

Employment law update for CIPD tutors and students



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This document is intended for tutors and students studying the employment law module of CIPD's Professional Development Scheme. HR practitioners may also find it useful.

It provides a comprehensive update at the time of writing on the most important employment law developments in the UK and anticipates the further changes that lie ahead. It is planned to update it every 6 months.

CIPD members can keep up to date with legislative and case law developments since this document was written at the Employment Law at Work area of the CIPD website

www.cipd.co.uk/hr-resources/employment-law.aspx

Non-members can see our *Employment law developments* factsheet which covers major law changes at www.cipd.co.uk/hr-resources/factsheets/employment-law-developments.aspx

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Introduction

The past year has seen the introduction of a major new piece of employment legislation in the form of rights for agency workers. In addition there has been the extension of the qualifying period for unfair dismissal moved back to two years and a range of procedural changes made to the way that employment tribunals operate.

In addition there were important developments in the case law, particularly as regards TUPE, age discrimination, belief-based discrimination and gross misconduct dismissals.

However the year will be probably be most remembered as far as employment regulation is concerned, as a period in which a vast range of new proposals were floated by Government ministers with several sets of formal consultations being launched. There has also been the rather unusual spectacle of the Secretary of State for Business calling proposals in a report commissioned by his own department as 'bonkers'. Such are the pleasures of living under a coalition administration.

As always, this update aims to be a user-friendly review of the major changes of the last year and future developments. It starts with the legislation that came into effect during the latter half of 2011 and the first months of 2012. It then identifies and describes the key cases decided in the courts during this period and briefly summarises a further number of cases of interest. Finally, the update focuses on future proposals and sets out a broad guide to these.

The law is stated as at 30 June 2012.

Major statutory developments since June 2011

Rights of agency workers

The Agency Workers Regulations 2010 implement the EU's Temporary Agency Work Directive, agreed and then approved by the European Parliament in October 2008.

The Regulations came into effect in England, Wales and Scotland on 1 October 2011, but have only had major operational significance from 24 December 2011 (12 weeks after their introduction). Separate Regulations came into force in Northern Ireland on 5 December 2011.

The new law means that agency workers who work continuously with a single end-user for twelve weeks or more have the legal right to the same pay, overtime, working time and holiday entitlements as equivalent permanent employees as well as equal 'basic working and employment conditions'. Pensions and sick pay are not be covered, nor is redundancy pay.

In addition, from day one, agency workers are now entitled to equal treatment in the areas of:

- staff canteens
- childcare facilities
- transport laid on by employers

There is also a general right that applies from day one for hirers to provide agency workers with information about any vacant permanent posts which might be appropriate for them. This can be done via a staff notice board or intranet. It need not amount to a personal bulletin of any kind.

Cases can potentially be brought to tribunal by agency workers against agencies and hiring organisations. Each is responsible in law for its own infringements.

The right is only to equal treatment in respect of pay and conditions that would be 'ordinarily included' in a contract were the agency worker to be employed on a permanent basis in the same role. So particular items which have been individually negotiated are not covered, nor are discretionary benefits.

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There is one major exemption included as far as pay is concerned. This is where the agency worker is employed on a permanent contract by the agency which pre-dates any assignment with an end-user. There are, however, very precise conditions here which most agencies will be reluctant to meet. They include, for example, specified hours of work, agreement about the type of work any worker will be required to do and, most importantly, guaranteed pay during periods in which the worker is not assigned to an end user.

The definition of the term 'agency worker' may well prove to be problematic in due course as it has been framed to exclude people who are self-employed and effectively supply themselves on an agency basis as well as people supplied via 'managed contracts'.

There are numerous other areas of potential complexity which will become clearer once we get some reports of cases over the next few years.

For example, when will a bonus payment made to permanent staff also be payable to agency staff? What exactly does the term 'the same role' mean in a situation in which agency staff perform different duties to equivalent permanent employees? Who is liable for infringements of the Regulations when an agency has carried out all the checks it is supposed to, but the worker is still paid less than they should be? Is there a right for agency staff to receive a share of any tips / service charges collected? What about access to compulsory training programmes (for example, health and safety)?

Another important point concerns breaks in service during the 12 week period. The Regulations state that any break of less than six weeks should be disregarded. In other words it is not possible for an agency to avoid them by removing a worker from a particular employment for a few days before returning them. Only after six weeks' absence does the 12 week clock start ticking again.

Other types of break which are to be disregarded for the purposes of calculating 12 weeks include jury service, maternity leave, sick leave, annual leave, industrial action and 'temporary cessations' such as school holidays or seasonal shut-downs.

It is however important to note that agency workers who are employed for a period of 12 months or more at the same organisation will not be able to claim unfair dismissal or constructive dismissal. No change has occurred to their basic employment status.

National Minimum Wage rates

From 1 October 2011, the national minimum wage (NMW) rates increased as follows:

- Adult rate: £6.08
- Lower rate: £4.98
- Youth rate: £3.68
- Apprentice rate: £2.60

The accommodation offset rose to £4.73 per day.

Unfair dismissal compensation

From 1 February 2012 the cap on compensatory awards in unfair dismissal cases rose to £72,300. The cap on weekly pay to be used in calculating basic awards and statutory redundancy payments rose to £430, making £12,900 the maximum level that a basic award can reach.

Increases to SSP, SMP, SPP and SAP rates

From April 2012 the weekly rate of Statutory Sick Pay (SSP) rose to £85.85 a week, while that for Statutory Maternity Pay (SMP) and associated paternity and adoptive rights rose to £135.45 each week. The lower earnings threshold over which SMP is payable rose to £107 a week.

