

# Employment Rights Update

March 2010



**Some** really interesting cases recently.

This month we summarise cases dealing with:

- Discrimination on the grounds of religion and belief
- Changes to contract
- Constructive Dismissal

## ***Ewedia -v- British Airways Plc***

Claimant was a practising Christian who worked on BA's check in desk.

BA's policy was that staff could wear any jewellery they wanted; provided it was not visible. Items deemed mandatory for religious purposes were permissible however even if visible. The Claimant was sent home one day for wearing a silver cross and refusing to conceal it.

The case is interesting because it deals with the definition of indirect discrimination. The Employment Appeal Tribunal rejected the indirect discrimination claim on the basis that the policy only affected the Claimant and not Christians generally.

The Court of Appeal agreed. They held that in relation to indirect discrimination it must be possible to make general statements about the religious group in question, such that an employer ought to reasonably appreciate that a "provision, criterion or practice" may have a disparate impact on that group. The use of

the phrase "would put" could not be read as requiring a tribunal to create a hypothetical peer group. The Tribunal had found that the disadvantage was suffered by Claimant alone and so the claim must fail.

This case makes logical sense but is seen by some as weakening the power of individuals to assert their rights under their religion or belief.

## ***Bateman & Others -v- Asda Stores***

In this case, the Tribunal held that the staff handbook permitted Asda to make changes to their employees' contracts including changes to pay. Therefore, it was not necessary for Asda to obtain the consent of those employees before making the changes.

The Employment Appeal Tribunal similarly concluded that the relevant wording of the handbook was clear as showing that Asda was entitled to review and to change the contracts of its employees without obtaining prior consent.

This is a decision which has a potentially devastating impact on an individual's rights under their contract of employment. For a more detailed summary and discussion of this case please see our employment law blog at <http://morrishsolicitors.blogspot.com>

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## ***Buckland -v- Bournemouth University H E Corporation [2010] Civ 121***

This case raised two interesting and important issues in respect of constructive dismissal claims:-

- Whether the conduct of an employer who has committed a fundamental breach of contract is judged by the “reasonable responses” test.
- Whether an employer who commits a fundamental breach of contract can cure the breach while the employee is considering whether to treat it as a dismissal.

The Claimant was a professor and one of his tasks was to mark student exam papers. They would be routinely marked by a second person to ensure consistency. However on this occasion they were remarked a total of three times. Professor Buckland was unhappy with the approach and saw it as a slur on his reputation. The University launched an inquiry at which Professor Buckland refused to appear as he felt the Chair was not sufficiently independent. The inquiry started in September 2006 and the report was published in February 2007. The report vindicated Professor Buckland but he still resigned. The case finally ended up in the Court of Appeal.

The appeal court endorsed the approach of the EAT in relation to the first issue.

1. In determining if an employer is in fundamental breach of the implied term of mutual trust and confidence the unvarnished test set out in **Mahmud v Bank of Credit and Commerce International SA 1997 IRLR 462** applies (the question for the tribunal is whether there was conduct calculated or likely to destroy mutual trust and confidence).
2. If, applying the principles in **Western Excavating (ECC) Ltd v Sharp 1977 IRLR 25**, acceptance of that breach entitled the employee to leave then he has been constructively dismissed.
3. The employer can argue that dismissal was for a fair reason.
4. If he does, the ET must decide whether dismissal was for that reason fell within the band of reasonable responses and was fair – **Sainsbury’s v Hitt [2003]**.

The Court of Appeal rejected the University’s argument that the reasonable responses test also arose at point one. The reasoning was thus – not paying staff wages due to a customer defaulting on payment would be a reasonable response based on such reasoning. To hold that a failure to pay wages it is not a fundamental breach in such circumstances completely altered the accepted position of the law of contract. **Abbey National Ltd v Fairbrother 2007 IRLR 320** therefore is not “good law”.

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The second issue was whether a repudiatory breach could be cured before acceptance.

The Report could arguably have cured the breach as it vindicated the Claimant. Sedley LJ reluctantly declined to introduce into contract law or the discreet arena of employment contracts the idea that a completed repudiatory breach could be cured. Jacob LJ was firmly of the view that any “cure” should only be in the hands of the wronged party.

This is a case which is helpful to employees in an area of law which is notoriously difficult to establish successfully.

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or suggestions for improvement to [jayne.phillips@morrishsolicitors.com](mailto:jayne.phillips@morrishsolicitors.com)

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