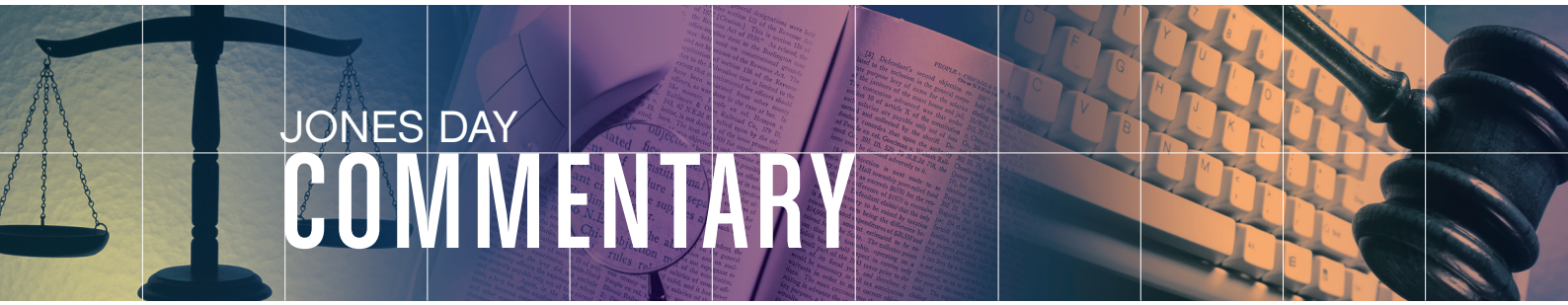
SEPTEMBER 2005



SUMMER 2005 EMPLOYMENT LAW ROUND-UP

Over the last months there have been a number of decisions of the Court of Appeal and the Employment Appeals Tribunal ("EAT") that will have significant practical impact on several important areas of employment law. Set out below are some of the key cases. Also included is a look at what cases are due to come before the House of Lords in the near future and what legislative changes can be expected over the next few months.

WHO EMPLOYS THE AGENCY WORKER– *Cable and Wireless plc v Muscat*

This is another in a long line of cases to look at the tripartite relationship between an agency worker, the agency and the client to whom the worker provides the services and to consider who, if anyone, is the employer.

In this case, the worker had, through a company established for the purpose and latterly via an employment agency as well, been supplying his services for over a year. The EAT followed the decision of the Court of Appeal last year in *Dacas v Brook Street Bureau (UK) Ltd* and affirmed that a contract of employment should be implied between the worker and the end user of the worker's services in these circumstances.

The case highlights the fact that if an individual is hired through an employment agency, it is not always possible to avoid an employment relationship with the end user. Agency arrangements should be reviewed on a regular basis and certainly before a year expires, which the Court of Appeal in the *Dacas* case cited as a crucial period in determining if the worker became an employee of the end user.

A DIRECTOR'S DUTY TO DISCLOSE HIS OWN WRONGDOING– *Item Software (UK) Ltd v Fassihi and ors*

The Court of Appeal has held that a director was in breach of his duty of loyalty and good faith to his company when he failed to disclose his own misconduct in seeking to divert a contract to another company (in which he himself was involved).

Although the Court of Appeal took the view in this case that it was not extending the duty of directors, the case represents the first time a court has held

that a director's duty to disclose his or her own wrongdoing is part of the fundamental duty to act in the best interests of the employer.

The Court did not expressly consider whether this duty could extend to non-director employees but it seems that, as the judge held at an earlier stage of the case, in certain circumstances (and particularly for senior employees), the duty could be extended in that way. In the judge's view, there will be cases where particular aspects of an employee's function will require him or her to disclose relevant facts, even if this includes disclosing his or her own misconduct. Normally an employer will be looking to take action over the original misconduct as opposed to any failure to disclose it. The issue arose in the *Item Software* case, however, because the company was seeking to recover loss that was held to have arisen not from the misconduct itself but from the fact that the company did not know of it.

PORNOGRAPHY AND HARASSMENT–*Moonsar v Fiveways Express Transport Ltd*

The EAT has held that a female employee was sexually harassed when male colleagues downloaded pornographic images onto their computer screens in her presence. They did not show the images to her, but it was enough that she knew what was going on and felt affronted. The fact that she did not complain about this behaviour was irrelevant.

The EAT held that the behaviour complained of, viewed objectively, had the potential to cause affront to female employees and therefore could be regarded as degrading or offensive to women. Consequently, this amounted to less favourable treatment of women, from which detriment flowed.

It is of particular note in this case that Ms Moonsar was successful despite her failure to complain about the indecent behaviour of her co-workers to her employer. However, the new statutory grievance legislation that came into force in October 2004 (which was not in force at the time of this case) can bar a sexual harassment claim if no grievance is raised in writing to the employer in advance of the claim being lodged at the Tribunal.

The case highlights the danger of unrestricted web access and the advisability of clear policies prohibiting the downloading of offensive material.

COLLECTIVE CONSULTATION ON REDUNDANCIES–*Junk v Kuhnel*

A recent ECJ ruling in a German case could have significant impact on collective consultation in redundancy situations in the UK. The case focused on whether notice to terminate employment by reason of redundancy could be given during the 30 or 90 day statutory consultation period or whether the employer had to wait until the end of the period before serving notice on any of the employees.

