action for compensation to be reduced, if the employer is able to show that the employee would have been dismissed even if the correct procedures had been followed.

A recent case in the Court of Appeal (*Gover v PropertyCare Ltd*) dealt with this issue. Mr Gover and the other claimants were employed by PropertyCare Ltd selling lettings insurance and related products to landlords. In mid 2001 PropertyCare Ltd decided unilaterally and without proper consultation to reduce their commission rates. When no agreement to this proposal was forthcoming from the employees, the company announced that their employment contracts would be terminated on 31 October 2001 and invited them to apply for their existing jobs with different terms and conditions. The claimants met to decide what to do but in any event their contracts were terminated on 1 November 2001.

During the original case, the Employment Tribunal had said that PropertyCare Ltd, had handled the dismissal process 'reprehensibly' but found that, even if PropertyCare had, after proper consultation, proposed terms that would not have been a fundamental breach of the employment relationship, the sales force would not have found the terms of this package acceptable. Therefore, all they had lost was employment during the period when consultation should have taken place.



*such an exercise launched the ET
'on a sea of unreliable speculation'*

The Employment Tribunal calculated a loss of earnings of four months, plus two weeks for when the consultation period should have taken place. On this basis it applied a 'Polkey reduction' and the unfair dismissal compensation was limited to an amount covering that period.

Mr Gover and his colleagues appealed to the Employment Appeal Tribunal, which upheld the Employment Tribunal decision.

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Polkey principle not easy way out

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They therefore took their case to the Court of Appeal and argued that the Polkey principle did not apply because it was not possible to reconstruct what would have happened had the employer acted fairly. It was not open to the Employment Tribunal to consider what would have happened if the unfair dismissal had not occurred and such an exercise launched the Employment Tribunal 'on a sea of unreliable speculation'.

The Court of Appeal dismissed the appeal. It judged that the Employment Tribunal had been correct in directing itself in reconstructing, from the evidence and drawing on its own experience, what would have happened had the employer consulted properly and offered reasonable terms. The key focus should be on the application of the wording of the Employment Rights Act which seeks to make the compensation awarded 'just and equitable'.

Jo Davis warns caution, however, and said companies should still be very careful and not view Polkey as a way of minimising losses.

'Following the introduction of the statutory dismissal procedures in October 2004, the legislation on unfair dismissal was changed so it is open to the Employment Tribunal to disregard minor procedural failings which would not have affected the fairness of the ultimate outcome, provided they are not a breach of the statutory dismissal procedures,' she said.

'Even though it may seem from Gover v PropertyCare Ltd that in a case of unfair dismissal an employer only has to claim that the dismissal was likely to happen anyway to minimise the compensation payable, it is always advisable to follow proper procedures and to seek advice when dismissing an employee. Failure to follow the statutory procedures can result in an increase in the compensation awarded of up to 50 per cent.

'Even if the Employment Tribunal decides that there should be a reduction in the compensation payable for unfair dismissal, the cost of defending a claim can be considerable.' ■



Butlins wins minimum wage appeal

Butlins has won the right to take its Minimum Wage case to the Court of Appeal after the Employment Appeal Tribunal (EAT) found against the company – but said the action raised important points of law.

HM Revenue and Customs (HMRC) had brought the claim in the Employment Tribunal against Leisure Employment Services Ltd, part of the Butlins Group, alleging it paid seasonal workers beneath the statutory minimum wage, after costs for accommodation were deducted from salary.

The £6 per fortnight fee was said to cover gas and electricity costs for employees living in accommodation provided by the company.

HMRC issued enforcement notices against Leisure Employment Services Ltd, but these were overturned at the Employment Tribunal.

HMRC appealed. The EAT found that the workers were under an obligation to pay a particular sum of money in order to be permitted to use the accommodation on

offer. As such, the amount they paid was in respect of the provision of living accommodation.

However, the company had already taken full advantage of the maximum amount of deductions that can be made from the minimum wage where an employer provides accommodation. The appeal was allowed and the enforcement notices allowed to stand.

The judge did express some sympathy towards Leisure Employment Services Ltd, as the arrangement did not seem unreasonable. He said the amount deducted was likely to be quite a lot less than the actual cost of the gas and electricity used and, had the company left it to the employees to pay their bills directly to the utility companies, it would not have fallen foul of the legislation. ■

Gay banker loses £5m claim

A homosexual HSBC employee who took his employers to Tribunal in one of the first major claims under the Employment Equality (Sexual Orientation) Regulations, has lost his bid for £5 million compensation.

