

June 2007

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Features

Don't discriminate when you investigate – Record payout for sexual orientation discrimination

According to recent ACAS figures, 470 claims for sexual orientation discrimination were brought in the employment tribunal between January 2004 and September 2006, with the most common claims related to bullying and harassment. The case of *Margaret Durman and Penny Smith v Barchester Healthcare Limited* (1701873/2005 & 1700455/2006) is a reminder to employers that, although most claims of sexual orientation discrimination may concern the more explicit and visible forms of prejudice such as name-calling, threats and assaults, poorly conducting a disciplinary investigation runs the risk of a tribunal deciding that there is no other explanation for the behaviour than direct sexual orientation discrimination.

Conducting a fair investigation will not only provide the groundwork for a fair dismissal if this is the appropriate sanction in the circumstances. It will also help avoid allegations of discrimination, for which compensation in the event of a successful tribunal claim is uncapped. It has been reported that the compensation awarded in the current case was a record amount and in the region of £350,000 to £500,000 – a significant liability for any employer.

In *Barchester*, the tribunal took into account the size of the employer and the fact it had a dedicated human resources department, in deciding that it could not see how the dismissal conducted could have been “so very bad unless sexual orientation discrimination was the root cause of it”. The essential problem with the disciplinary investigation by *Barchester* was that it had all the appearances of being deeply biased and the tribunal decided that a heterosexual couple would not have been treated the same.

The *Barchester* investigation was prompted by an anonymous email naming the claimants, lesbians in a relationship together, and making serious allegations that included patient abuse. The claimants were suspended pending the investigation.

The claimants suspected the email was sent by a man with whom they had previously had difficulties and about whom they had complained to the police. This information was documented in one of their personnel files. Despite this, the investigator did not look into the matter. The tribunal took the view that she should have done so as it was “distinctly possible that the email [was] founded upon a homophobic view of [the claimants’] relationship”.

There were also errors in how evidence was gathered. The investigator put a notice up in the staff room concerning the allegations, which the tribunal found had the effect that “anyone with the slightest grievance or grudge was in effect encouraged to come forward and make a complaint”. She also went through patient and staff files, as the tribunal put it - “seeking to find matters which could be turned into allegations to be investigated”.

Some issues arise from *Barchester* which an employer should bear in mind when conducting disciplinary investigations:

- investigate fully and fairly. The amount of investigation required depends on the individual circumstances of the case. Where the allegations and consequences of dismissal are very serious the investigation should be detailed and thorough;
- the employer’s task is to gather all the available evidence, but be careful not to use the investigation as an excuse to “go fishing”;
- do not simply search for evidence against the employee, but also anything which may point towards innocence. Bear in mind that the investigation must be “even-handed” in order to be reasonable;
- seek to keep the investigation confidential;
- suspension while an investigation is ongoing is a serious step, particularly in sensitive cases involving senior employees and serious allegations, where the repercussions of suspension without good cause will be more serious. Consider whether it can be avoided, for example through re-deployment. The tribunal in the *Barchester* case said this should have been considered, given the resources of the employer.

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If *Barchester* had investigated the allegations more appropriately, it may well have found that there was no cause for concern and the women would not have been dismissed and so brought claims. Investigation is the cornerstone of fairness and an investigation which is fair will go a long way to avoiding a finding not just of unfair dismissal, but can also avoid discrimination allegations.

By Kellie McCormack

This article previously appeared in a similar form in Workplace Law.

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Agency workers: More certainty for businesses

The status of agency workers has re-emerged over recent months, but this time to a welcome sigh of relief from employers. Previously, the cases of *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437 and *Cable & Wireless Plc v Muscat* [2006] IRLR 354 suggested that, in certain circumstances, an implied contract of employment may exist between a worker and an end user, which risks workers claiming unfair dismissal against an end user once a placement has ended.

In four recent cases, summarised below, the Employment Appeal Tribunal (“EAT”) has resolved some of the confusion and provided useful guidance on the status of agency workers.