Up until now, this has been unclear in the UK, and to some extent it remains so even after this case. Before *Junk*, it was common for employers to give notice before the end of the 30 or 90 day period, so that the notice period (or at least part of it) ran concurrently with the consultation period. This reflected the wording of the UK statutory provision, which says that the consultation period must occur before the first dismissal "takes effect", which was taken to mean when the employment of the relevant individual actually terminated as opposed to when notice was given. What *Junk* has done is make it clear that only once consultation is complete can notice be served. In practice, this will mean waiting until the end of the 30 or 90 day period before serving notice.

COLLECTIVE CONSULTATION ON REDUNDANCIES–*Hardy v Tourism South East (TSE)*

TSE announced a plan to close one of its offices with an initial plan to make 12 out of the 26 employees redundant and to redeploy the rest to another office. TSE took the view that because there was a proposal to dismiss less than 20 employees, the requirement to consult collectively (which arises on a proposal to dismiss 20 or more employees by reason of redundancy in any 90 day period) was not triggered. Ms Hardy, however, brought a claim against TSE, arguing that it had failed to carry out the required collective consultation. The issue turned on the meaning of "dismissal"

and whether an announcement to redeploy amounted to a dismissal, thus bringing the numbers over 20 and triggering the requirement to collectively consult.

The EAT stated that an employer "proposes to dismiss" an employee if, on an objective consideration of what the employer says or writes, the employer is proposing to withdraw the existing contract of employment from the employee, or the departures that the employer is proposing to make from the existing contract are so substantial that they amount to the withdrawal of the whole contract. Thus, a redeployment may amount to a dismissal if what the employer proposes is, in reality, a different contract of employment. Whether this is the case depends upon the terms of the contract and the terms of the proposed redeployment in all the circumstances. On the facts, it was significant that Ms Hardy would have had to apply for a transfer and that there was no mobility clause in her contract entitling TSE to move her. Also of significance was that the new location was some 100 miles away.

Employers should note therefore that the collective consultation requirements may be triggered where restructuring of various kinds is proposed, even if the employer's hope (and expectation) is that fewer than 20 employees (and perhaps none at all) will end up leaving employment as a result. A proposal to dismiss employees as redundant includes plans to transfer some of the staff (particularly if the new location is far away) or if the employees are being required to reapply for their own jobs.

LIMITATION ON COMPROMISE AGREEMENTS– *Hinton v University of East London*

Prior to his voluntary redundancy in 2003, Dr Hinton was employed by the University of East London. Between 1998 and 2001, Mr Hinton raised grievances against his employer that the Tribunal said amounted to qualifying disclosures for the purposes of the whistleblowing legislation.

However, despite the university being aware that Mr Hinton considered himself to have suffered a detriment for making these disclosures (and therefore felt he had a whistleblowing claim), when it came to his compromise agreement, a long list of potential claims was included but the list failed to include whistleblowing. Mr Hinton happily signed up to the compromise agreement and then lodged a claim in the Employment Tribunal based on whistleblowing.

The case reached the Court of Appeal, which held that he was free to pursue his claim. The Court stated that because the statute relating to compromise agreements states that the compromise agreement must "relate to the particular proceedings", it is not sufficient to simply include a general release and a list of all potential claims. Careful thought must be given to the potential claims, and these must be listed.

This means that in the future, when drafting such agreements, it will be necessary to refer to the claims that have been raised or, if no claims have been raised, then a statement of the claims that the employee is giving up should be included. Using off-the-peg agreements that are not tailored and/or do not refer to the particular circumstances and claims may not provide an enforceable waiver of claims.

DECISIONS EXPECTED IN THE NEAR FUTURE

The House of Lords is due to hear and/or give judgement in a number of cases related to employment law issues. Among them is the appeal in *Lawson v Serco,* on which we reported last year. That case concerns the ability of employees who are not necessarily in the UK to claim unfair dismissal in the Employment Tribunal. It is hoped that the House of Lords will establish some clear guidelines for tribunals to apply. Another case of interest is the appeal in the *Rutherford* litigation as to whether the age limit for claiming unfair dismissal and redundancy payments is indirectly discriminatory on the grounds of sex. That decision, although of general interest as to the approach that courts and tribunals should take to assessing indirect discrimination claims, will be of only short-term direct relevance because age discrimination legislation is expected next year that is likely to address these issues. Another decision to look out for is the House of Lord's judgement in the *Matthews* litigation concerning part-time firefighters and whether they can compare themselves to full-time firefighters for the purposes of the legislation preventing discrimination against part-time workers.

FUTURE LEGISLATION

As mentioned above, a key piece of legislation expected next year is the government's Age Discrimination bill seeking to outlaw (or at least limit) discrimination in the workplace on the basis of age. Draft regulations have been issued and are the subject of current consultation. We will be producing a commentary on the subject in due course, looking to highlight some of the things employers should be thinking about now in order to prepare for the significant impact this legislation is likely to have.

New TUPE regulations were due to come into force in October of this year, but those have now been delayed until April 2006, following further consultation earlier this year.

LAWYER CONTACTS

For more details on any of the issues raised in this *Commentary*, please contact one of the Employment team in London. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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