Peter Lewis claimed he lost his job because he was gay. He was dismissed on the grounds of 'gross personal misconduct' following an alleged incident of sexual harassment at the firm's gym, three months after starting with the company.

However, although the Employment Tribunal found that HSBC had not discriminated against Mr Lewis when dismissing him, it did find he had been less favourably treated than a heterosexual employee as regards the initial investigation into the complaint.

A remedies hearing will take place at a later date if the parties fail to reach an agreement on the settlement terms.

David Buckle advises care when dealing with potentially contentious issues, such as race and sexuality. He said: 'Staff training should be considered to avoid the danger that pre-conceived ideas of homosexual stereotypes influence the behaviour or language of those carrying out the investigation process.' ■



Rolled up pay unlawful says ECJ

The Department of Trade and Industry has now updated its guidance on the Working Time Regulations to reflect the outlawing of rolled up holiday pay.

In March this year, the European Court of Justice (ECJ) said the practice was unlawful and advised employers to renegotiate contracts involving rolled up holiday pay for existing employees or workers as soon as possible, so that payment for statutory annual leave is made at the time leave is taken.

Under the practice of rolled up holiday pay, a worker is paid an hourly rate, which includes an excess to be set aside by the employee for holidays. They are then not paid during annual leave.

The ECJ said employers who have already given rolled up holiday pay in relation to

work undertaken, provided the payments have been made in a transparent and comprehensible manner, can offset any future leave payments made at the proper time.

As such, only employers who have paid rolled up holiday pay in a way that was not transparent and clear to the employee are at risk of financial exposure as a result of this ruling.

Pay-in-lieu of minimum paid holiday leave has also been ruled as unlawful by the ECJ. The court decided that it was not allowed even if the holiday year in question had expired and the allowance was carried forward to the next year. ■

Grievance letter update

The Employment Appeal Tribunal (EAT) has offered further guidance on what constitutes a statutory grievance letter following the conclusion of two cases.

In *Arnold Clark Automobiles v Stewart & another*, the EAT held that a letter claiming financial compensation, sent by the claimant's solicitor prior to the action, did amount to a grievance letter. The fact that the letter was headed 'without prejudice' and would not normally be admissible as evidence did not matter.

In *Canary Wharf Management Ltd (CWML) v Edebi*, however, the EAT ruled that even though Mr Edebi, a security guard with the company, had written to them nine months before his resignation with grievances and citing the Disability Discrimination Act (DDA), the fact that he did not include any reference to the

DDA in his resignation letter – or indeed refer to his previous communication – meant he could not sue for disability discrimination after he left the company.

In his original letter, Mr Edebi claimed his job, which involved long hours standing outside in all weathers, aggravated his asthma and said CWML should have made adjustments to his job under the DDA. However, as there was no follow-up after this, and the company believed Mr Edebi's asthma had improved due to use of an inhaler, no further action was taken.

Although the EAT accepted that Mr Edebi was complaining his working conditions had

had an adverse effect on his health, it would not be just to the employer to say that his resignation letter fairly raised 'even in a non-technical and unsophisticated way' an issue that the employer could reasonably understand arose under the DDA.

All the security guards had been subject to the same conditions and Mr Edebi had not identified any failures specifically to make adjustments for his illness, nor did he allege that he had been treated any less favourably than his colleagues. ■

Discrimination on the grounds of age will be outlawed in respect of employment, vocational training, the award of professional qualifications and trade union membership

A new age for the workplace

With the new Employment Equality (Age) Regulations 2006 due to come into force on 1 October, UK industry is bracing itself for one of the most far-reaching pieces of legislation to affect the workplace in the last 30 years. Discrimination on the grounds of age will be outlawed in respect of employment, vocational training, the award of professional qualifications and trade union membership. This includes victimisation or harassment, so sending joke 'over the hill' birthday cards to staff may be unwise!

Whether you see this as needless political correctness or an inevitable and necessary piece of protective legislation, if you are an employer, you should certainly sit up and take note: there is no limit on the compensation available to an aggrieved employee who succeeds at a tribunal.

So what will the Regulations mean in practice? In summary, it will be unlawful for an employer to:

- treat staff less favourably on grounds of age if that treatment is related to recruitment methods, the refusal (or deliberate failure) to offer employment, the terms on which employment is offered or given, the opportunity for promotion, transfer, training or other benefits, dismissal and any other harm or disadvantage done to an employee.
- indirectly discriminate by applying a policy or work practice (which otherwise applies equally to all staff) and, by so doing, place an employee of a particular age group at a disadvantage when compared to other employees of other age groups.

Such treatment may be allowed if it is a 'proportionate means of achieving a legitimate aim', but until case law can provide us with some specific guidance on what is 'proportionate' and a 'legitimate aim', relying on this justification could be risky.