James v Greenwich London Borough Council (2006) UKEAT/006/06/ZT

We have previously reported this case in February’s edition of Law at Work. Mrs James had worked for the council for five or more years, initially as a permanent employee, and then through an agency. Mrs James was off sick for two months, and on her return, the agency told her she was no longer required at the council. She submitted a claim for unfair dismissal against the council, on the basis that an implied contract of employment existed between them, and referred to the fact that she had worked there for a long time, was treated like a full time member of staff, and she had virtually no contact with the agency.

The EAT dismissed her appeal, and held that the passage of time alone was insufficient to form an employment relationship between a worker and an end user. There need to be mutual obligations between the worker and the end user which are inconsistent with the agency relationship. In this case, although the council had a significant degree of control over how Mrs James performed the work, the council were not obliged to accept her from the agency and the agency could at any time provide an alternative worker, as it did during Mrs James’ sickness absence.

Cairns v Visteon Limited [2007] All ER 39 Jan

We previously reported this case in February’s edition of Law at Work. Mrs Cairns had a contract of service with an agency, but chose to bring her claim against the end user because she believed she would have a greater chance of success.

The EAT held that, as she had an express contract with the agency, there was no reason to imply a parallel contract of employment with the end user.

Craigie v London Borough of Haringey (2007) UKEAT/0556/06/JOJ

Mr Craigie was supplied to the council through an agency that deducted tax and national insurance and gave him four weeks’ paid leave, but did not pay him sick pay. His contract with the agency clearly stated he was not an employee. The council made Mr Craigie an offer of a permanent position, but withdrew it after unsatisfactory references were provided. It then told the agency that it no longer required Mr Craigie’s services, and the agency terminated his appointment. Mr Craigie claimed unfair dismissal and breach of contract against the council.

The EAT held that the contract between Mr Craigie and the agency, and between the agency and the council, managed the relationship effectively and was consistent with the services supplied. It was not necessary, therefore, to imply a contract of employment to give business efficiency to the arrangements. Furthermore, the court pointed to the fact that Mr Craigie was able to choose not to go into work on a particular day, which defeated any argument that there was mutuality of obligation between him and the council.

Heatherwood and Wexham Park Hospitals NHS Trust v Kulubowila and others (2007)

UKEAT/0633/06/LA

Mr Kulubowila had a contract of service with an agency. He worked under the direction of the hospital's managers, received training from the trust, and notified his manager at the hospital, not the agency, if he wished to take a holiday.

The EAT held that, although, the element of control was plainly present, it was not enough to form the view that because Mr Kulubowila looked like an employee, acted like an employee and was treated like an employee, the business reality was that he was an employee and the tribunal must imply a contract of employment. The working relationship between the parties was consistent with the express arrangements, and it was not necessary to imply a contract between Mr Kulubowila and the trust. The EAT clarified that agency workers may in fact be employed by nobody, and this was consistent with the distinction which parliament had chosen to make between employees and workers, that employees have unfair dismissal protection and workers do not.

Observations and guidance

In all four decisions the EAT focused on the true nature of the relationship between the parties. This depends on the specific facts in each circumstance. However, the following observations should assist in providing guidance on how tribunals will address the issue:

Necessity

Where there is an employment agreement between the agency and the worker, it does not necessarily imply a contract between the worker and the end user. In fact, an agency worker may be employed by nobody. Where agency arrangements are superimposed on an existing contractual relationship, such as those in *Muscat*, it may be appropriate to assume that the agency arrangements are a sham and conclude that the previous contract continued to operate.

Consistency

The contract performed must be consistent with the agency arrangements. A significant feature of a genuine triangular relationship is that the end user cannot insist on the agency providing a particular worker.

Time

The passage of time alone is insufficient to form an employment relationship between a worker and an end user.

Mutuality/control

There must be mutuality of obligation, an obligation to provide work in exchange for a fee, and a sufficient degree of control by the end user for a contract of employment to exist with the end user.

Watch this space ...

