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Employment Law Cases Update and Newsletter

February 2012

Those of us who offer legal advice in Bristol, and particularly those who profess expertise in employment law, need to consider their response to the reported views of Liam Fox (Independent, February 23, 2012). Fox, the former Tory cabinet minister, is reported as saying:

> "It is too difficult to hire and fire, and too expensive to take on new employees. It is intellectually unsustainable to believe that workplace rights should remain untouchable while output and employment are clearly cyclical".

These comments are apparently part of pressure from Conservative MPs to relax employment protection laws as part of a "go for growth" package.

My own reaction to this "pressure" is as follows:

- I don't need lecturing on "intellectual sustainability" from an ex-cabinet minister, and I believe that very few employment lawyers would welcome this assessment of their trade.
- We are seeing concerted attacks on employment rights in the context of an economic crisis with its roots in the greed of American bankers. It is supremely ironic that apologists for capitalism red in tooth and claw are now turning on those least able to defend themselves, blaming them for the crisis, and seeking to impose American "hire and fire" principles.
- The cycles of capitalism are historical facts. Fox seeks to undermine workers' rights, achieved after decades of bitter struggle, in the name of these cycles.
- Attempts to dilute workers' rights should be opposed by all employment lawyers worthy of their name.

R. H. Spicer

Head of Chambers

Newsletter Contents

Coping with....Stress at Work

Last year, the Chartered Institute of Personnel and Development announced that the biggest cause of sickness to those at work was stress. With nearly half a million people suffering from it, it is clearly an issue that needs to be addressed.

But how do you cope with stress at work? The biggest problem is identifying the root. Most of us have some degree of stress in life, but when this is compounded by problems at work then it is essential that you seek help. Preferably, if the issues can be addressed in the workplace, talk to either your manager or occupational health team. If the problem persists you must go and see the doctor.

Some view treating stress as a medical problem as unnecessary. Unfortunately, like depression, it is just that. Not only can your doctor talk to you about alleviating the problem, stress left untreated can develop into more comprehensive psychological issues. There is no shame in taking time off work to address issues that if left can be made worse.

If you're suffering from lack of concentration and confidence or feelings that you can't cope, talk to some-one. If the employer fails to reasonably assist you, or has caused an unnecessary amount of stress to you, then you could be able to claim compensation.

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Employment Law Cases

Vicarious Liability

Weddall v Barchester Healthcare Ltd; Wallbank v Wallbank Fox Designs Ltd [2012] EWCA Civ 25

Facts Mr Weddall was deputy manager of a care home. In September 2006, when he was on duty, a nightshift employee called in sick. Mr Weddall telephoned Mr Marsh, a senior health assistant, and asked him if he would replace the missing employee. Marsh went to the care home and attacked Mr Weddall. He was sentenced to 15 months imprisonment.
Mr Wallbank was the managing director of Wallbank Fox Designs. Mr Brown, an employee of the company, was processing bed frames through an oven. His work was criticised by Mr Wallbank. He assaulted Mr Wallbank and was later convicted of inflicting grievous bodily harm.
Both Weddall and Wallbank claimed compensation from their employers on the basis of vicarious liability.

Appeal decision Weddall: Employer not vicariously liable: the violence was the employee's response to a routine and proper request that he volunteer for a night shift. It was an independent venture of his own, separate and distinct from his employment.
Wallbank: Employer vicariously liable: Brown's conduct could not be described as a prank or as horseplay. The circumstances in which an employer may be vicariously liable for his employee's intentional misconduct are not closed. The risk of an over-robust reaction to an instruction is a risk created by the employment. It may be reasonably incidental to the employment rather than unrelated to or independent of it.

Redundancy payment

Unreasonable refusal of alternative employment

Readman v Devon Primary Care Trust UKEAT/0116/11/ZT

Facts R was employed by the Respondent for 23 years in community nursing. She was placed on notice of redundancy and accepted a lower graded position. R worked the statutory trial period, but found the position unsuitable and resigned. R was then offered an alternative role as modern matron, at her original grade. She declined this position as she did not want to work in a hospital setting.
The issue was whether R was entitled to a statutory redundancy payment based on:
i) the offer of employment as a modern matron was suitable alternative employment
ii) R unreasonably refused that offer.