The Regulations also provide for circumstances in which retiring an employee could amount to discrimination and/or unfair dismissal. The compulsory retirement of an employee before the age of 65 will be unlawful unless it can be objectively justified, although a dismissal by reason of retirement over the age of 65 would not constitute unlawful age discrimination. However, employers must be sure to follow carefully the procedures laid down in the Regulations, which include providing the employee with between six and twelve months notice of dismissal.

Employees will also have the right to ask to work past retirement age and both employer and employee need to follow a set statutory procedure in dealing with such requests. Failure to do so will, in certain

circumstances, make a dismissal automatically unfair. Significantly, the age limit on bringing a claim for unfair dismissal and entitlement to statutory redundancy pay will be removed.

Time will tell whether the Regulations will mark the beginning of a 'new age' for employee rights, but employers now have very little time to make sure their existing policies and practices will comply and to minimise the risks of a costly 'coming of age' in October. ■



Discrimination and diversity

The age discrimination legislation will mean that, as an employer, any decision you make that may be directly or indirectly affected by an employee's age, will need to be justified.

This legislation will affect everything from how you recruit and train your staff to how they are treated by colleagues in the workplace. It will also give all employees, old and young, an ability to challenge the decision to terminate their employment in an employment tribunal.

Gearing up

1 October is not far way. You need to start reviewing your age discrimination policies and paperwork now to ensure your business will be compliant from that date.

An effective and consistent approach to age discrimination, and more generally, 'diversity', will help you to comply with anti-discrimination legislation. It can also help to attract and retain both staff and customers.

Diversity – what does it mean?

Quite simply, it means that everyone is different. In an employment context, it means equal opportunities... and a lot more besides. Diversity implies a recognition of the benefit of differences between people and an understanding that employees are individuals with their own unique contribution to make, for which they should be valued.

Diversity encourages a breadth of experiences and skills within an organisation, making it more adaptable to business needs and to the expectations of current society.

Training

An effective approach towards discrimination and diversity depends on the involvement of everyone within the organisation. Managers and staff have their own roles to play in achieving this, but they often lack the information and skills necessary. These skills are acquired through training.

The very fact that you have provided training in this area will be to your advantage if a discrimination case is brought against you, as this helps you establish a defence to any claim.

B P Collins

We have formulated a package of products to safeguard companies against age discrimination claims and ensure wider protection against discrimination claims in general. These include:

1. A thorough review of all of your employment contracts, policies and other paperwork to ensure that it does not contravene the discrimination legislation, including the age discrimination legislation coming into force on 1 October.
2. Practical advice and training on dealing with age discrimination and diversity issues and on promoting diversity within your organisation. Our bespoke training courses cover:
 - The concepts of equality and diversity
 - Implementing these in the work environment
 - Equal opportunities legislation
 - Identifying and preventing discrimination

Companies that wish to select only part of the package can be accommodated. ■

employment case study

In Case: age discrimination

In Case: Age Discrimination, the fifth in our highly popular series of employment case studies, is a 'must' for all employers in a quandary over how to deal with forthcoming age related employment legislation.

This case study will use our successful scenario format to illustrate the scope of the legislation and its impact in the workplace. It will cover the full extent of the legislation, from how you recruit and reward your staff to how to part company without bloodshed.

The case study will start with registration at 9.00am with a 9.30 am start. It will include three mini scenarios, with plenty of opportunity for discussion on the points emerging and questions from the floor. After the case study, a light lunch will be served at which you can put any further questions to members of the B P Collins Employment Team.

We expect this event to be very popular to register please contact Sam Howe on 01753 891775 as soon as possible to secure your place. Alternatively, you can register by emailing Samantha.howe@bpcollins.co.uk. please quote ref 2106. ■

Burnham Beeches Hotel, Grove Road, Burnham, Slough SL1 8DP
21 September 2006. 9.00am.

New age discrimination regulations challenged already!

The Heyday Group, a working rights organisation backed by the charity Age Concern, has launched a legal challenge against the age discrimination legislation in the High Court.

The main challenge is to the legality of the default retirement age, which Heyday says effectively forces those over the age of 65 out of work. Although an employee has the right to request to work beyond the default retirement age, the regulations allow an employer to refuse such a request without giving reasons. Heyday argues that the regulations fail to implement the EU Equal Treatment Framework Directive properly.

Heyday has stated in its press release: 'Each year tens of thousands of workers lose their jobs for the simple reason that they have reached a certain age. Replace the word 'age' with 'race' or 'gender' and such an act would be unthinkable...'

