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Discriminatory References

The Employment Appeals Tribunal ("EAT") has handed down its decision in *Bullimore v Pothecary Witham Weld Solicitors*, which is authority for the proposition that an employer who provides a discriminatory reference can be liable for the loss of earnings of the employee even if the recipient also victimises the employee on the back of it.

The employee in this case was a solicitor who was victimised as a result of the reference provided by the previous firm. The prospective employer declined the offer on the basis of the poor reference. The Tribunal held that the claim for loss of future earnings against the former employer was too remote. The EAT disagreed with this, finding that this was not an uncommon form of victimisation. If the recipient had not received the discriminatory reference and acted upon the same, the claimant would have no remedy for loss of earnings.

The EAT suggested apportionment of damages between the provider and recipient of the reference to reflect their joint culpability.

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Internet Use at Work

Recent research by MyJobGroup.co.uk**,** the operator of the UK's largest network of regional jobsites, found that more than half of British workers access social media websites while at work. Based on a survey of 1000 employees, the study found that of those acknowledging use of sites such as Facebook, Twitter and Myspace, one-third report spending more than 30 minutes a day and nearly 6 per cent more than an hour.

The report suggests that the cost to the UK economy could be as much as £14billion in lost productivity, with SMEs likely to be most adversely affected.

Employers would do well to monitor the use of social networking sites during work hours and ensure that their employees are not abusing their freedom of access to these sites. If you would like to discuss setting up a policy to be included within any handbook or contract, please contact one of our employment law specialists.

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Guides to the Equality Act

The Government Equalities Office (GEO) has recently published guides which were produced to assist The British Chambers of Commerce, CAB, ACAS and the Equality and Diversity Forum. There are different guides for different workers, employers, etc.

The Equality Act brings together nine pieces of equality legislation in an effort to assist those whose discrimination claims are brought on different grounds.

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New Guide on Stress at Work

The CIPD, in conjunction with ACAS and the Health & Safety Executive, have produced a guide for employers on 'Work Related Stress: What the Law Says'. You can find the guide using the following link:

http://www.cipd.co.uk/NR/rdonlyres/1B504994-F40F-4801-B93D-8FA4DE73E1FD/0/5233Stress_and_Law_guide.pdf

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National Minimum Wage from 01.10.10

£5.80 to £5.93 an hour for workers aged 21 and over
£4.83 to £4.92 an hour for workers aged 18 to 20
£3.57 to £3.64 an hour for workers aged 16 to 17

The Government has extended the adult National Minimum Wage rate to 21-year-olds from October 2010. Previously the qualifying age for the adult National Minimum Wage was 22.

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Slee Blackwell Solicitors
www.employerslegalprotection.co.uk e: employment@sleeblackwell.co.uk
31 Queen Street, Exeter T: 01392 423000
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Administrative changes constituted 'measures' for purposes of TUPE consultation

In the case of *Todd v Strain and ors*, the new employer had made changes to the employee's pay arrangements following a TUPE transfer. The EAT held that the changes were 'measures' in connection with the transfer and, as a result, the transferor's failure to inform and consult the workforce about them was in breach of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regulations"). Although the arrangements were administrative, they were not an unavoidable consequence of the transfer. Furthermore, the TUPE Regulations did not prescribe that a measure's effect must be disadvantageous to employees in order to trigger the requirement to consult the work force.

In this case the transferor ("T") was the owner of a care home, which was transferred to the transferee ("TE") in January 2008. In November 2007, T called a meeting, without providing any prior notice to employees, to inform staff that an offer had been made for the home; T assured his employees that their jobs were safe. Only a third of employees attended this meeting, at which no detailed information about the transfer was given. Apart from some minor communications with one employee T failed to consult with staff prior to the transfer. 32 care home employees subsequently complained to a Tribunal that T and TE failed to inform and consult under the TUPE Regulations.

