Parker & Co

Employment Update | **September 2011**

Welcome to the latest edition of Parker & Co's Employment Update. We focus on an EAT case about pay cuts, a decision of the EAT on termination payments and another EAT case on third party harassment. We also review a Supreme Court decision on employment status and round-up the latest case law on holiday pay.

Can an employer dismiss employees who refuse to accept a pay cut?

EAT provides guidance to employers who are considering dismissing employees who do not accept a reduction in pay

In *Garside and Laycock Ltd v Boot*, the employer decided to implement a five per cent pay cut across its workforce in order to avoid making redundancies. The Claimant refused to accept the pay cut and was dismissed. The ET held this was an unfair dismissal.

However, the EAT disagreed and held that the ET had wrongly considered the reasonableness of the employee's decision to reject the pay cut, rather than whether the employer was reasonable to have dismissed him for not accepting it.

In addition, the ET had misunderstood relevant case law. The EAT remitted the case to be heard by another ET.

In doing so it provided some guidance on how the reasonableness of the employer's actions should be assessed. The EAT considered that the ET should assess whether, in the circumstances (including the size and resources of the employer's undertaking) it was reasonable to treat the refusal to agree to a contractual variation as sufficient to dismiss the employee.

The EAT also considered that the question of equity should be addressed, which could include whether management pay was also being reduced.

Similarly, the process by which the pay cut was negotiated may be relevant where a Tribunal considers that it runs counter to equity's implied sense of fair dealing.

Parker & Co

Termination payments

EAT case reminds employers to take care in how they describe termination payments

Publicis Consultants v O'Farrell concerned an employee who was entitled to 3 months' notice and claimed before an ET that she had not received it.

By letter dated 14 May 2009, the employer confirmed that the Claimant's employment was terminating by reason of redundancy and that she would be paid up to and including 18 May 2009. The Claimant was therefore given 4 days' notice of the termination of her employment. In addition, the letter stated that she would receive an ex gratia payment equivalent to 3 months' salary, which would be paid without deductions for tax and national insurance, together with her statutory redundancy payment and holiday pay.

The Claimant brought a claim for breach of contract for failure to pay her salary for the 3 month notice period. The employer argued that the ex gratia payment was actually made in respect of the notice pay. However, the ET found that the payment was ex gratia and not in respect of her notice entitlement. The employer was therefore in breach of contract.

The EAT agreed. The wording of the letter was unambiguous and the monies were clearly advanced as an ex gratia payment. Further, had the letter been ambiguously worded, it would have been appropriate to construe the wording against the employer, as it had drafted the letter.

The intention of the employer here was probably to give the employee the benefit of receiving 3 months' notice but without deductions for tax and national insurance, thereby allowing the employee to receive more than her legal entitlement. Where an employer intends to make a payment in excess of minimum entitlements, communications should be marked without prejudice and subject to contract, and employees should be required to sign a compromise agreement.

Parker & Co

Employment Update | September 2011

Liability for harassment carried out by a third party

This case is an example of how an employer can be found liable for harassment when it does not protect its staff

In *Sheffield City Council v Norouzi*, a child racially harassed a Council employee. The Council was found to be liable for these acts as it knowingly failed to protect the employee.

The Claimant, an Iranian, was employed by the Council as a residential social worker. He worked at a residential home for troubled children. One of the children was regularly offensive, on racial grounds. The child would mock the Claimant's accent and say that he should go back home. The Claimant was upset by his treatment and went on sick leave. The Council had been informed of the harassment and employers can be found liable for the conduct of a third party where there is a continuing course of conduct about which the employer is aware, but does nothing to protect its employee/s. As a result of the Council's inaction, it was found liable for the repetitive harassment.

On appeal the Council sought to argue, relying on a recent case involving the Equal Opportunities Commission, that an employer could only be liable for such harassment if the failure to take action to safeguard the employee itself leads to the creation of an 'intimidating, hostile or offensive environment' and the employer's inaction is itself on racial grounds.