Decision
1) The tribunal held that the first question is to be assessed objectively; even though the position must be suitable for the specific employee. The second question is based on the soundness of the reasons for refusing the offer.
2) The EAT agreed that with the Tribunal that as the modern matron position was in a hospital where R already had a base, it was a largely similar position and thus was suitable alternative employment. However they disagreed with the conclusion that it was unreasonable for R to decline the offer.
3) The EAT held that the ET had failed to consider the core reason for refusal; namely that R's background and qualifications were in community nursing.
4) R's appeal therefore succeeded and she was awarded a redundancy payment.

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Employment Law Cases cont.

Discrimination

Record Amount of Compensation

Michalak v The Mid Yorkshire Hospitals NHS Trust and Others (2012) Eq Opp Rev 28:221

Facts M, a woman of Polish origin, was employed by MY as a consultant physician. Soon after starting employment, she took maternity leave. She was subjected to disciplinary proceedings which resulted in her dismissal. She complained of unfair dismissal, race and sex discrimination and victimisation.

M's maternity leave started a campaign by senior persons in the hospital to get rid of her. A number of secret meetings were held, with the aim of creating a strategy to dismiss M. References were made to M's Polish origins and cultural issues. M was not informed of the meetings.

During M's absence, colleagues were paid extra to cover her absence. M complained that by excluding her from these payments, she was being treated less favourably because she had been on maternity leave.

Senior managers and clinicians decided on a strategy to pursue investigations to try and identify misconduct by M. She was suspended from work in January 2006 following complaints by staff.
The tribunal found that M had been subjected to a campaign of harassment, was subjected to an improperly long suspension, and was dismissed for various acts of misconduct, none of which were substantiated.
There had been repeated references to M's ethnic origins and the cultural issues which might arise. Although about half of the respondent's consultant body were from ethnic minority backgrounds, the secret meetings and disciplinary panels comprised all British white people. There was direct race discrimination: the respondent failed to show that its actions were untainted by race discrimination.
Three of the fourteen individually named respondents were also found liable for sex and race discrimination.

Compensation award M was awarded £4,452, 206 in compensation.
M suffered from chronic post-traumatic stress disorder, depression and anxiety. It was unlikely that she would be able to return to work as a consultant. Her symptoms had persisted for more than two years and she had undergone an enduring personality change.

- Injury to feelings: £30,000: upper end of top Vento band.
- Personal injury: psychiatric illness: £56,000.
- Exemplary damages: £4000: Oppressive, arbitrary or unconstitutional action by the employer.
- Actual loss of earnings: from date of dismissal: £168, 234.
- Cost of care: past care: £43,207. Three years' future care: £31,122.
- Future loss of earnings: Calculated retirement age of 68: average net income over 14 years: £941, 802.
- Pension loss: £666,260.
- Medical treatment: £50,000.
- Loss of benefit of life insurance: £15,000.
- Uplift: The old statutory grievance procedure applied: 15% uplift: grave and contumelious failure to comply. (Total award grosed up for tax)
- Liability joint and several between all relevant respondents.

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Opinion

Last month at a conference for business owners, David Cameron launched an attack on the 'monster' that is health and safety law; warning that it was stifling business growth and contributing to the slow economic development. Continuing his onslaught, the prime minster suggested that local authorities needed a 'slap' to force them into more effective cooperation with business.

He also admitted that he was wrong about something. Was it the admission that the austere measures enforced upon us weren't working? Was it the admission that his approach to the Eurozone cross was an error in judgment? Or maybe it was the fact that referring to Ed Balls' "enthusiasm" in the House of Commons in the following terms was wrong; "the endless, ceaseless banter, it's like having someone with Tourette's permanently sitting opposite you."