Unfair dismissal qualifying periods

A simple but major change in unfair dismissal law was introduced on 6 April 2012. From this date the qualifying period went up from one year to two years, meaning simply that until an employee has completed a continuous period of two years in their employment they will not be able to bring a case of unfair dismissal.

The justification for the change back to two years relates to encouraging job creation by removing disincentives that may deter employers from taking on new staff.

The move is however, hugely controversial as it involves removing fundamental employment rights from hundreds of thousands of people. There is also a potential issue over its legality under EU law, given that more women than men will be affected.

Importantly this change is not retrospective in its effect. In other words it only applies to employees whose contracts have commenced on or after Friday 6 April 2012. Anyone employed before that date will qualify for unfair dismissal after a single year of continuous service.

Employment tribunal reforms

On 6 April 2012 there were some significant changes made to employment tribunal procedure which were intended to speed the system up and reduce costs:

- Witness statements are now taken as read unless the Employment Judge directs that they should be read out.
- Unfair dismissal cases are now being heard by judges sitting alone without lay members, unless the judge directs otherwise.
- No state-funded witness expenses are now payable.
- Tribunals are now able to require that a deposit of up to £1000 is paid when one of the parties insists on pursuing a weak case (the previous maximum was £500).
- Tribunals are now able to award up to £20,000 in costs against losing parties (the previous limit was £10,000).

Major developments in case law

This section is structured as a 'top ten countdown' of key cases (or groups of cases). They are ranked broadly in order of their practical significance for day to day human resource management.

10. Injury to feelings awards

Edwards v Chesterfield Royal Hospital NHS Foundation Trust (unreported, [2011] UKSC 58 14 December 2011, SC)

Botham v Ministry of Defence (unreported, [2011] UKSC 58 14 December 2011, SC)

These two cases relating to the same basic legal issue were recently heard in the Supreme Court.

The issue at stake is whether or not there are any circumstances in which an employer can be obliged by a court to compensate a successful claimant for more than financial losses when the manner of their dismissal causes injury to feelings.

For many years now, and controversially, the House of Lords' ruling in the well known case of *Johnson v Unisys Ltd [2001] IRLR 279, HL* has stood. Here, the House of Lords ruled that no compensation for injury to feelings was ever awardable under wrongful dismissal law however unpleasant the manner of the dismissal. The rather unconvincing grounds given were that it would be constitutionally wrong for the courts to create rights that applied in wrongful dismissal cases that had specifically not been created by Parliament when it framed unfair dismissal law.

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The *Edwards* and *Botham* cases concerned, respectively, a situation in which the employer had breached its own disciplinary policy when dismissing and one in which there had been a breach of mutual trust and confidence during the course of the dismissal.

In neither case, according to the Supreme Court, can damages for injury to feelings be claimed. This can only happen if the breach occurs prior to the dismissal, for example at an early stage of a disciplinary process.

9. Marital status

Dunn v The Institute of Cemetery and Crematorium Management (unreported UKEAT/0531/10 2 December 2011, EAT)

Hawkins v Atex Group Ltd and others (unreported, UKEAT/0302/11 13 March 2012, EAT)

In the *Dunn* case the Employment Appeal Tribunal (EAT) ruled that it was unlawful under the Equality Act 2010 for an employer to discriminate against a woman because she was married to a particular individual. The law is not just there to protect people from discrimination on grounds of marital status generally.

There are potentially quite significant implications here, bringing into question the legality of policies that prevent people who are married or in civil partnerships working together.

However, the EAT appears to have made a contrary decision in the more recent *Hawkins* case. Here it was decided that unlawful discrimination on grounds of marital status only occurs when a person is treated less favourably than she would have been had she been in a close unmarried relationship. In other words it is just discrimination against people who are married in general terms that is covered.

There are therefore now two conflicting judgements from the same court on the same issue.

8. Legal representation at internal disciplinary hearings

R (On the application of G) v Governors of X School (unreported, [2011] UKSC 30 29 June 2011, SC)

This important Court of Appeal judgement was overturned by the Supreme Court in late June 2011.

Until 2009, as a general rule, employees had no right to bring a legal representative with them when they attended a disciplinary hearing.

However, thanks to the rulings in this case and another (*Kulkarni v Milton Keynes Hospital NHS Foundation Trust [2008] IRLR 829, CA*), this position changed in 2009.

The *Kulkarni* case concerned a part-qualified doctor who was disciplined after a patient complained that he had placed his stethoscope inside her underwear without first getting her to consent.

As the outcome of the case could, if it went against the claimant, have led to a situation in which he could not practise as a doctor in the UK, he asked that he might be permitted legal representation at the disciplinary hearing. The request was turned down.

The outcome of this case, which went in favour of the claimant, hinged on the detail of his contract and of the Trust's policies. However, in passing judgement the Court of Appeal dealt (via obiter comments) with the general issue, and it is this part of the judgement which has significance for certain types of organisations.

The *R v X* case concerned a music teacher who was alleged to have kissed a 15 year old boy. Here the High Court and subsequently the Court of Appeal, found that legal representation should have been available to the claimant at all stages in the disciplinary process because the outcome could have been a ban from working in any educational institution on the direction of the Secretary of State.

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Unusually there was an application in a UK employment case of principles derived from the European Convention on Human Rights – Article 6 that covers the right to a fair trial. The Court of Appeal, made reference to a Belgian case that was decided in the European Court of Human Rights in 1982 in making its obiter judgement.