If permission is granted for the case to proceed, a full hearing may take place in the autumn. ■

Part-time workers get bank holiday Monday blues

A bid by a part-time employee to claim days off in lieu of bank holidays has been rejected.

The Employment Appeal Tribunal upheld a tribunal decision which found that Mr McMenemy, of Capita Business Services, who worked only Wednesday, Thursday and Friday each week, was not entitled to pro-rata time off or pay in lieu in respect to Monday bank holidays.

Mr McMenemy claimed it was unfair as full-time workers in his team who normally worked on a Monday were given the day off.

Capita argued that, as it operated seven days a week, some of its full-time employees worked Tuesday to Saturday and did not benefit from Monday bank holidays.

The contracts of both full-time and part-time workers provided that they were entitled to take public holidays only when they fell on a normal working day.

However, Kathryn Fielder warned businesses from reading too much into the case.

'The decision reflects the circumstances in this case and it might well have been



different had all the full-time workers worked the standard five-day week,' she said.

'On the subject of bank holidays, employers should note that the Government has now published a consultation paper outlining proposals to ensure that all workers get paid leave for bank holidays in addition to their statutory four weeks annual leave.' ■

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Injury to feelings award cut: Compensatory not punitive says EAT

A single mother who won damages for sexual discrimination over an unfair job interview has had her award reduced on appeal.



Ms Woodward had her award for injury to feelings reduced to £4,000, after the Employment Appeal Tribunal agreed the original figure had been designed to punish the company, Corus Hotels Plc, rather than to compensate Ms Woodward.

It also found that the Employment Tribunal had been incorrect to take into account the financial resources of Corus Hotels when setting the award.

During the case, Ms Woodward claimed her interviewer, Mr Rushton of Corus Hotels, had conducted her interview for the position of receptionist in a 'crassly sexist manner'. She claimed he had asked her whether she had any children and made numerous references to her personal circumstances.

Ms Woodward also said that he told her not to stop looking for work and had tried to dissuade her from taking up the receptionist post.

An original award of £525 for loss of earnings was uncontested.

Jo Davis, Head of Employment said: 'Ms Woodward found another job shortly after her interview with Corus Hotels, otherwise the loss of earnings claim would have been higher. Employers should make sure that all stages of the recruitment process are carried out in a way that does not discriminate directly or indirectly on grounds of sex, marital status, ethnic origin or race, religion or belief, sexual orientation, gender reassignment or disability. From 1 October 2006, employers can add age to that list.' ■

BNP MP's race claim dismissed by Court of Appeal

A Bradford British National Party MP who lost his job as a bus driver, has had his claim for discrimination on racial grounds overturned after the Court of Appeal said it would 'turn the race relations legislation upside down'.

Lord Justice Mummery said Mr Redfearn's case was 'at odds' with the Race Relations Act and upholding it would mean 'that any less favourable treatment brought about because of concern about the racist views or conduct of a person in a multi-ethnic workplace would constitute race discrimination.'

Mr Redfearn originally lost his case at the Employment Tribunal, but appealed and had the ruling overturned in his favour by the Employment Appeal Tribunal.

However, the Court of Appeal found that, although the decision to dismiss Mr Redfearn had included racial considerations, it did not automatically follow he had been dismissed on racial grounds.



Serco dismissed Mr Redfearn claiming it feared his continued employment would present a health and safety risk to its employees and passengers

Mr Redfearn had worked for bus company, Serco Ltd, in Bradford for less than 12 months when an article appeared in the local paper identifying him as a candidate for the BNP in the forthcoming local elections.

Following this, union UNISON wrote to Serco expressing concern, as between 70% and 80% of the company's customers were Asian, as was 35% of its workforce.

The company also received representations from the GMB union and from employees concerned for their personal safety and that of the company's property in the event of any retaliatory action on account Mr Redfearn's political views.

Health and safety risk

After his election on June 15th 2004, Serco dismissed Mr Redfearn claiming it feared his continued employment would present a health and safety risk to its employees and passengers. It was also concerned that its reputation might suffer as a result of its association with the BNP.

As Mr Redfearn had been an employee for less than a year and was therefore unable to bring a claim of unfair dismissal, he brought a claim of discrimination contrary to the Race Relations Act 1976.

The Court of Appeal said that the claimant had been treated less favourably not because he was white but because of a particular 'non-racial characteristic' ie. membership of the BNP. Therefore, the dividing line of colour or race was not made by Serco but by his political party, which defines its own membership in terms of its racial policies. Mr Redfearn's complaint was one of discrimination on political grounds, which falls outside the anti-discrimination laws. ■



Government reverses Lords asbestos ruling

Asbestos sufferers have won Government support after it pledged to reverse a controversial House of Lords decision for proportional damages.

