

Employment Rights Update

December / January 2011/2012



In this month's Bulletin we have cases on Redundancy, Holidays and Equal Pay

We hope that you find the information useful and of interest.

Redundancy Procedures – Entitlement to see interview notes

In *Camelot Group Plc v Hogg* the EAT had to consider a Tribunal's finding that a redundancy dismissal was unfair. The Tribunal relied on the fact that the employer had failed to supply the interview notes the Claimant had requested, until after the decision to dismiss was taken.

The Employment Tribunal relied on the case of *John Brown Engineering Limited v Brown* – authority for the proposition that an employee should be given a reasonable opportunity to challenge the assessment of the employer under a redundancy matrix.

The EAT overturned the Tribunal's decision.

EAT said that *Brown* was **not** authority for the proposition that every request for interview notes (or other documents) must be complied with prior to the decision being taken to dismiss. Certainly it was good practice for the employer to do so, but a failure

was not fatal to the employer's defence.

The key here was this: the employee had failed when requesting the notes to make any specific allegation or to challenge in any particular respect the assessment that had been made by the employer. She made a general challenge.

Significantly perhaps, she also failed, having received the notes, to make any point about them or to raise any complaint of any sort with the employer about them. On that basis the EAT thought that a *Polkey* reduction of 100% would have been fair in any event.

The moral of the story for employees and their representatives is clear: if you intend to mount a challenge to the employer's assessment, you should do so in detail and giving specific examples of why you think the employer's assessment is inaccurate. A properly detailed challenge will make it very difficult indeed for an employer to resist disclosing the interview notes/other records.

A vague non-specific "I'm not happy about it" challenge will likely see the employer proceed to dismiss with impunity.

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The latest on holidays and the meaning of “annual leave”

In *Russell v Transocean International Resources Limited* the Supreme Court has handed down its decision in relation to the claims by off-shore oil workers that they were not receiving their annual leave entitlement.

The workers argued that since they worked 2 weeks off-shore then took 2 weeks at home, the employer was obliged to let them take annual leave during the time they were actually working i.e. during the off-shore periods. Perhaps unsurprisingly, the Supreme Court unanimously dismissed the workers' appeal. The Court said that there was no special quality about the on-shore periods that meant that they were not suitable times during which annual leave might be taken.

The case is fairly specific to certain working groups, but of more general interest are the comments made by Lord Hope to the effect that annual leave entitlement periods should be measured in periods of a week.

The off-shore workers argued that in effect their on-shore periods were the equivalent of a 5 day week worker's weekends. Would an employer be

able to insist that a 5 day worker should take some or all of his annual leave on Saturdays?

Lord Hope's remarks suggest that a worker is able to opt to take annual leave in periods expressed in days – but an employer can only insist on periods of a week at a time being taken. Intriguingly his Lordship went on to say that he was not expressing a final opinion about the matter.

The Supreme Court refused to refer the construction of the words “annual leave” to the European Court, and it remains to be seen whether the off-shore workers will seek to pursue their challenge by other means.

In the meantime there is at least ammunition in this Judgment to enable a worker to say that a 5 day week worker cannot be required to take their holidays at weekends.

Equal Pay – incremental pay structures

In *NOMS v Bowling* the EAT has held that incremental pay scales can justify pay differentials between men and women.

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Here the Claimant was a woman who identified a male comparator whose performance was identical to her own but whose pay was higher.

EAT accepted the employer's argument that the comparator had originally begun employment at a higher incremental point, because of his then greater experience – that had nothing to do with sex, and accounted in each subsequent year for the differential (one assumes, until both reached the top of the scale).

There are a number of cases now reported where the higher Courts seem to show an increasing willingness to accept the arguments made by employers in relation to the historical reasons for pay imbalance – provided, of course, that those historical reasons are not themselves tainted by sex discrimination.

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or suggestions for improvement to david.sorensen@morrishsolicitors.com

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