The EAT disagreed and further held that the Council should have raised this point in the ET, meaning it was too late to raise the issue on appeal. The Council also sought to argue that the child's motivation in mimicking the Claimant's accent was to challenge authority and was thus not racially motivated and therefore it could not be liable for such conduct. The EAT dismissed this argument, finding that to mock the Claimant's Iranian accent was to mock a racial characteristic and that this was comparable with overtly racial abuse.

Although this case involves a very particular set of facts and concerns the Race Relations Act 1976, the decision is one of which employers should take note.

Parker & Co

Employment Status

The Supreme Court analyses employment status, focussing on the reality of the relationship in practice

Ensuring that agency workers and those intended to be contractors are not in fact employees has always been a difficult proposition. This is particularly so where the reality of day-to-day conduct suggests an employment relationship. Two recent cases provide some clear guidance on how to best protect against the creation of an employment relationship.

The EAT confirmed in *BIS v Studders* that there can be no contract of employment between an agency worker and an employment agency which provides workers to an end user, when the contract between them showed no intention to create such a relationship and there was neither mutuality of obligation to provide/accept work and the employment agency did not have the appropriate degree of control over the worker in respect of him/her carrying out the day-to-day activities required by the end user.

In contrast, the Supreme Court held in *Autoclenz Ltd v Belcher* that car valets whose contracts stated that they were self-employed were actually employees.

The SC held that where the reality does not reflect the express contractual terms, the express contractual terms may be disregarded, whether an intention to deceive a third party is present or not. The relative bargaining power of the parties in forming the contract may also be a consideration.

The fact that the contracts stated that the valets could provide a substitute to carry out their duties but in reality were not actually able to do so was a key factor in the ET's decision at first instance that the valets were employees. In addition, it was found that the valets were fully integrated into the business and the company had full control of their activities.

The SC held that these were findings that the ET was entitled to make.

Parker & Co

Employment Update | September 2011

Holiday pay update

These three cases provide some clarity around complex holiday pay issues

How holiday pay should be calculated where a worker's pay is variable was addressed by the Advocate General in *Williams and ors v British Airways plc*. In the AG's opinion, where pay varies, paid annual leave should correspond to a worker's average earnings; including certain supplements usually paid. However, it is for Member States to determine how average remuneration should be calculated using a sufficiently representative reference period. For British Airways this means that flying allowances should be included in calculating holiday pay for pilots. The AG considered that a worker must not suffer any disadvantage as a result of taking annual leave which may act as a deterrent to taking such leave. However, supplements should only be included in the calculation of average remuneration where they are regular components of pay.

In the German case *KHS AG v Schulte*, accrued holiday and sick leave was again addressed. Prior to this case, it appeared that an employee on sick leave might be able to accrue and carry over statutory holiday entitlement year after year. In giving her opinion, the AG referred to the International Labour Convention, which envisages entitlement to annual leave expiring 18 months after the end of the leave year in which it accrues. The AG felt that 18 months would be sufficient for the proper exercise of the right to annual leave in the case of a worker on long-term sick leave. However, 18 months should be seen as a minimum period and more generous provision may be made by Member States.

In *NHS Leeds v Larner*, the employee was signed off sick for the whole of the pay year 2009/2010 and subsequently dismissed on grounds of incapability due to ill-health. The employer refused to make any payment in respect of untaken annual leave on grounds that no formal request for leave had been made. However, the EAT held that entitlement does not depend on the worker submitting a request for such leave before the end of the relevant pay year.

Parker & Co

Employment Update | **September 2011**

News in brief & what's coming up

Recent changes:

→ Adult National Minimum Wage increases from £5.93 to £6.08 on 1 October 2011.

→ From 1 October 2011, agency workers will have equal rights in relation to pay and conditions following a 12 week qualifying period. Please see our previous Update for further information.