However, this is now no longer good law. According to the Supreme Court, Article 6 should not have been interpreted as extending to internal disciplinary hearings.

7. Holiday entitlement

KHS AG v Schulte (unreported, C-214/10 22 November 2011, ECJ)

Fraser v South West London St George's Mental Health Trust [2012] IRLR 100, EAT

In the *KHS AG* case the European Court of Justice decided that it was compatible with EU law for member states to have regulations that require staff to take any statutory holiday entitlement that is carried over into a new holiday year within 15 months.

This is not yet UK law, but it is safe to assume that the Government will take advantage of this ruling and change the UK Working Time regulations at an early opportunity.

The whole question of untaken holiday, carrying over and paying in lieu on termination continues to produce quite a bewildering amount of complex litigation. Some rulings of the Employment Appeal Tribunal (EAT) appear to conflict and so greater clarity will only come once one is appealed. The present position appears to be that:

- An employer can lawfully require staff to take their statutory holiday before the end of a holiday year. There is no automatic right to carry-over.
- However, in some circumstances employees do have a right to pay-in-lieu when they leave an employment having not taken all their holiday. When exactly this occurs is confused. Some EAT judgements say that it can happen in more circumstances than others.

The latest case is *Fraser* in which the EAT said that the right to pay in lieu only occurs when an employee has been unable to take leave due to sickness and has either given notice of an intention to do so, or made a request to that effect.

As mentioned above, the Government is currently consulting on this whole area of law with a view to ensuring that UK regulations are compliant with existing European case law. It is expected that amending regulations will be introduced during 2012 which should clarify things.

6. TUPE

Smith and others v Trustees of Brooklands College (unreported, UKEAT/0128/11 5 September 2011, EAT)

Enterprise Managed Services Ltd v Dance (unreported, UKEAT/0200/11 21 September 2011, EAT)

Spaceright Europe Ltd v Baillavoine and another (unreported, UKEAT/0339/10 1 February 2011, EAT) [2012] IRLR 111, CA)

Eddie Stobart Ltd v Moreman and others [2012] IRLR 356, EAT

The first two cases are interesting and potentially significant Employment Appeal Tribunal (EAT) rulings relating to pay harmonisation. Employers had moved to harmonise pay between existing and transferred staff following a TUPE transfer. In the first case this occurred two years after the transfer, in the second it happened sooner as part of a productivity improvement drive.

In both cases the EAT ruled that these pay changes did not breach TUPE regulations. In neither case was the change simply brought about for the sake of harmonisation or 'tidiness'. There were other factors also. Therefore they were not 'tupe-related' and could go ahead without breaching the law.

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The *Spaceright* ruling is about a different TUPE issue. It relates to a situation in which an employee is dismissed prior to a transfer even though no specific transferee has been identified or has come forward. It was held that the claimant had been dismissed in order to help facilitate a transfer by cutting costs. Her dismissal was therefore transfer-related and unfair in law.

The *Eddie Stobart* case has much greater potential significance. This relates to situations in which 'organised groupings of employees' are required to transfer as a result of a 'service provision change'. In this case the EAT rejected the suggestion that this should happen when a person or a group of people are simply employed to work for the majority of their time on one contract. The test must be more stringent. There must be a process whereby the employee or employees have been assigned in some way to work on the contract that is being transferred, in order for their right to be transferred along with it to kick in.

5. Equal pay

Skills Development Scotland v Buchanan (unreported, UKEATS/0042/10 25 May 2011, EAT)

Hosso v European Credit Management Ltd [2012 IRLR 235, CA]

Continuing with the TUPE theme, in the *Buchanan* case the Employment Appeal Tribunal established that employers can justify a situation in which a man is paid more than a woman (or vice versa) for doing like work when the reason is related to a TUPE transfer in which a relatively low-paid group of staff joins a relative highly-paid group. In other words this is an acceptable 'material factor' (formerly a 'genuine material factor') that justifies a difference in pay.

Previous updates have drawn attention to the possibility, introduced thanks to the Equality Act 2010, that in future people may be able to bring equal pay claims using the (old) sex discrimination regulations and procedures. This was not possible when there were two separate Acts dealing with different types of sex discrimination (that is, the Equal Pay Act 1970 and the Sex Discrimination Act 1975), but is possible in some circumstances now that the two sets of regulations are contained within the one Equality Act. Moreover, there is an important incentive in the form of an injury to feelings award which will encourage people to do so.

The *Hosso* case suggests not just that this is indeed a possibility, but that henceforth certain types of equal pay claim must be brought under the sex discrimination regulations. These are claims that relate to the unequal treatment of men and women in the area of non-contractual benefits. Here the claim related to the allocation of share options. This was a discretionary and not a contractual benefit in the company concerned and could thus not give rise to a conventional equal pay claim.

In this case the claimant lost her right to bring a claim as she was out of time (that is, had failed to submit within three months) as far as sex discrimination law was concerned, despite being in time (that is, within six months) as far as equal pay law was concerned.

4. Belief

Maistry v BBC (unreported, ET/1313142/2010 14 February 2011, ET)

Hashman v Milton Park (Dorset) Ltd t/a Orchard Park (unreported, ET/3105555/2009 10 January 2011, ET)

These cases were recent employment tribunal claims reported widely in the press. While they are not binding precedents, they are an important indication of the way things are going as far as the definition of 'belief' is concerned in the law protecting workers from discrimination on grounds of 'religion or belief'.

