Parker & Co

Employment Update

July 2007

INTRODUCTION

This quarter's update focuses on the use of "without prejudice" communications, disability discrimination and the requirements of the statutory dismissal and disciplinary procedure. We also look at a TUPE case which held that TUPE can, contrary to popular belief, apply to share sales.

Links in blue in the pdf are clickable to take you to the appropriate site. If you have any questions arising from the articles, please call or email us and we will be happy to discuss them with you. As ever, your comments are welcome.

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"WITHOUT PREJUDICE" COMMUNICATIONS

You will remember the case of *BNP Paribas v Mezzotero* in 2004 which limited the use of without prejudice negotiations in certain situations. The EAT held that the 'without prejudice' privilege only applies to written and oral communications which form part of a genuine attempt to compromise an existing dispute. In an employment context, raising a grievance does not necessarily mean there is a dispute, as a grievance may or may not lead to litigation. The EAT also held that there may be exceptions to the exclusion of evidence under this heading where a party seeks to exclude evidence of "unambiguous impropriety" and that in discrimination cases this is particularly so. The effect of this case was to limit the use of without prejudice negotiations.

The Court of Appeal has recently handed down two decisions concerning without prejudice communications which provide further guidance on this issue.

In *Brunel University v Webster & Vaseghi* the University had commented in its quarterly newsletter that it considered the compensation demands of the employees bringing discrimination claims to be unreasonable. It further stated that it hoped that the Association of University Teachers would adopt an approach which would *"allow issues to be resolved sensibly and unmeritorious claims to be eliminated"*. The employees considered they had been victimised because they had brought a discrimination claim. In order to rebut the allegation that they had made unreasonable compensation demands the employees needed to refer to without prejudice negotiations. The University sought to prevent this.

The Court of Appeal held that without prejudice privilege had been waived for the following reasons:

- The employees had referred to and annexed documents referring to without prejudice communications to their ET1 and the University had done the same in respect of its ET3 and therefore privilege had been waived; and

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IN BRIEF

INDUCING A BREACH OF CONTRACT

The House of Lords recently held that the tort of inducing a breach of contract requires the wrongdoer to have intended to interfere with the contract in question. The case was that of *Mainstream Properties Ltd v Young* and two other conjoined cases, including *Michael Douglas v Hello*.

Although not an employment case, the decision is relevant to cases concerning restrictive covenants and confidential information. Sometimes when an employee or former employee breaches a restrictive covenant or duty of confidentiality, the employer will look to a third party for damages, for example a new or potential employer, believing the third party to have induced the employee to breach their contractual obligations.

The decision makes clear that liability will not attach to the third party unless they deliberately, rather than carelessly or negligently, induced the breach.

"WITHOUT PREJUDICE" COMMUNICATIONS, continued from page 1:

- The University had not simply conducted an internal grievance procedure. It had set up an independent panel of University Council members which carried out an investigation to determine the facts of what had happened in the without prejudice meeting. The panel acted as independent adjudicators in formal adversarial proceedings where evidence was called, inferences drawn and conclusions reached. Privilege had therefore been waived. The Court of Appeal commented that had the grievance meeting simply consisted of an internal discussion between employee and employer or of those already having knowledge of the without prejudice discussions, privilege would not have been waived.

Although the Court of Appeal did not comment on the correctness of the decision in *BNP Paribas v Mezzotero* it did acknowledge that in certain circumstances it might be difficult for employees to show victimisation if they are not permitted to rely on without prejudice communications. The Court of Appeal also commented that the exception relating to circumstances of "unambiguous impropriety" should only arise if one of the parties had made it clear that it seeks to exclude any reference to without prejudice negotiations.

The second case, *Framlington Group v Barnetson*, did not overturn the decision in *Paribas v Mezzotero*, but the Court of Appeal did emphasise the importance of allowing parties to attempt to settle disputes early. Framlington had decided that it wished to bring Mr Barnetson's employment to an early end. On hearing this, Mr Barnetson presented his terms for the termination of his employment pursuant to his contract of employment. These were not accepted and Framlington put forward a counter offer, which was rejected. The Court of Appeal considered that although litigation had not been commenced or threatened the parties were clearly in a dispute as to Mr Barnetson's contractual entitlement and therefore the communications in questions were covered by without prejudice privilege. The crucial question was *"whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree"*.