These cases provide greater comfort to businesses that employ temporary workers through agencies, although there is a strong call for legislative reform in this area. While the EAT has taken a more restrictive approach to the employment status of agency workers, it has highlighted that agency workers are often very vulnerable and need to be protected from the abuse of end users' economic power.

The government published consultations between February and May 2007 on the proposals to increase protection for vulnerable agency workers which were outlined in its strategy paper 'Success at Work', published in March 2006. The government's proposals are not far-reaching in terms of employment status, but rather, they relate to loans to agency workers, charging agency workers for other services and other miscellaneous provisions.

In addition, a private members' bill, Temporary and Agency Workers (Prevention of Less Favourable Treatment) Bill is due to have its second reading in the House of Commons on 19 October 2007. The bill proposes giving a right to equal treatment to agency workers, akin to the right to equal treatment given to part-time and fixed-term employees. However, it is unusual for private members' bills to be passed as legislation and it is expected that this one will not make it through the legislative process.

Agencies, workers and end users should continue to watch this space: the issue has yet to be resolved.

By Camilla Marriott

This article has previously appeared in a similar form in People Management and Complanet

Case law update

Exiting employees: When are discussions truly off the record?

We report here two cases which deal with the without prejudice rule. Statements made as genuine attempts to resolve a dispute will generally be without prejudice to the parties' legally-pleaded position, and therefore inadmissible in evidence before the court. The without prejudice rule allows the parties to negotiate freely and make offers and concessions without fear that these will be brought before a court or tribunal. This is useful, for example, where an employer is contemplating dismissing an employee, but wants to preclude the possibility of a subsequent claim from that employee.

Recent Employment Appeal Tribunal ("EAT") decisions suggest there can be exceptions to this rule, especially in the context of discrimination and victimisation. The courts have said that it is in the public interest that allegations of unlawful discrimination in the workplace are heard by a tribunal. Discriminatory comments made in the course of without prejudice discussions were therefore admissible as evidence in one case (*BNP Paribas v Mezzotero* (2004) EAT/0218/04, see June 2004's edition of Law at Work for a report of this case).

The two cases reported here gave a higher level of court, the Court of Appeal, the opportunity to consider the without prejudice rule.

Taking into account the cases below and earlier cases, employers are advised to keep in mind the following points in order to reduce the risk of their without prejudice communications being used as evidence against them in a court or tribunal:

- employers should always be aware that anything said during without prejudice discussions could be relied upon to form the basis of further claims, and should therefore be especially vigilant about making remarks of a discriminatory nature which contains threats;
- the employee must genuinely consent to discussions being held on a without prejudice basis;
- to attract without prejudice status, there must be a pre-existing dispute between the parties, and discussions must constitute a genuine attempt to resolve that dispute. For example, a grievance in its early stages will not always amount to a dispute. An appeal of an overturned grievance probably will. Where an employee says he has claims he could bring, and that is not accepted, there is probably a dispute;
- merely stating that discussions are without prejudice where there is no genuine dispute between the parties will not attract the rule. However, from a tactical perspective, labelling a discussion as without prejudice might have a deterrent effect on some claimants.

Part 1: use of without prejudice evidence in internal grievance procedure amounted to waiver of without prejudice status

Brunel University & Another v Vaseghi & Webster [2007] EWCA Civ 482

Why care?

In this case, the Court allowed without prejudice communications to be admitted as evidence because they had been produced as evidence during previous grievance hearings. The Court also acknowledged that the protection given to without prejudice discussions is not absolute, and can give way to other public policy considerations.

The case

Two employees of the University, Professor Vaseghi and Mrs Webster, brought two consecutive claims against the University. The first claim was a race discrimination claim and there were without prejudice settlement discussions between the parties prior to the tribunal hearing. Both employees lost.

They then made allegations of victimisation based on certain comments made by the Chancellor of the University. A grievance panel heard evidence about the without prejudice settlement discussions between the parties relating to their earlier race discrimination claims, and went on to conclude that both victimisation grievances should be rejected. The employees submitted tribunal claims.

During the victimisation claim in tribunal, the employees sought to rely on evidence of the without prejudice

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discussions. The University objected to the introduction of this evidence on the basis that it would breach the without prejudice rule.

