

# Employment Rights Update

October 2010



**This** month we have cases on:-

- Collective Consultation
- Wrongful Dismissal
- Unfair Selection for Redundancy

I hope some or all will prove of interest and maybe even assistance.

## ***United States of America v Nolan***

The Court of Appeal has referred this case to the European Court of Justice (the ECJ) in order to clarify when consultation obligations in collective redundancies arise. The case relates to a decision by the US to close an army base in Hampshire. The Court of Appeal found that an earlier decision on this issue by the ECJ was unclear. The question is when the obligation to consult arises; the law says it arises when an employer "is proposing" to make redundancies, but does that mean the employer is merely thinking about the issue, and has not yet made a decision that will lead to redundancies - or is there a proposal only when such a decision has actually been made to make the redundancies?

The decision could have important consequences and we will report on the result once it has been delivered by the ECJ.

## ***Weston Recovery Services v Fischer***

The Claimant was dismissed for gross misconduct. The Tribunal found that the dismissal was within the range of reasonable responses but that the conduct did not amount to gross misconduct justifying summary dismissal. The Claimant was therefore awarded his basic award and four weeks' notice pay. The EAT held that in fact the finding of the Tribunal meant that the Claimant had been wrongfully dismissed and so whilst not entitled to the basic award, he was entitled to his four weeks notice pay. This case shows that failure to give notice will not, in itself, render a dismissal unfair. It may be wrongful, but the remedy for wrongful dismissal is notice pay (and related payments) only.

This case also serves as a reminder to legal representatives that when pursuing unfair dismissal cases, especially those involving summary dismissal, it is also beneficial to claim wrongful dismissal.

## ***Pinewood Repro Limited t/a County Print v Page***

Mr Page was taken through a redundancy process. During which he received no explanation as to how the selection scores had been arrived at. He was simply informed that they were "reasonable and appropriate". The Tribunal found that an employer should provide an explanation as to why an individual was allocated scores otherwise the employee could not properly appeal those scores. Failure to provide such information made the dismissal unfair. The Tribunal also found that no cogent evidence had been presented by the

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employer to prove that the Claimant would still have been selected had a proper process been followed (a “Polkey” argument) and so no reduction was made to compensation. Both parts of the decision were upheld by the Employment Appeal Tribunal.

This is a significant case for employees. It is certainly by no means unusual for an individual to be presented with a completed matrix with no further information or explanation being proffered. This case is clear authority that such a lack of explanation can make the dismissal unfair.

Secondly, it is not unusual for an employer to argue that there was, for example, a 25% chance that the employee would have been redundant anyway as, in the example, there was one job to go out of four. The EAT held in the Pinewood case that a similar argument (but one of three) was “completely fallacious”. So, to be successful in such an argument the employer must provide persuasive evidence that there is merit to it.

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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