Whether communications are covered by without prejudice privilege will very much depend on the particular circumstances. However, employers should not assume that something marked as without prejudice, or simply using those words in an off the record discuss, will protect the content from disclosure. If there is no real risk of litigation or termination at the time, privilege is unlikely to apply.

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IN BRIEF

AGE DISCRIMINATION

A recent decision in Ireland serves as a warning to UK employers in relation to the information requested on application forms.

In *Cunningham v BMS Sales Ltd* BMS was held to have directly discriminated against Mr Cunningham by refusing to represent him and put him forward for sales opportunities for which he was qualified.

Mr Cunningham had been requested to provide information about his living arrangements, marital status, number of children, age and date of birth. Mr Cunningham did not want to provide this information as he considered it irrelevant to his employment.

Mr Cunningham eventually gave a false age of 37 (he was 47) and refused to provide his date of birth. BMS considered the information relevant and stated in evidence that it would have represented Mr Cunningham had he not been initially evasive and then gone on to provide incorrect information. He was awarded €5,000.

DISABILITY DISCRIMINATION – REASONABLE ADJUSTMENTS AND CONSULTATION WITH EMPLOYEES

Two recent EAT decisions have held that the duty to make reasonable adjustments does not include a duty to make an assessment of a disabled employee and consult with them about possible adjustments.

In 2006 *Tarbuck v Sainsbury's Supermarkets Ltd* Dr Tarbuck, a business analyst and IT project manager, was made redundant. She suffered from depression and it was accepted that she was disabled for the purposes of the Disability Discrimination Act. The Employment Tribunal held that Sainsbury's failure to consult with Dr Tarbuck to agree the steps that might be taken to prevent her being at a disadvantage in applying for alternative roles, was a breach of its duty to make reasonable adjustments.

However, the EAT held that Sainsbury's were not under a duty to consult with Dr Tarbuck. While good practice will usually include consultation, if objectively the employer has done what is required of it then whether it knew of its obligation to make reasonable adjustments and whether or not it consulted with the employee is irrelevant.

The decision in *Tarbuck* was applied by the EAT in the recent case of *Spence v Intype Libra Ltd.* Mr Spence had been employed as an IT Manager until he was dismissed on the grounds of capability after a long period of absence due to vascular problems. There were discussions between Mr Spence and his employer as to how it may be possible for him to return to work. Unfortunately no agreement was reached. Mr Spence argued his employer had failed in its duty to make reasonable adjustments by not obtaining and consulting on a medical report before dismissing him. The EAT held that this was not a breach of the duty to make reasonable adjustments.

While these recent cases have held that the duty to make reasonable adjustments does not extend to a duty to obtain a medical report or to consult with employees about adjustments, employers should note that the decision in *Spence* being appealed and the appeal is supported by the Disability Rights Commission.

Case law prior to these two decisions supports the DRC's view *Tarbuck* and *Spence* were wrongly decided. We will report on further developments as the appeals progress.

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ADDITIONAL PATERNITY LEAVE

Following our alerter in May, a reminder that consultation on the Government's proposals for additional paternity leave (APL), closes on 3 August 2007.

The Government plans to introduce a period of 26 weeks APL, paid at the same rate as statutory maternity pay, currently £112.75 per week.

APL may be taken during the second six month period following the birth of a child but if taken will be instead of the mother's additional maternity leave.

The earliest date for introduction will be for babies due on or after 5 April 2009.

The Government is seeking input on the process of implementation including notification periods, the use of a checklist by employers and the necessary forms.

The consultation paper can be found on the Department of Trade & Industry's website: www.dti.gov.uk/consultations/page39405.html.

STATUTORY DISCIPLINARY AND DISMISSAL PROCEDURE – THE REQUIREMENTS OF STEP 2

The EAT, in *Ingram v Bristol Street Parts*, has handed down a further decision concerning the requirements of the statutory disciplinary and dismissal procedure. Miss Ingram was dismissed for gross misconduct as a result of her fraudulent accounting practices. The Employment Tribunal held that the dismissal was automatically unfair because of the employer's failure to comply with step 2 of the procedure.