The Court of Appeal said that the settlement discussions were clearly without prejudice, since they were an attempt to settle a dispute, but also said that to deny the claimants the opportunity of referring to the without prejudice discussions would severely hamper their ability to bring a victimisation claim and would be an abuse of the without prejudice principle.

The Court commented that where a grievance meeting took place in the usual way, internally, there would be no question of waiver if the parties mentioned matters covered by without prejudice privilege. However, in the particular circumstances of this case, where the grievance procedure was in effect a trial of the victimisation issues by an independent panel, where both parties gave or called evidence of previous negotiations, there had been a mutual waiver of privilege in respect of the without prejudice negotiations.

Part 2: communications protected by the without prejudice rule only if parties might reasonably have contemplated litigation

Barnetson v Framlington Group Ltd [2007] EWCA Civ 502

Why care

In practice, settlement negotiations begin at varying stages of discussions about the departure of an employee. However, only those discussions which take place after a dispute has arisen are protected by the without prejudice rule. This case considers the point in time at which without prejudice rule begins to apply.

The case

Framlington told its employee, Mr Barnetson, that it intended to dismiss him in three months' time. Heads of terms and a draft compromise agreement were produced. However, two months later, discussions broke down and Mr Barnetson was given notice that his employment would terminate at the end of the month. He started proceedings for wrongful dismissal.

Mr Barnetson included in his witness statement certain passages relating to the settlement discussions. Framlington objected, saying that those passages were without prejudice.

The Court of Appeal held that, given the nature of the discussions and the time they took place relative to the subsequent dispute, the discussions were not covered by the without prejudice rule. Parties must be encouraged to attempt to settle litigation, and there is no special rule applying to employment litigation. To encourage those in dispute to settle their differences without recourse to litigation, a "dispute" can engage the rule, even if formal litigation had not yet begun. The crucial question would be whether, in the course of negotiations, the parties had contemplated or might reasonably have contemplated litigation if they could not agree. The Court pointed out that this question was highly case sensitive, and the dividing line might not always be clear.

What to take away

These cases serve as a reminder that employers must exercise caution when conducting settlement discussions which they hope will be without prejudice, or risk their off the record communications being revealed in court.

The *Barnetson* case provides guidance on how the without prejudice rule might attach to discussions between parties which are genuinely aimed at avoiding litigation. The issue as to whether discussions attract without prejudice status will turn on the facts of the case, and it will be the job of the court or tribunal to investigate what the parties understood the purpose of the discussions to be, as well as simply considering how close in time they were to litigation.

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Returning from maternity leave to the “same job” – Some flexibility for employers

Blundell v Governing Body of St Andrews Catholic Primary School (2007) **UKEAT/0329/06**

Why care?

A woman returning from ordinary maternity leave has the right to return to “the job in which she was employed before her absence” in most circumstances (Maternity and Parental Leave Regulations 1999). Those returning from additional maternity leave are entitled to return to the same job or, if it is not reasonably practicable to return to exactly the same job, one which is suitable for her and appropriate for her to do in the circumstances.

This is the first case at Employment Appeal Tribunal (“EAT”) level to consider the nature of an employee’s right to return to her old job after maternity leave and, in particular, the “level of specificity” with which that job is defined.

The case

Mrs Blundell was a teacher in a reception class at a primary school. The Headteacher, Mrs Assid had a practice of rotating the classes the teachers taught every two years.

Mrs Blundell went on maternity leave and, shortly before her return to work, Mrs Assid offered her the option of a ‘floating role’ or class teacher of class two. Mrs Blundell wanted to go back to teaching the reception class rather than either of those options and so she presented a claim of sex discrimination.

The EAT found in favour of the school. It held that the aim of the legislation is to “provide that a returnee comes back to a work situation as near as possible to that she left”, and avoid adding to the burdens on mothers with very young children. To achieve this aim, employers need to do more than simply honour the terms of the employee’s contract on her return to work.

