Parker & Co

Employment Update

October 2009

Welcome to the latest edition of Parker & Co's Employment Update. This quarter we focus on recent EAT decisions on TUPE and discrimination, and two Court of Appeal cases addressing legal representation at an internal disciplinary hearing and damages for loss of notice pay.

Mobility, detriment and TUPE

The EAT considers the construction of mobility clauses after a TUPE transfer.

In *Tapere v South London and Maudsley Trust*, Mrs Tapere transferred between NHS Trusts and was required to work in Beckenham instead of Camberwell. She argued the extra travelling time would disrupt her childcare arrangements, ultimately resigning and claiming constructive dismissal.

The mobility clause in Mrs Tapere's contract stated she could be required to work at other locations "within the Trust". Overturning the ET, the EAT held these words limited the geographical application of the clause, which should be construed at the point the contract was entered into. Further, an ET should only consider if being required to move location was reasonable after it had established if the express term included that qualification, or that one should be implied.

The EAT also considered the approach required to determine if an employee can treat him or herself as dismissed under Regulation 4(9) of TUPE if the new employer proposes a substantial change in working conditions which causes a material detriment. Ascertaining if a "change" occurs and, if so, determining whether it is "substantial" are both questions of fact. An ET should consider the nature and degree of the change, with its character likely to be the most important factor.

As with discrimination law, detriment should be considered subjectively. Therefore, to decide if there is a material detriment, the impact of the change should be considered from the employee's perspective. The EAT held that Mrs Tapere had been constructively dismissed and she was also entitled to treat herself as dismissed under Regulation 4(9), and remitted the case to a fresh ET.

Parker & Co

Discrimination and motivation

The EAT holds that motive, however benign, was irrelevant to establishing discrimination where race is the ground of the treatment in question.

In ***Amnesty International v Ahmed***, the EAT has upheld the original ET decision that AI's refusal to appoint a Sudanese woman to the post of Sudanese researcher was discriminatory. Miss Ahmed applied for promotion to Sudan researcher, a post that she was filling on a temporary basis. AI felt that her ethnicity would compromise its perceived impartiality, and expose Miss Ahmed to increased safety risks when travelling in Sudan or Eastern Chad. Consequently, Miss Ahmed resigned and claimed race discrimination and unfair constructive dismissal.

The ET held AI's refusal was based on her national or ethnic origin and constituted direct discrimination. Amnesty International's attempt to rely on a statutory defence in relation to acts done by an employer in pursuance of any enactment, by arguing that sending Miss Ahmed to Sudan would have meant it breached its duty as her employer under the Health and Safety at Work etc Act 1974 was rejected. The ET also found that Miss Ahmed had been constructively dismissed.

In the EAT, the two-stage approach which AI argued should have been applied, a "but for" test as to causation followed by an analysis of the motivation of the discriminator, was rejected. The only question for the ET was whether the ground for the decision was Miss Ahmed's ethnic origins.

As AI's decision not to appoint her as a researcher was solely based on her ethnic origins, there had been direct discrimination. The EAT therefore upheld the ET's judgment that Miss Ahmed suffered direct race discrimination. However, the EAT went on to hold that the ET had been wrong to find that these circumstances also breached the mutual term of trust of confidence, entitling Miss Ahmed to claim constructive dismissal. The fact that the decision constituted direct discrimination did not mean that trust and confidence was undermined. Amnesty International had reached its decision after a thorough and reasoned process, motivated by no racial prejudice.

Parker & Co

Employment Update | October 2009

Disciplinary hearings

The decision will not create a free standing right to legal representation at internal hearings for all, but the Court of Appeal opens the door further for those in the public sector by using the European Convention on Human Rights.

In ***Kulkarni v Milton Keynes Hospital NHS Foundation Trust*** the CA has held that a doctor's contract of employment entitled him to be represented at an internal disciplinary hearing by a lawyer instructed by the Medical Protection Society.

The case was decided by reference to Dr Kulkarni's employment contract, with the CA deciding it had to construe the terms of the contract in relation to representation at disciplinary hearings, which had to be consistent with the 'Maintaining High Professional Standards in the Modern NHS' (MHPS) framework, objectively. The CA held that the definitive expression of the right to representation in any type of disciplinary proceedings was that set out in paragraph 22 of MHPS and this permitted a doctor to be represented by a legally qualified person, employed or retained by a defence organisation. "Retained by" meant the same as "instructed by". However, a doctor was not permitted to bring an independently instructed or retained legally qualified person. If they happened to have a spouse, partner, colleague or friend who was legally qualified and who was prepared to represent them, that was permitted.