The Tribunal held that T had failed to inform and consult appropriate staff representatives about the measures envisaged in connection with the transfer. Furthermore, they held that T had failed to arrange for the election of appropriate employee representatives and were subsequently in breach of the Regulations. The Tribunal identified several measures that T had envisaged taking which included changes to the way T would make payments to staff for work done in the days up to the date of transfer, including a change to their normal payment date, but which were not communicated to staff or any staff representative.

The EAT held that T had failed to inform and consult, holding that the payment arrangements at issue constituted 'measures' under the Regulations. The EAT held that an employer has a duty to consult with employees to explain transitional arrangements in order to reassure them, if necessary, that they will not be prejudiced in any way. Although the sums involved in this case were minimal, the EAT reminded T that the Claimants were low paid so any such changes would have a severe adverse effect on employees. The EAT held that as the changes caused the employees to worry, the measures were not so trivial as to not be caught by TUPE Regulations. Furthermore, the Regulations do not prescribe that a measure's effect must be disadvantageous to the affected employees in order to trigger the requirement to consult.

The theme of this case is that there is a fine line between administrative changes that are the inevitable consequences of a transfer – and which do not trigger the duty to inform and consult employees – and administrative changes that represent a departure from what would normally have occurred - which the employer must inform and consult about. Employers concerned about which side they will fall on would be advised to err on the side of caution and consult employees about any changes that need to take place. If you have any questions please call our dedicated helpline service and speak to one of our employment specialists.

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TUPE - Temporary Cessation of Undertaking

In *Wood v London Colney Parish Council,* the Employment Appeals Tribunal ("EAT") has handed down it's decision which is authority for the proposition that a temporary suspension of the activity of an economic entity will not prevent a transfer of an undertaking.

In this case The First Respondent, a social club, had employed the Claimant as a bar steward. The First Respondent later handed back its lease to the Second Respondent and the club then surrendered its premises licence. Later, the Second Respondent took over the 'economic entity', the bar, and applied for its own premises licence, terminating the Claimant's employment and continued trading with its own staff.

The EAT held that the economic entity was only temporarily suspended by the loss of the premises' licence and as trading did not cease, there was still a relevant transfer.

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Accrued but untaken annual leave cannot be reduced if a worker changes from Full-time to part-time

In a recent case before the European Court of Justice, it has been held that if an employee changes from full to part time working, their accrued holiday leave cannot be reduced, or paid at a reduced rate, because the worker then reduced his or her working hours from full to part-time.

This applies only if the worker has not been able to exercise his or her right to the accrued leave before going part-time, for example where maternity leave intervenes between accrual of the leave and going part-time.

Please contact our employment team for further assistance.

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Unfair Dismissal

The EAT has recently considered the following question; is 'loss of £3,000' the same as 'theft of £3,000'? In the case of *Celebi v Compass* the EAT say "No".

In this particular case the employer alleged that she had 'lost' £3,000. Although the employer believed that the employee had in fact stolen the £3,000. Despite this euphemism, the employee knew she was actually being accused of theft. A disciplinary hearing found her guilty of the 'loss' and she was dismissed.

The EAT held that the lack of accuracy in the allegation meant the dismissal was unfair under 'ordinary' unfair dismissal principles. It was also unfair under the (now repealed) statutory dismissal procedures, as the Step 1 Letter did not accurately set out the charge.

It is important that investigatory and disciplinary procedures are carried our properly in order to avoid any incidents such as this. If you have any queries or require assistance in drafting new procedures please contact one of our employment law specialists.

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Pre-employment health questions

With effect from 1st October 2010, the new Equality Act 2010 will enable an individual who thinks that he or she was not offered a job because of an answer given to a health related question, will be able to bring a claim against the potential employer for direct disability discrimination.

Potential employers will be prevented from asking candidates questions about their health, unless they are intrinsic to the job role. This may have far-reaching implications as it will allow those with mental health issues, a medical condition, or disability, not to disclose their condition prior to the offer of employment, unless it will without doubt hinder their ability to do the job.

If you refuse employment based on such questions, you will have the burden of proving that the refusal was not disability discrimination. ACAS has advised that "*from October employers should no longer send out pre-health questionnaires with employment application packs*".