The EAT said that the “level of specificity” with which the “same job” is to be addressed is a combination of the terms of the contract and a question of fact for a tribunal. To assist a tribunal in making this decision, the EAT suggested it should bear in mind:

- the purpose of the legislation, that is to provide continuity and to avoid as little dislocation as possible in the returning employee’s working life; and
- the fact that there is no need to construe ‘the same job’ as covering a broad spectrum of work. ‘Job’ can be quite specifically defined, given the fact that the legislation provides for exceptional cases, namely where it is not reasonably practicable for the employer to allow the employee to return to the same job.

The EAT went on to hold that, if, as here, the precise post varies from time to time normally, the ET is not obliged to “freeze time at the precise moment its occupant takes maternity leave but may have regard to the normal range within which variation has previously occurred”.

In making its decision in this case, the EAT took into account the fact that Mrs Blundell could be required under her contract to teach any class as asked by her head, plus the fact that the school customarily required teachers to change classes every two years.

The nature of Mrs Blundell’s work, according to her contract, was as a teacher. Her capacity was ‘primary school teacher’ rather than ‘reception class teacher’ and her place of work was the primary school as a whole rather than the reception class. The post to which she returned was the same post, and Mrs Blundell lost her claim.

What to take away

This case says that employers are afforded certain leeway where the job itself is variable, and such variation has in fact been applied in practice. There is some latitude provided in the legislation where it is not reasonably practicable for the employer to give the employee her old job back, assuming she has taken additional maternity leave.

Employers should not consider that this case allows them to move maternity leave returners around when they return unless, as in this case, that was the normal position before.

To establish what counts as the “same job”, the EAT says here that what the contract says is only determinative of whether the nature of the work is the same. The contract does not determine matters relating to capacity and place. These must be determined on a factual basis by the tribunal.

Note also that the same rules apply to returning to work after parental leave – if an employee takes a block of four weeks or less parental leave, he or she is entitled to return to the same job. If the block of parental leave is greater than four weeks, he or she is entitled to return to the same job, or if that is not reasonably practicable, one which is suitable and appropriate in the circumstances.

Hot topics

Smoking ban reminder – 1 July 2007

From 1 July 2007, smoking in enclosed public spaces, including workplaces, will become unlawful. Our e-alert of 15 February 2007 explained what this means for employers and what you need to do. Please contact us if you would like a copy of the e-alert.

Heyday case delayed

We reported in our cases to watch for 2007 the 'Heyday' case (see February's edition of Law at Work). This is a claim instigated by Heyday, an organisation for people in or nearing retirement, which challenges the legality of compulsory retirement. Under the age regulations, which came into force in October 2006, UK employers are permitted to compulsorily retire employees who reach 65, provided they follow a special procedure. Heyday has challenged this on the basis that compulsory retirement is not permitted by the EU legislation and this point has been referred to the European Court of Justice ("ECJ"). The parties are yet to agree the wording of the referral to the ECJ which means the judgment is not expected for another 18 months. Employers, particularly public sector employers, await the judgment with interest.

Holiday increase response published

The Department of Trade and Industry ("DTI") has published its [response](#) to its consultation on the draft regulations which increase the minimum annual leave entitlement under the Working Time Regulations 1998. The current entitlement of 4 weeks will increase to 4.8 weeks from October 2007 and then to 5.6 weeks from January 2009. The second increase was originally planned for October 2008, but has been delayed. Other proposed changes include an exemption for employers who already comply with the minimum entitlement on 1 October 2007.

The DTI expects that final legislation will be available by the end of June, following which we will issue an e-alert about the new law.

DTI consults on implementation of increase in paternity leave and pay

The DTI proposes to introduce new rules about statutory paternity leave and pay. Currently, fathers are entitled to two weeks' statutory paternity leave and pay. The new rules would allow a father to use the mother's entitlement to additional maternity leave and any statutory maternity pay, if the mother returns to work before their expiry. This would mean the father could take up to 26 weeks' leave and receive 13 weeks statutory pay.

The [consultation](#) deals with the implementation and administration of the proposed rules. It closes on 3 August 2007.

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