In *Grainger plc and others v Nicholson* [2010] IRLR 4, EAT and *Power v Greater Manchester Police* (unreported, UKEAT/0087/10 8 October 2010, EAT, referred to in previous updates, claimants had demonstrated successfully that their 'beliefs' could form the basis of claims to the employment tribunal when a detriment was suffered on those grounds – one related to a belief in spiritualism, the other to climate change. In the *Grainger* judgement, the Employment Appeal Tribunal set out guidance which allowed a great deal of discretion to tribunals when deciding these questions:

- it must be a belief and not merely an opinion or viewpoint based on current information
- the belief must be genuinely held
- the belief must concern a weighty and substantial aspect of human behaviour
- the belief must have a 'certain level of cogency, seriousness, cohesion and importance'
- the belief must be 'worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of other.'

These two more recent claims both went in favour of the claimants. In the *Maistry* case the belief was 'in the higher purpose of public-sector broadcasting'. In the *Hashman* case the relevant belief was 'in the sanctity of life' made up of opposition to fox-hunting and hare-coursing combined with a commitment to veganism and environmentalism.

3. Age discrimination

Fuchs and another v Land Hessen [2011] IRLR 1043, ECJ

Prigge and others v Deutsche Lufthansa AG [2011] IRLR 1052, ECJ

HM Land Registry v Benson and others [2012] IRLR 373, EAT

Woodcock v Cumbria Primary Care Trust (unreported, [2012] EWCA Civ 330 22 March 2012, EAT)

Seldon v Clarkson Wright and Jakes (unreported, [2012] UKSC 16 25 April 2012, SC)

The *Fuchs* case is the latest in a line of ECJ rulings that confirm the right of employers mandatorily to retire people at 65 notwithstanding age discrimination law. The position is now clearly established that provided a business justification can be advanced which amounts to 'a proportionate means of achieving a legitimate aim', the dismissal is lawful as far as EU age discrimination law is concerned. Here the justification was based on providing promotion opportunities for younger staff, the presence of a generous pension and a wish to avoid disputes with employees about declining performance due to old age.

However, in *Prigge*, another German case, a collective agreement which required airline pilots to retire at 60 was ruled by the ECJ to be unlawful. The justification advanced on this occasion was health and safety, it being argued that once they pass 60 pilots become dangerous. The ECJ disagreed citing international agreements which permit pilots to fly up until the age of 64.

The Supreme Court took the opportunity when hearing the appeal in the *Seldon* case to clarify matters a bit on this question of maintaining a compulsory retirement age as far as the UK is concerned. They confirmed that in principle defences such as a wish to promote inter-generational justice and avoiding undignified performance-based dismissals of elderly people were acceptable, but that employers were still under an obligation to demonstrate the relevance of these to their own organisations. Moreover, they are also still obliged to demonstrate that the chosen mandatory retirement date is appropriate.

In other words, the Supreme Court is ensuring that merely having a 'legitimate aim' is not sufficient. The employer also needs to show that their means of achieving it is 'proportionate'.

More significantly, the Supreme Court overturned an important part of the Court of Appeal's judgement in the *Seldon* case. This relates to whether or not an employer can only legitimately justify direct age discrimination when their aim (namely the wish to maintain a mandatory retirement date) has a public interest dimension and is not solely something that operates in the interests of the organisation concerned. The Court of Appeal said that it was not necessary to demonstrate that the continuation of mandatory retirement operated in the public interest. The Supreme Court has confirmed that it is necessary.

The *HM Land Registry* case has considerable potential significance. This concerned whether or not it was 'a proportionate means of achieving a legitimate aim' for an employer to apply 'a cheapness criterion' when determining who to select for voluntary redundancy when more applied than was possible to let go. The Employment Appeal Tribunal decided that in this case it was.

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This increases the likelihood that a future case relating to compulsory redundancy may go the same way. Were it to be established that 'cheapness criteria' could be used in selection exercises of that kind, it would effectively mean that applying 'last in first out' rules was lawful under age discrimination law - a key ruling that is yet to come.

However, the *Woodcock* case (decided a month later) points another way. Here the Court of Appeal stated that cost savings alone cannot be used to justify age discrimination. There need to be other associated reasons too - in this case the fact that extensive informal consultation had taken place ahead of a decision to make a man redundant before he became entitled to a pension.

2. Redundancy

University of Stirling v University and College Union [2012] IRLR 266, EAT

Samsung Electronics UK Limited v Monte D'Cruz (unreported, UKEAT/0039/11 1 March 2012, EAT)

USA v Nolan (unreported, C-583/10 22 March 2012. Advocate General)

The *Stirling University* case is an important one relating to the expiry of fixed-term contracts and redundancy rights. Here the Employment Appeal Tribunal (EAT) ruled that the termination of a fixed term contract on time and in circumstances in which there was no expectation of renewal is not a redundancy for the purposes of collective consultation. It does not therefore count towards the twenty required to trigger collective consultation obligations.

It is important to note that this ruling in itself does not change the position that in principle the termination of a long-term fixed term contract can give the right to a redundancy payment and can also require employers to include temporary staff in restructuring exercises on the same basis as permanent staff. This is because these rights are covered by different sets of regulations. Further case law will be needed to clarify this important point.

USA v Nolan has yet to be finally decided by the ECJ, but the Advocate General's opinion was published in March 2012 and generally provides a good guide as to what the final decision will be. Here the likelihood is that the essence of the judgement by the UK courts in *UK Coal Mining v National Union of Mineworkers (Northumberland Area [2008] IRLR 4, EAT* will be overturned. The issue is at what point collective consultation must start ahead of a programme of redundancies. According to the *UK Coal Mining* case the answer is from the point at which a decision is taken to close a workplace, effectively requiring the virtues of that decision to form part of the consultations. The Advocate General rejects this approach in *USA v Nolan*. Consultation can start after this and thus be restricted to discussions about mitigating the consequences of redundancies.