Equal Pay: In *Brownhill and ors v St Helens and Knowsley Hospital NHS Trust* the EAT has held that an Employment Tribunal erred in comparing the overall remuneration of claimants and comparators in an equal pay claim. The Claimants had terms in their contracts providing for enhanced payments for working unsocial hours, which were less favourable than similar terms in their male comparators' contracts. However, the Claimants earned more than their comparators when their overall packages were compared. The EAT considered, however, that where a 'term' is a distinct provision or part of the contract with sufficient content to make it possible to compare it with a similar provision in another contract then this is the comparison which should be made.

Constructive Unfair Dismissal: In *McBridge v Falkirk Football Club*, the Claimant was the U19 team manager. He resigned after his right to pick his team was arbitrarily removed after an Academy Director was appointed. His employer successfully argued that an implied term existed whereby the Claimant would relinquish this right once an Academy Director was appointed. The EAT disagreed and this case is confirmation that the duty not to act in a manner likely to undermine trust and confidence is an objective test. Therefore an employer cannot rely upon factors in a particular industry as a defence to a breach of the implied term. In this case the football club sought to rely on the fact that 'an autocratic style of management' is 'the norm in football', as a defence to a breach of the implied term of trust and confidence. The EAT also held that a term should not be implied into a contract of employment which is imprecise, unnecessary or not obvious.

Recommendations by Employment Tribunals: Employment Tribunals can, when finding in favour of a claimant, award compensation, make a declaration/s and/or order reinstatement. In addition, an Employment Tribunal may make a recommendation that the employer take certain action/s to prevent or reduce the risk of future discrimination. The EAT confirmed in *Lycée Français Charles de Gaulle v Delambre* that an Employment Tribunal has a wide discretion in making recommendations when upholding a discrimination complaint. The recommendations made in this case included informing the "governing board" and senior management of the Tribunal Judgments, engaging an HR Professional to review their policies and procedures and having a programme of equality and diversity training implemented throughout the organisation.

Parker & Co

Employment Update **September 2011**

Protective Awards: An Employment Tribunal complaint may be brought where an employer fails to comply with its collective consultation obligations. However, such a complaint should be brought by a recognised Trade Union or employee representatives. In the case of *Independent Insurance Co Ltd (in provisional liquidation) v Aspinall & anor* the employer had been obliged to consult and provide information to employee or trade union representatives, and to arrange for the necessary elections. As there were no elections, individual employees brought claims. The Employment Tribunal made a protected award which applied to both of the claimants. However, it also extended the award to cover all employees who were employed at a particular office. The effect of this decision was to enable other employees whose cases had been dismissed or struck out and employees who had not even brought a claim to benefit. It would be impossible for an employer to defend proceedings against individual employees. The EAT disagreed with the Tribunal, confirming that the protective awards could only benefit the employees that brought the claim.

The Bribery Act 2010: The Bribery Act 2010 came into force on 1 July 2011 and creates new offences carrying a maximum penalty of ten years' imprisonment or an unlimited fine. Employees, directors and commercial organisations can all be held liable. The Act creates the new offences of bribing another person, accepting a bribe, bribing a foreign official and a commercial organisation failing to prevent bribery. Organisations should ensure that adequate anti-bribery procedures are in place as such procedures can be relied upon when defending a charge of failing to prevent bribery. Where the relevant actions take place abroad, they will constitute an offence if the person performing them is a British national, is ordinarily resident in the UK, is a body incorporated in the UK or is a Scottish partnership. The Government has stated that it does not intend for the Act to prevent genuine hospitality or similar business expenditure, provided that it is reasonable and proportionate.

Parker & Co

Employment Update | **September 2011**

Contact us

If you have any questions arising from the articles or on other areas of employment law, please call or email us and we will be happy to discuss them with you.

Helen Parker	**020 7614 4031**	**Email Helen**
Richard Woolmer	020 7614 4035	Email Richard
Jackie Feser	020 7614 4038	Email Jackie
Charlotte Schmidt	020 7614 4033	Email Charlotte
Rebecca Jackson	020 7614 4032	Email Rebecca

Parker & Co Solicitors

28 Austin Friars, London, EC2N 2QQ

Tel: 020 7614 4030 | **Fax**: 020 7614 4040 | **Email**: info@parkerandcosolicitors.com

---