If you find yourself in such a situation please call one of the team at Slee Blackwell to ensure that your current policies and practices are compliant.

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Inflating redundancy scoring for female on maternity leave was discriminatory

On occasions when dealing with maternity leave issues, some employers can overcompensate in order to avoid facing proceedings being brought against them for sex discrimination.

The case of *De Belin v Eversheds Legal Services Ltd* highlights the danger in this course of action. The Respondent, Eversheds, were found to have discriminated against a male lawyer on grounds of sex, when, in a redundancy scoring exercise, it inflated the score of his female colleague to take account of the fact that she was on maternity leave.

The case was based upon the Respondent having enhanced the score of a female colleague in the selection pool. This enhancement led to the claimant's overall score being 27 and the female colleague's was 27.5. Accordingly, it was the Claimant who was made redundant.

The Tribunal decided Eversheds had subjected the Claimant to less favourable treatment on the grounds of sex, and that the claimant had been discriminated against and unfairly dismissed. The Tribunal found that the Respondent could have scored the exercise differently; for example, it could have chosen a different period when the female employee was working and not absent on maternity leave.

The Tribunal also found that the employer could not rely on the "special treatment" qualification in the sex discrimination legislation, which provides that "*no account shall be taken of special treatment afforded to women in connection with pregnancy or birth*". This qualification could not be interpreted to provide women with blanket special treatment.

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Equal Pay Guidance For Small Firms

A joint publication by The Equality and Human Rights Commission and the British Chamber of Commerce on equal pay will be of benefit to owners of small and medium businesses who may be in doubt as to their equal pay obligations and will assist them in ensuring that their pay systems are non discriminatory. The Guidance can be accessed at http://www.equalityhumanrights.com.

Slee Blackwell Solicitors
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Computers – Health and Safety

As we are all aware, there has been as substantial increase in the use of computers within the work place, with the majority of employees working directly with computers every day. The Health and Safety at Work Act lays down legal standards for computer equipment and requires employers to take steps to minimise risks for all workers. In some situations employers have found themselves paying out substantial sums for injuries that have been caused through the use of computers where the employer could have reasonably foreseen that there was a risk to the health of an employee, but they failed to take any preventative measures.

Neck, shoulder, back and arm pain, fatigue and eyestrain are all associated with excessive use of computer equipment or the employee's workstation. . The working environment can be recognised as the cause of ailments such as carpal tunnel syndrome, tenosynovitis, and also conditions where there is pain but no condition can be identified, or repetitive strain injuries (RSI). Employers need to consider the way that an employee's work is organised and managed in order to avoid exacerbating the employee's condition. The main causes of 'upper limb disorders' as they are known are:

- Repetitive work
- Uncomfortable working postures/ unsuitable chairs/back supports
- Sustained or excessive force
- Carrying out tasks for prolonged periods of time
- Poor working environment and organisation (e.g. temperature, lighting and work pressure, job demands, work breaks or lack of them)

Employers should consider these risks and carry out a desk assessment for each employee individually so that they can assess the employee's needs. Any changes to the workstation should be made as quickly as possible such as providing wrist supports, back rests, stools, ergonomic keyboards, screen filters and so on. The aim is to make work more comfortable and productive for employees by taking a few simple precautions.

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Conduct of Employment Agencies & Employment Business (Amendment) Regulations 2010

The Regulations amend rules regarding upfront fees for the entertainment industry. The Regulations now prohibit employment agencies from taking upfront fees from photographic and fashion models. In addition, they extend the cooling off-period for upfront fees for certain occupations.

They have removed a number of administrative steps that employment agencies are required to take, including: carrying out identity checks for job-seekers (other than those who will be working with vulnerable people); obtaining agreement to terms when they introduce job-seekers for permanent employment (except when they charge a fee for a work-finding service); and agreeing terms with the permanent employer.

Advertisements for jobs no longer need to include a statement as to whether or not the organisation is acting as an employment agency or employment business, but they must state whether a position is temporary or permanent.