As you will be aware, step one requires the employer to "set out in writing the alleged conduct or characteristics or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee" and step two requires that "the employer must send the statement or copy of it to the employee and invite the employee to attend a meeting to discuss the matter". While the employer had informed Miss Ingram of the basis for the allegations prior to the meeting it had not provided all of the evidence in advance. The Employment Tribunal held that this was a breach of step 2.

The EAT disagreed holding, that the Employment Tribunal had set the requirements for compliance with step 2 too high. All that is necessary under step 2 is for the employee to be given sufficient material to enable the employee to put their side of the story. Failure to provide all of the evidence on which the employer intended to rely in advance may fall to be dealt with under general fairness principles of unfair dismissal law but it does not constitute a breach of the minimum requirements.

CONSTRUCTIVE DISMISSAL – SICKNESS ABSENCE AND COMPENSATION FOR LOSS OF EARNINGS

The EAT's decision in *GAB Robins v Trigg*, deals calculating a compensatory award in relation to an employee absent on sick leave who alleges constructive dismissal. Mrs Trigg worked as a Personal Assistant to two investigators. She had been overworked and bullied by her employer for a substantial period of time but her employer had failed to act on her concerns and the concerns of the two investigators for whom she worked. Mrs Trigg was signed off work with anxiety and depression in September 2004. In December, Mrs Trigg lodged a grievance about the long term bullying and her workload. GAB failed to deal with her grievance properly and as a result Mrs Trigg resigned in February 2005 and claimed constructive dismissal. The Tribunal found in Mrs Trigg's favour and awarded her compensation.

GAB appealed to the EAT arguing that the Tribunal had erred in law in

- deciding that Mrs Trigg had been constructively dismissed; and

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IN BRIEF

VICTIMISATION

In our May alerter we advised you of the outcome of the highly publicised case of *St Helens Borough Council v Derbyshire* involving school dinner ladies who had been victimised after bringing equal pay claims. Here is a reminder in case you missed it. Employers need to be careful when corresponding with individuals that have brought discrimination proceedings against them.

The Council sent a letter to all the staff including the dinner ladies and a second letter specifically to each individual bringing a claim. Both letters warned of the long-term consequences should an ET find in their favour. The increased cost of providing the service was highlighted and the fact that this would mean that the school-meal provision would have to be scaled back and the possibility of redundancies. The letter sent only to the individual Claimants urged them to settle in view of the consequences of a decision against the Council. The dinner ladies brought a second claim alleging the letters amounted to victimisation.

The House of Lords agreed, as the object of the letters was to put pressure on the dinner ladies to settle rather than an honest and reasonable attempt to settle the claims.

CONSTRUCTIVE DISMISSAL – SICKNESS ABSENCE AND COMPENSATION FOR LOSS OF EARNINGS, continued from page 4

- awarding compensation for loss of earnings. GAB argued that as Mrs Trigg had been absent for some time prior to the dismissal, her absence (and therefore her loss) after the dismissal had not been caused by that dismissal.

The EAT upheld the Tribunal's decision. The important aspect of this case is the finding that Mrs Trigg should be awarded compensation for loss of earnings. The EAT distinguished the issue of compensation in a constructive dismissal situation from that where an actual dismissal occurs and where loss of earnings may not be awarded. The EAT accepted that had Mrs Trigg been dismissed by GAB while off sick, her illness could not have been said to have resulted from that dismissal. However, constructive dismissal covers a series of events, not just the "last straw" (the failure to deal with the grievance properly), and in this case the bullying and overwork had caused the sickness absence. Therefore Mrs Trigg's loss of earnings can be said to be attributable to the dismissal and she should therefore be compensated.

EQUALITY ACT – CONSULTATION

Following the Discrimination Law Review, the Government has launched consultation on proposals for a single Equality Act which would combine all existing discrimination legislation and hopefully provide a clearer legislative framework.

The Government is seeking input on a variety of issues including:

- harmonising the definition of indirect discrimination;
- the use of a comparator in cases of direct discrimination;
- extending the concept of "reasonable adjustments" beyond disability discrimination;
- whether the genuine occupational requirement test should be introduced for all types of discrimination (apart from disability);
- whether equal pay and sex discrimination legislation should be streamlined; and
- whether a single definition of disability discrimination should be created.

Consultation closes on 4 September 2007. The consultation paper is available on the Department of Trade & Industry's website: Discrimination Law Review

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SMOKING AT WORK

In our last update we reviewed the provisions of the Health Act 2006 covering smoking at work.