The *Samsung Electronics* case is more significant from a practical HR point of view. This concerns the increasingly common situation in which employers select people for redundancy using an interview system. People at risk are encouraged to apply for jobs in a 'new structure' and are interviewed for them. Unsuccessful candidates are then those selected for redundancy.

Here the claimant complained that despite the job in the 'new structure' being almost identical to his existing job, he had been rejected after an interview which used subjective criteria to assess rival candidates. In particular he felt that account should have been taken of his past performance appraisals which demonstrated an excellent record in the job. He also objected to the failure of the panel to apply its own person specification, but to judge candidates against a wider set of 'core competences' which allowed for much more subjectivity. He won his case at an employment tribunal, but lost it when the company subsequently appealed to the EAT. The use of subjective judgement was not unreasonable and did not render the dismissal unfair.

1. Gross conduct dismissals

Look Ahead Housing and Care Ltd v Rudder (unreported UKEAT/0163/10 8 September 2010, EAT)

Quadrant Catering v Smith (unreported, UKEAT/0362/10 10 December 2010, EAT)

London Borough of Brent v Fuller [2010] IRLR 414, EAT

Ezias v North Glamorgan NHS Trust [2011] IRLR 550, EAT

These are four in a series of very interesting recent judgments which suggest an ongoing disagreement between the Employment Appeal Tribunal (EAT) and other courts on the question of gross misconduct dismissals.

This is hugely important from a practical HR management perspective and it is a question that badly needs to be resolved one way or the other. As yet it cannot be concluded that it has been.

In the first three cases the EAT overturned rulings by employment tribunals. In both cases the tribunals had found that the dismissals fell outside the 'band of reasonable responses'.

In the *Rudder* case, in which an employee was overheard by a client making a discriminatory remark, there had been no consideration by the employer of whether an alternative sanction short of dismissal might have been more appropriate. They had simply dismissed on grounds of gross misconduct following a disciplinary hearing.

In the *Smith* case the claimant had sworn in the presence of a manager; there being some doubt about whether her words had been directed at the manager. Here the tribunal ruled that dismissal on grounds of gross misconduct was too harsh a sanction in the circumstances and stated that it should be a last resort and not a first resort.

In both cases the EAT said that the tribunals had misapplied the law by substituting their own views as to what it would have been reasonable for the employer to have done. That is not the job of an employment tribunal. If the facts are clear, a proper procedure has been carried out and it is the genuine belief of the employer that the employee is guilty of misconduct, they have the right to dismiss.

These are the latest in what is now a long line of EAT rulings that are very employer friendly on the question of summary dismissals for gross misconduct. They appear to undermine, if not to ignore altogether, the long-established practice that tribunals take account of the Acas Code of Practice on disciplinary and grievance procedures when determining whether or not a decision summarily to dismiss on grounds of gross misconduct is reasonable.

However, in the *Fuller* case which has some similarities, the Court of Appeal overturned the EAT judgement (that a gross misconduct dismissal was fair) and re-instated the original employment tribunal decision (that it was unfair). This case is quite complex for various reasons. It concerns the summary dismissal of a special needs school administrator on the grounds that she had criticised colleagues who were restraining a child acting hysterically. The tribunal found that it had been a one-off incident for which no reasonable employer would have dismissed. In other words, as with the above cases, the tribunal's view was that this was misconduct, but not gross misconduct. A warning should have been given and the administrator should not therefore have been dismissed.

The EAT overturned the tribunal ruling using the now familiar reason that it had wrongly substituted its own view for what is reasonable and that the decision to dismiss or not to dismiss is for the employer once facts have been established and a proper procedure followed.

The Court of Appeal overturned the EAT ruling, but only on a majority ruling. They ruled that the EAT had been overly 'fussy' and 'pernickety', had overanalysed the case and had been hypercritical of the way the tribunal judgement had been written. The majority stated that the tribunal had been entirely within its rights to conclude that a reasonable employer would have imposed a penalty short of dismissal.

The dissenting minority judgement is interesting, but does not contradict the key point here. It relates to whether or not a previous informal verbal warning should have counted as a formal warning, thus permitting the employer to dismiss. In other words it questions whether or not the incident that triggered the administrator's dismissal was in fact a 'one off.'

This is only one case, so it is too early to judge whether or not it represents a genuine reining in of the EAT by the Court of Appeal on this crucial question of whether or not a tribunal can decide that summary dismissal is too harsh a sanction and thus find in favour of a claimant who has been dismissed on grounds of gross misconduct.

The *Ezsias* case concerned dismissal following a breakdown in the relationship between the claimant (a senior consultant) and some of his colleagues. He had repeatedly questioned their professionalism and had complained about them frequently using colourful language in writing and verbally to managers. The Chief Executive had met with him to discuss what might be done and had concluded that there was nothing that could be done which would satisfy the claimant. The consultant was therefore dismissed, without a full disciplinary procedure being followed, on grounds of a 'fundamental breakdown of trust and confidence.'

The EAT upheld the tribunal's decision that this dismissal could be justified under 'some other substantial reason' and that there had thus been no requirement on the part of the employer to undertake a full, formal disciplinary enquiry before dismissing. Another interesting and apparently harsh judgement by the EAT.