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Good News for Employers… surely not? Well, it may be but watch this space

The government is actively considering increasing the qualifying period for unfair dismissal from one year to two years. The timing has not yet been announced, and there will be a consultation period first. If it happens, it is a rare piece of good news for business, but bad news for employees. In theory, employers would have an extra year to dismiss unreasonably - but they could still face allegations of discrimination (or unfair dismissal claims where no qualifying period is required, ie whistle blowing and certain health & safety, maternity and trade union related dismissals). So, it is not entirely good news.

The length of service qualifying for unfair dismissal rights has changed several times. In 1971 it was six months. It increased in 1980 to one year (two years for small firms of 20 or fewer employees) and then to two years (for employees of any employer, regardless of size) in 1985. In June 1999 it came back down to one year, following a House of Lords decision that the two year period was potentially discriminatory to women, as they were statistically less likely to accrue two years' service. It seems that the current government is confident of being able to justify "social policy" behind the change to the new period – i.e. expanding opportunities in the labour market and such like.

Watch this space for updates on this subject…

Slee Blackwell Solicitors

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UK protests at EU maternity leave proposals

The Pregnant Workers Directive 92/85/EC requires EU Member States to ensure that employed pregnant women and new mothers are guaranteed income during a 14 week maternity leave period. The Directive states that expectant and new mothers must receive an income which, at the very least, is equivalent to that to which they would be entitled if off work sick. There are EU plans to increase the 14 week period to 20 weeks.

According to UK Government sources quoted on euobserver.com, the change, if implemented, will cost the UK £2.4 billion. The site says the plans have been attacked by the UK Government a week before the European Parliament is due to be vote on the matter.

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Dismissal by Letter is Effective when employee reads it

In *Gisada Syf v Barratt*, the Supreme Court (formerly the Judicial Committee of the House of Lords) dismissed the appeal from the Court of Appeal's decision.

Mrs Syf was on holiday when a letter from her employer arrived via recorded delivery on 30th November 2006. Her son signed for the letter and did not open the letter. Although Mrs Syf was expecting a letter from Barrett she had not given her son permission to open her post. Mrs Syf did not learn about the dismissal until her return home on 4th December.

She later issued a claim at the Employment Tribunal on 2nd March 2010, just being within time of what she believed the limitation date having expired. Barrett argued that the 'effective date of termination' was 30th November, this being the date the letter was signed for, and as such, her claim was out of time. If the effective date was 4th December, her unfair dismissal claim was presented within the required timescale.

The Supreme Court held that the effective date of termination was 4th December, i.e. the time she was first aware of the letter The Court held that she should not be criticised for wanting the letter to remain at home unopened, instead of asking her son to read to her as the contents were private. As she did not learn of the decision until 4th December, nor had she deliberately failed to open the letter, or gone away to avoid reading it, the effective date of termination would be the date she actually learned of the decision to dismiss. This being the case, Mrs Syf's claim was presented in time and remitted back to the Employment Tribunal to be heard.

The Court held that, on policy grounds, it was desirable to interpret the time limit legislation in a way that is favourable to the employee, and that strict contractual laws concerning termination of contracts should not displace the statutory framework.

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Compulsory Retirement and Age Discrimination

The European Court of Justice ("ECJ") has handed down a ground breaking Judgment on compulsory retirement.

In *Rosenbladt v Oellerking Gebaudereinigungsges mBh, t*he ECJ held that a compulsory retirement age of 65, whilst on the face of it was a discriminatory practice on the grounds of an employee's age - is justified if the employer meets following conditions:

1. the contract (ie the clause regarding an employee's retirement age) has been collectively negotiated with a union;

2. that the employee will receive a pension (on the facts, a state pension, but presumably an occupational pension will do when the state pension age rises) so that the employee will have an replacement income; and,

3. compulsory retirement has been in widespread use in the relevant country for a long time without having had any effect on the levels of employment. As England has had a default retirement age for a number of decades this condition will be met.

This will have massive ramification for employers who seek to justify a compulsory retirement age after the default retirement age is abolished in October 2011. UK tribunals have so far been reluctant to follow the liberal approach of the ECJ when it comes to justifying age discrimination.

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