ACAS have produced guidance on this issue which can be found in its advisory booklet, Health and Employment.

This can be downloaded from the ACAS website - www.acas.org.uk

COMPENSATION

The EAT, in *Aroma (Northampton) Ltd v Ang,* has held that as a matter of law, it is not possible to award compensation in respect of a period where the Claimant's work permit had expired.

TUPE – APPLICATION TO SHARES SALES?

It is a well established that the Transfer of Employment (Protection of Employment) Regulations do not apply to share sales. However, a recent decision by the Court of Appeal in *Millam v The Print Factory (London) 1991 Ltd* serves as a note of caution to employers. If the purchasing company in a share sale seeks the wholesale integration of the newly acquired business with its existing business there is a significant possibility of TUPE applying to that re-organisation.

In this case, Mr Millam was originally employed by FP Ltd, whose shares were purchased by MC Ltd. FP and MC both went into administration and MC was purchased by TPF Ltd. Mr Millam argued that he had first transferred from FP to MC and then to TPF pursuant to TUPE.

The Employment Tribunal held that Mr Millam's employment had transferred. Despite the contractual documentation identifying Mr Millam as an employee of FP and notwithstanding the fact that FP and MC were two separate companies and held separate board meetings, the Employment Tribunal considered there were a number of factors which supported the conclusion that Mr Millam's employment had transferred. These factors included that MC sought to exercise the power to change the terms and conditions of FP's employees, took all important decisions relating to FP's business (including the decision to put the company in administration) and channelled the work flow between the companies.

The EAT disagreed holding that the Tribunal had "pierced the corporate veil" in reaching its conclusion and had not been entitled to do so. The EAT considered that the Employment Tribunal had looked behind the fact that FP Ltd and MC Ltd were separate legal entities before and after the share sale in reaching its decision that Mr Millam's employment had transferred and this was impermissible as there had been no evidence that the subsidiary company, FP Ltd, was a "sham or facade". The EAT held that MC and FP remained separate companies and there was no evidence of a transfer of assets or staff after the share sale, although there was lack of independence typical of a subsidiary company

The Court of Appeal held that the Employment Tribunal had not pierced the corporate veil in reaching its decision, but had made a finding of fact that FP Ltd's business was, in reality, being carried out by MC, which it was entitled to do. The EAT had not given sufficient weight to this finding and focused on the legal structure. While noting this was important, the Court held it was not conclusive when considering whether, within the legal structure, control of the business had transferred as a matter of fact. The Court of Appeal therefore upheld Mr Millam's appeal.

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WHAT'S COMING UP?

1 October 2007: The statutory minimum holiday entitlement will be increased from 20 days to 24 days (including bank holidays).

1 October 2007: The Commission for Equality & Human Rights (CEHR) will replace existing bodies such as the Equal Opportunities Commission and the Commission for Racial Equality. The CEHR will cover all forms of discrimination.

6 April 2008: Employers with between 50 and 99 employees will become subject to the Information and Consultation Regulations.

1 April 2009: The statutory minimum holiday entitlement will be increased from 24 days to 28 days (including bank holidays).

RESTRICTIVE COVENANTS: ENFORCEABILITY

Beckett Investment Management Group Ltd (BIMG) and its subsidiaries sought to enforce a post termination restriction preventing two former senior employees from dealing with or soliciting clients for 12 months following the termination of their employment.

The employees had been employed by BIMG and a crucial definition within the restriction referred only to "the company", being BIMG. However, BIMG was a holding company with subsidiary companies providing the financial services to clients. If strictly interpreted protection would not extend to clients of its subsidiaries. The Court of Appeal held that the law recognises the reality of how large businesses operate and therefore rejected a literal interpretation of the clause, holding that "the company" could include protecting clients of the subsidiaries, particularly given the former employees' knowledge of the group structure.

The trial judge had held that the period of 12 months was arbitrary and therefore unenforceable. The Court of Appeal disagreed, appreciating that any fixed duration bears an element of arbitrariness. It recognised that BIMG and its subsidiaries would need "to recruit, organise, train and project suitable replacements". 12 months was considered a reasonable duration given the seniority and importance of the employees, the logistics of replacing them and the industry standard of clauses being 12 months in duration.

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See our website for details of the employment and business immigration services we offer

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