Other interesting recent cases

The following are brief summaries of cases that are notable or interesting, confirming points or developing less significant new precedents. Some have significance for specific types of employment situation, others are simply curiosities:

- In *Jackson v Liverpool City Council* [2011] IRLR 1009, CA the Court of Appeal overturned a County Court ruling in a case about the fairness of an employment reference. Mr Jackson won his claim that his employer had acted negligently in raising allegations about him that were not proven and had not been investigated. The Court of Appeal said that the employer had not acted unreasonably as the full facts had been disclosed in a follow-up telephone conversation. In any event, the answers given to the specific questions asked had been reasonable.
- In *Aitken v Commissioner of Police of the Metropolis* (unreported 2011) EWCA Civ 582 18 May 2011) the Court of Appeal ruled that a tribunal was right to find against a police officer who had been dismissed for an act of aggressive behaviour. The fact that he suffered from a mental illness and that this was the probable cause of his conduct did not mean that dismissing him was contrary to disability discrimination law.
- In *Wardle v Credit Agricole Corporate and Investment Bank* [2011] IRLR 604, CA the Court of Appeal overturned a tribunal's decision to award a successful claimant a sum equivalent to 'career-long loss of earnings' (£180,000). This should only happen in highly exceptional circumstances. The proper approach is for the tribunal to estimate when it is more likely than not that the successful claimant will get a new job. Loss of future earnings should only be calculated to that estimated time.
- *London Borough of Hackney v Sivanandan* [2011] IRLR 740, EAT is an extraordinary case in which a claimant successfully argued that she had been victimised by a charity that was funded by a local council. She had been refused employment on the grounds that when employed there at an earlier date she had brought a discrimination claim. The case was brought against the charity, the council and also various named individuals who were associated with these bodies. She won over £400,000 and the parties were held to be 'jointly and severally liable' for paying her this sum. However, the Employment Appeal Tribunal stated that it was not its responsibility, nor that of any employment tribunal, to apportion the sums owed between the losing parties. It was for them to agree the apportionment among themselves. This overturns established practice.

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- In *Moore v President of the Methodist Conference* (unreported UKEAT/0219/10 15 March 2011, EAT) the Employment Appeal Tribunal ruled that a 'superintendent minister' who had responsibility for overseeing a group of congregations was an employee and could thus pursue a case of unfair dismissal. This is an example of another case in which the established position that ministers of religion are not employees is being undermined. Here the multiple test was applied, resulting in the finding that the claimant had been working under a contract of employment.
- In *CF Capital v Willoughby* (unreported [2011] EWCA Civ 1115 12 October 2011, CA) the Court of Appeal ruled in favour of the claimant's right to bring a case of unfair dismissal. She had been dismissed in writing 'by mistake', her employer having assumed wrongly that she would accept its offer of a new contract. The employer subsequently withdrew its dismissal and thus argued that she had resigned. Not so, said the Court of Appeal. A dismissal is a dismissal even if it was mistaken.
- In *Salford NHS Primary Care Trust v Smith* (unreported, UKEAT/0507/10 26 August 2011, EAT) the Employment Appeal Tribunal decided that a disabled physiotherapist's requests for a career sabbatical and to undertake a period of 'non-productive' work while recovering from her illness were not 'reasonable adjustments' that the employer was obliged to make.
- In *Grant v HM Land Registry and another* [2011] IRLR 748, CA) the Court of Appeal concluded that merely mentioning to other staff that a man was gay did not constitute unlawful harassment. The claimant had 'come out' in one workplace before being transferred to another. He had wanted to come out there too, but in his own time and in a manner of his own choosing. His new boss had effectively pre-empted this, but had not done so in a manner likely to cause humiliation, or to create any kind of a hostile working environment.
- In *Garside and Laycock v Booth* [2011] IRLR 735, EAT) the Employment Appeal Tribunal ruled that it was not unlawful to dismiss an employee who had refused to accept a pay cut provided that the manner of implementation fell within the band of reasonable responses. The key point is that it is not for a tribunal to investigate whether or not the pay cut itself is justifiable in such circumstances.
- In *Roberts v North West Ambulance Service* (unreported, UKEAT/0085/11 2 September 2011, EAT) the Employment Appeal Tribunal ruled that in some circumstances the scope of required 'reasonable adjustments' under disability discrimination law could extend to practices which only impacted on a disabled person indirectly. In this case while the claimant was provided with a dedicated desk to work at, it was not always available at the start of his shift because other employees used a hot-desking system.
- In *G E Caledonian Ltd v McCandliss* UKEATS/0069/10 the Employment Appeal Tribunal decided that a contract to sponsor a student through university and to provide training in vacations did not amount to a contract of service.
- In *Homer v Chief Constable of West Yorkshire* (unreported, [2012] UKSC 15 25 April 2012, SC) the Supreme Court ruled that it did constitute unlawful indirect age discrimination to require job holders to have completed a particular degree programme before they could be employed on the highest grade. The policy discriminated against people who were coming up to retirement and would not have sufficient time to gain the degree before their employment ended.
- In *Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley* (unreported, UKEAT/0417/11 23 March 2012, EAT) the Employment Appeal Tribunal overturned a tribunal's ruling that it was necessary for a disabled person to be paid in full during a phased return to work. If someone returns to work on a part-time basis they can lawfully be paid only for the hours they work. Paying the full-time salary is not a reasonable adjustment.
- The case *Cavenagh v William Evans Limited* (unreported, [2012] EWCA Civ 697 24 May 2012, CA) concerns a situation in which the employee's contract was terminated by mutual agreement and a 'pay in lieu of notice' agreement made. He therefore left immediately with a cheque in his pocket. Later the employer discovered evidence of gross misconduct that would

have allowed it to dismiss summarily without notice. The employer sought to recover the notice pay. The Court of Appeal ruled that they had no right to recover this money.