The CA also suggested that it would have held that Article 6 of the European Convention on Human Rights (right to a fair trial) was engaged and as Dr Kulkarni was facing a charge which would make him unemployable as a doctor if proven, it implied a right to legal representation.

While the CA's comments about Article 6 were obiter, there is seemingly now scope for argument based on Article 6 to succeed in future in relation to public sector employees and this is consistent with the recent decision in *R (on the application of G) v The Governors of X School and another*. Leave to appeal has been granted.

Parker & Co

Notice period and mitigation

The Court of Appeal decides that employees who are constructively dismissed must give credit for earnings during what would have been their notice period.

In the case of ***Stuart Peters Ltd v Bell***, the CA dealt with the issue of whether or not the Norton Tool Principle should be extended to cases of constructive dismissal.

The Norton Tool principle (from the 1970's case of ***Norton Tool Company v Tewson***) provides that an employee who is dismissed without notice and without payment in lieu of notice, is entitled to compensation equal to their net pay for their period of notice and that no deductions should be made in respect of earnings received from alternative employment during that period.

According to the CA, the purpose of the principle is to uphold the expectation that contractual notice will be paid except in situations of gross misconduct. This is the case even where the employer genuinely believes that it was entitled to dismiss without notice or payment in lieu of notice.

The CA highlighted the general rule that an unfairly dismissed employee should be compensated for loss actually suffered and that the Norton Tool principle is a limited exception applicable only where an employee has been actually dismissed and not where an employee has resigned alleging a fundamental breach of contract by their employer. In such circumstances there is usually a dispute and therefore it would not be usual for an employer to make a payment in lieu of notice.

Consequently normal mitigation rules apply, the Norton Principle does not, and deductions may be made in respect of earnings received during what would have otherwise been the notice period.

Parker & Co

Employment Update | **October 2009**

News in brief & what's coming up

Review of the default retirement age: The Government announced in July that it will bring forward its review of the default retirement age to 2010.

Gate Gourmet**:** Six employees who were dismissed by Gate Gourmet during the unofficial industrial action in 2005 have lost their appeals before the EAT, which upheld all six ET decisions confirming that the employees had either been dismissed while taking part in unofficial industrial action, and therefore the ET had no jurisdiction or that the dismissals were fair.

Disability discrimination: The EAT in Fareham ***College v Walters*** has held that if, when a disabled employee is dismissed, there is a reasonable adjustment which if made would have avoided the need to dismiss, the dismissal will be an unlawful act of discrimination by reason of being a failure to make reasonable adjustments. This is significant in view of ***Lewisham v Malcolm*** which made it more difficult for employees to show discrimination for a reason related to their disability by challenging the established test for identifying appropriate comparators. The decision means that employees will not, as was previously the case, have to rely on disability-related discrimination in such circumstances.

Extensions of time: In ***Cambridge & Peterborough Foundation NHS Trust***, the EAT agreed with the ETs decision to exercise its discretion by allowing a Claimant to lodge a claim for unfair dismissal after the expiry of the normal 3 month time limit. The Claimant received a decision in respect of his appeal after the expiry of the time limit which contained new and fundamental facts. This changed his view about the merits of his case and he therefore decided to lodge a claim.

TUPE & Equal Pay time limits: The CA has confirmed that claims for equal pay losses accumulated during employment up to the date of the transfer to the new employer, must be brought against the new employer within 6 months of the date of the transfer; but claims for losses after the date of the transfer can proceed against the new employer for up to 6 years' losses from the date of the claim. Claims must be pursued within 6 months of the termination of *that* employment.

October 2009 changes – a reminder

→ From 1 October, the weekly limit of salary used to calculate statutory redundancy pay will be increased from £350 to £380. This limit will also apply to other payments such the basic award for unfair dismissal. However, this increase will replace the next annual uplift due in February 2010 and therefore no further rise will be seen until February 2011.

→ The adult national minimum wage will be increased from £5.73 to £5.80 from 1 October 2009.

Parker & Co

Employment Update | **October 2009**

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
Dan Begbie-Clench	020 7614 4034	Email Dan
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

---