The ruling, handed down last month, meant that victims of mesothelioma could not receive full compensation unless they were able to sue all the employers who had exposed them to asbestos fibres.

As the disease can take 40 years to develop, it can be very difficult to trace the insurers of those former employers that have ceased to trade.

However, the government has now announced that it intends to amend the Compensation Bill in order to reverse the decision.

One case that would have been affected by the Lords' decision was that of widow, Sylvia Barker of Holywell, Flintshire, whose husband Vernon died in 1996 aged 57, having been exposed to asbestos dust by more than one employer during his working life.

Under the original law – prior to the Lords intervention – the High Court found that Corus (UK) Plc was 100 per cent liable for Mr Barker's illness and his subsequent death, as the claimant could seek full compensation from any employer, even if they could not prove which exposure had caused the disease.

Under the Lords ruling, it would have been necessary for Mrs Barker to sue all her husband's employers in order to get the full compensation amount, in this case £152,000. This is despite the fact that they may have gone out of business and/or been underinsured. ■

'Sexist' Employment Rights Act claim thrown out

Employees aged 65 and over who were hoping to claim unfair dismissal, have suffered a set back after the Court of Appeal upheld a decision supporting the Employment Rights Act 1996.

The Department of Trade and Industry (DTI) had appealed an Employment Tribunal decision which found that the current law, which prevents those over 65 years-old claiming compensation for unfair dismissal and/or statutory redundancy pay, amounted to sex discrimination because more men than women work over the current retirement age of 65.

The DTI were successful at first instance, Mr Rutherford & one other, took their cases to the Court of Appeal, where they were told the Employment Appeal Tribunal had been correct in its decision to overturn the original tribunal's finding.

At the appeal tribunal, it was decided that the wrong pool of workers had been selected for comparison when concentrating on age and that a comparison with the workforce as a whole showed the law, as it stands, does not have a disparate impact on men compared with women.

However on October 1 this year, the new Employment Equality (Age) Regulations come into force. This will remove the upper qualifying age for unfair dismissal and redundancy and will give employees the right to request to work beyond 65, or any other retirement age set by their employer.

The employer will have a duty under the regulations to consider the request. ■



Bosses warned give TA's jobs back or face fine

Employers have been reminded they could face heavy fines if they refuse to re-employ volunteer reservists back from the Middle East.

Since military operations in Iraq began in 2003, 12,000 reservists have been called up.

Under the Reserve Forces (Safeguard of Employment) Act 1985, an employer has a duty to re-employ the former employee once the reservist has made an application for reinstatement to employment.

However, some employers are unaware of their obligations. A Staffordshire garage company recently discovered the penalty for refusing to give an employee, who served in the Territorial Army, his job back when he returned from his tour of duty in Iraq. They were fined £750 by Kidderminster Magistrates Court and ordered to pay compensation of almost £1,000. ■

in brief...



■ Work based injuries – NHS to recover costs

Employers are being told to tighten health and safety policies before new Injury Cost Recovery legislation comes into force on October 1.

The new rules will mean the NHS is able to claim back the cost of treating an employee injured in the workplace, through Employers Liability Insurance (ELI).

The move is intended to encourage employers to take steps to prevent workplace accidents and to ensure that negligent employers pay the full cost of their actions.

■ Liability Insurance and temporary workers

On the subject of Employers Liability Insurance, businesses that employ seasonal and part-time staff are reminded that the law requires them to carry adequate ELI to cover temporary staff. Sole traders who work alone are not required by law to carry ELI but if they take on extra staff they must be sure to arrange cover. Even those working on a voluntary basis may need to be insured.

■ Transgender females win pension rights

There has been a further development to a case we reported in our last issue.

The European Court of Justice has ruled that transgender females should not be refused a pension aged 60. Male-to-female transsexuals had been treated under UK law as if they were men, who currently receive pensions aged 65. However the Advocate General said this was contrary to the Social Security Equal Treatment Directive.

The ruling will only apply to female transsexuals who applied for, but were denied a pension at age 60 before the Gender Recognition Act 2004 came into force. ■

talk to the experts...

01753 279 029

the employment team

Jo Davis, Partner and Head of Employment

Craig Havard, Partner

Kathryn Fielder, Senior Associate

James Townsend, Associate

Jonathon Bruck, Associate

David Buckle, Associate

The Employment Team
can be contacted on the
number above or email:

enquiries@bpcollins.co.uk
www.bpcollins.co.uk