- In *The President of the Methodist Conference v Preston* (unreported, [2011] EWCA Civ 1581 20 December 2011, CA) the Court of Appeal confirmed the recently established position in a number of cases that ministers of religion are employed by their churches and can therefore pursue cases of unfair dismissal in the tribunals.
- In *Moxam v Visible Changes Ltd and another* (unreported, UKEAT/0267/11 24 November 2011, EAT) the Employment Appeal Tribunal overturned a tribunal judgement in a race discrimination case. The claimant was a black woman who was born in the UK, her parents being immigrants from Jamaica. During her employment on two occasions she heard managers referring to 'f*****g immigrants'. The tribunal rejected her claims of harassment and direct race discrimination on the grounds that she was not an immigrant. The Employment Appeal Tribunal disagreed, ruling that these incidents did constitute discrimination 'on racial grounds'.
- The case *Czikai v Freemantle Media Ltd and others* (unreported, UKEAT/0606/10 12 October 2011, EAT) concerns the failure of a contestant to advance very far in the TV show 'Britain's Got Talent'. She argued that her failure to sing to a high standard during her audition was due to fatigue and to swollen arms that were disability-related. The Employment Appeal Tribunal decided that while that may have been true, contestants on TV talent shows are not job applicants and are thus not covered by the relevant clauses in the Equality Act 2010.

Future developments

Employment tribunal reforms

More changes to tribunal procedure are planned, although details have yet to be finalised. These include pre-claim conciliation by Acas and employment judges having the right to levy fines of up to £5000 on employers who lose cases and have been found to have acted unreasonably in defending a claim. Importantly this will include negligence. (See the section below on the Queen's Speech).

April 2014 is likely to see the introduction of fees when a claimant submits an ET1.

Ministers are currently considering alternative possible plans, all of which propose a sliding scale of fees depending on the sum being sought by way of compensation.

The minimum sums proposed are:

- an issue fee payable on submission of the ET1 of £150, plus
- a hearing fee of £250 payable when the hearing commences.

The maximum sums being proposed are:

- an issue fee of £250, plus
- a hearing fee of £1,250

or

- a one-off issue fee of £1750.

Additional fees would be payable if an employer wanted to counter-claim and when appeals are taken to the Employment Appeal Tribunal.

Losing respondents will then be required to reimburse victorious claimants in addition to paying any other compensation required by the tribunal.

Parental leave

An EU directive has been agreed increasing parental leave entitlements across Europe from 13 weeks to 18 weeks per child.

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The original deadline date for implementation was 8 March 2012, but there is a clause allowing a delay of up to 12 months if a member state needs 'to take account of particular implementation difficulties'. The UK Government has decided to take advantage of this clause and will not be introducing the change until March 2013 because of a thorough review of parental leave being undertaken as part of the *Modern Workplaces* consultation. Proposals on a new system of flexible parental leave were announced in the Queen's Speech (see section below).

Pension reform

In May 2006 the then Government published a white paper entitled *Security in retirement: towards a new pensions system* setting out proposals for long-term, fundamental reform of state pensions.

The white paper drew on the recommendations of the Turner Commission which reported in 2005 after having undertaken a lengthy, in-depth investigation of the whole issue of population ageing, increasing dependency ratios and the need to push everyone into saving more for their retirements.

The Pensions Act 2008 contained most of the resulting measures. The Coalition Government subsequently made some relatively minor adjustments to the timings, but not to the substance.

The requirements are complex and apply at different times to different organisations depending on their size in terms of staff. The first 'staging date' will be in October 2012. There are 42 in all.

It appears now that businesses employing fewer than 5 people will be exempted from the new auto-enrolment regime 'until the next Parliament'

For others, the major new requirements will be as follows:

- From the set 'staging date' everyone who is employed, is between age 22 and 65 and is paid more than £7,475 a year, will either have to be enrolled in an occupational pension scheme or in the new Government-sponsored 'personal pension account scheme'.
- This includes agency works and secondees who have more than three months' service.
- Contributions will be payable, as a minimum, on earnings between £5,715 and £38,185.
- 'Job holders' will be able to opt out if they wish, but otherwise they will be automatically enrolled into one scheme or the other, including any new starters after the relevant staging date.
- Employers will not be able to opt out, but they will have 12 weeks in which to enrol new staff.
- Until September 2016, minimum contributions will be:
 - employees will contribute 1% of earnings
 - employers will contribute 1%.
- From September 2016 to September 2017:
 - employees will contribute 3% of earnings
 - employers will contribute 2%.
- From October 2017:
 - employees will contribute 4% of earnings
 - employers will contribute 3%.
- Tax relief will mean that a further 1% is contributed.

Further plans involve simplifying the rules for accessing the state pension and state second pension and making the system more accessible to people who take periods out of the workforce for the purposes of raising families and caring for elderly dependants.

Additional financial incentives will also be introduced to encourage more people to work beyond the state pension age.

The state pension age will also rise. The Blair/Brown Government plan foresaw a rise from 65 to 66 in 2024, to 67 in 2034 and to 68 from 2044.

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In the autumn of 2011 the Coalition Government announced its intention to bring forward these dates very considerably. The state pension age will rise to 66 between October 2018 and October 2020 and to 67 between 2026 and 2028.

National Minimum Wage rates

From 1 October 2012 the national minimum wage rate will increase as follows:

- Adult rate: £6.19
- Apprentice rate: £2.65

The following rates will not increase this year:

- Lower rate: £4.98
- Youth rate: £3.68

The accommodation offset will rise to £4.82 per day.