No no, the penetrating mistake for which Cameron finally held his hands up was actually nothing as headline-grabbing – the national insurance holiday for new businesses outside of the South-east didn't actually create any new jobs. Quelle surprise. Everybody, well everybody that wasn't educated in Eton and has job security (probably) until 2015, knows that there are no new jobs. Anywhere. Most people are having a hard enough time trying to hold on to the one they've got.

Cameron has sought to rectify his mistake at not providing businesses with opportunity for growth by announcing that;

> "One of the coalition's New Year resolutions is this: kill off the health and safety culture for good. I want 2012 to go down in history not just as Olympics year or diamond jubilee year, but the year we banished a lot of this pointless time-wasting from the economy and British life once and for all... I think that will take a lot of fear out of the health and safety monster and make sure that businesses feel they can get on, they can plan, they can invest, they can grow without feeling they are going to be strangled by red tape and health and safety regulation." (London Evening Standard)

Unfortunately, this statement only reinforces view perpetuated by the media and workers; that health and safety is restrictive. Perhaps Mr Cameron made this comment to therefore engage with his electorate, the "Common People". However, quite simply, his approach to condemning health and safety law completely undermines the policy reasons for having it and worse, not only does Cameron subscribe to the myth that health and safety law strangles growth, he is perpetuating it. A few points must be made:

- There is no "health and safety culture". There is a fear of litigation for failing to comply with health and safety. The two are quite different.
- This culture is analogous to another myth – compensation culture. It is a phrase frequently used, but again, it does not exist. Researchers in to the compensation culture, in their 2006-2007 report to the House of Commons, recognised that the true problem is *excessive risk aversion* and not a repeated desire to sue.
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- It is not the principle of the law that is to blame – it is the interpretation of it. If interpretation is failing, one looks to the drafting of the offending item. One does not remove it completely.

Health and safety rules and regulations are perhaps the most important body of law in the UK. By requiring risks to be identified, it STOPS INJURY AND DEATH. That means that health and safety law SAVES LIVES. It does not just, like most other areas of law, punish those who caused injury or death after the event. Murder, for example, is "the unlawful killing of a human being in the Queen's peace, with malice aforethought." The law on murder doesn't stop the killing; it punishes not prevents. In health and safety law crimes and civil wrongs are committed on the possibility of causing injury. Why, therefore, does Mr Cameron refer to this important body of law as the enemy? Why is he, weirdly, using violent metaphors to define law that is the most protective of them all? Is it to be that Common person and engage with people? Or more sinisterly, does he actually believe that businesses and his "Big Society" would be better off without it?

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Chambers & Legal News

Chambers' Update

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...Speaking of which, our online blog has now been archived for ease of navigation and you can subscribe to these newsletters online as well!

Earlier on today, the 29th February 2012, we held our second seminar of the year on Employment Law Reforms. A copy of the key changes in employment law will soon be available on our website. Among the range of topics we discussed, the recurring theme this month has been "are employment rights, right?" As noted at the beginning of this month's edition, there seems to be a real push for downscaling in employment rights. Look out for further comments on the website as the changes are announced. We also await the proposed consultations, particularly one led by Mr Justice Underhill, into the issues.

Bristol News

Yesterday, the 28th February 2012, the regular community meeting regarding St Paul's Carnival was held at the Malcolm X Centre. Unfortunately, due to the financial constraints on the Carnival, organisers announced that this year, the Carnival would be contained within Portland Square. This means that there will be no outdoor sounds systems at night, instead moving to licensed premises and the whole event would be downscaled.

This is a real shame as anyone who has ever been to St Paul's Carnival knows, the joy is the community spirit where everyone is involved. While the financial pressures are understandable, we expect to see S.O.C.A (Save Our Carnival Association) lead the charge to make sure that the true spirit of Carnival remains the same.

Dates for your Diary

March 28th 2012	Seminar on Costs All welcome. Please confirm with Emma or Robert by calling or emailing Chambers.

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