The Queen's Speech

In May 2012 the Government set out its planned programme of legislation for the coming year. The Queen's Speech contained around twenty 'meaty' legislative proposals including the following:

- An Enterprise and Regulatory Reform Bill which includes the following proposals:
 - Compromise agreements will be renamed settlement agreements.
 - The Bill contains proposed wording on settlement offers which would enable employers to have meetings with employees with a view to terminating employment without these meetings being taken into account in unfair dismissal proceedings. This is widely regarded as introducing 'protected conversations', but only in relation to unfair dismissal claims.
 - Reducing the level of the cap on unfair dismissal awards (currently £72,300), possibly by making it a multiple of the individual claimant's weekly pay.
 - Submitting claim forms to Acas to allow for conciliation before they even go to the employment tribunal offices.
 - The right for tribunals to levy punitive fines on losing respondents (up to £5000) when they are found to have deliberately or maliciously infringed a claimant's employment rights.
 - All Employment Appeal Tribunal appeals are being heard by a judge sitting alone without wing members.
 - The right for officials employed by the ETS to take some decisions currently reserved for employment judges where both parties agree.
 - Narrowing the conditions necessary for a disclosure to be 'protected' in whistleblowing cases' to those that are clearly 'in the public interest'. This would remove rights from people whose complaints are rooted in breaches of their own contracts.
- A Children and Families Bill which proposes:
 - The right for mothers and fathers to share entitlements to maternity/paternity/parental leave during the first year of a child's life a great deal more flexibly than is currently the case.
 - The right would come into effect in 2015 at the earliest, but would represent a radical change.
 - Earlier proposals to extend the right to request flexible working to all employees do not appear in this draft bill.

Working time

The Government is proposing to make changes to the existing Working Time Regulations. For more information see the section above on Holiday entitlement under Major developments in case law.

Other possible developments

A variety of proposals for the reform of employment law and health and safety regulations have been floated by ministers and others close to them in recent months. Some are said to be 'under active consideration' others have been (or still are) the subject of formal consultation processes.

There are also proposals in the EU pipeline that may or may not ultimately come into our law. These include:

- Increasing the number of situations in which costs are awarded by employment tribunals.
- Requiring that claimants include a full schedule of loss in their ET1 forms.
- Allowing tribunals to award costs or reduce compensation when a claimant unreasonably refuses an offer to settle a case ahead of a tribunal hearing.
- Empowering tribunal officials to carry out interlocutory hearings that are concerned with setting dates and exchange of information in place of employment judges.
- Radically reducing health and safety requirements in low risk workplaces (for example, an exemption from the need to undertake formal risk assessments).
- Paying full pay for the first 20 weeks of maternity leave.
- Allowing fathers time off to attend ante-natal appointments as well as mothers.
- Requiring employers to carry out an equal pay audit whenever they lose an equal pay claim in the tribunal, unless such an audit has been carried out within three years.
- A general de-regulation and streamlining of the regulatory burden on the recruitment industry
- The creation of an 'Independent Assessment Service' to assess the fitness for work of employees who have been absent for four weeks or more due to ill health.
- An extension of Compulsory Maternity Leave (CML) from two to six weeks
- The introduction of 'filial leave' aimed at assisting people who have caring responsibilities for elderly parents. It would operate in much the same way as parental leave does at present.

The Government-commissioned Beecroft Report was published in May 2012. Much of the extensive press coverage that greeted its publication concerned earlier draft versions which contained more controversial proposals than made it into the final version.

The proposals that stand a good chance of becoming law at some stage are the following:

- the repeal of the 'third party harassment' clauses in the Equality Act 2010
- reform of the Criminal Record Bureau checking system
- establishment of a new outsourced Government service to assist employers with work permit checking
- some form of government-backed scheme to help micro businesses reach no-fault settlements with staff they wish to dismiss
- reducing the minimum redundancy consultation period from 90 to 30 days.

In addition, ongoing Government reviews are taking place, or will shortly, on the reform of:

- transparency and shareholder power in respect of executive remuneration, along with reform of appointments to remuneration committees.
- TUPE (particularly post-transfer harmonisation)
- employment tribunal rules of procedure
- the National Minimum Wage (the aim being to simplify the regulations)
- the Acas Code of Practice on disciplinary and grievance procedures.

Useful contacts

CIPD members can find more information on employment law developments, in the **Employment Law at Work** area of our website at www.cipd.co.uk/hr-resources/employment-law.aspx. It includes a Latest news page (updated weekly), Case Reports and their implications for employers, Legal Timetables giving developments since January 2010 and future proposed legislation, sets of Frequently Asked Questions (FAQs) on employment law topics, and many Useful links to related websites.

The text of recent legislation is available online.

Public General Acts since 1988 at www.legislation.gov.uk/

Statutory Instruments since 1987 at www.legislation.gov.uk/

Bills currently going through Parliament at www.parliament.uk/bills/bills.cfm

Government department websites usually contain useful summaries of recent and forthcoming legislation. The main departments for employment law are:

Department of Business Innovation and Skills at www.bis.gov.uk/

Department for Work and Pensions at www.dwp.gov.uk/

The **Employment Appeal Tribunal (EAT)** www.employmentappeals.gov.uk deals with appeals from the decisions of the employment tribunals. The website has the full text of judgments from July 1999 and a list of cases heard during the most recent month, as well as procedural information.

British and Irish Legal Information Institute (BAILII) at www.bailii.org provides access to a comprehensive collection of British and Irish legal materials available free of charge.



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