



King Street Chambers
The Chambers of Mrs Nancy Hillier

Civil Team Newsletter – February 2009

Hello.

Welcome to the third of King Street Chambers' civil team newsletters. In this edition, Richard Adkinson

- writes some more case reviews,
- looks at the upcoming repeal of the statutory disciplinary and grievance procedures, and the replacement, slated to take place on 6 April 2009,
- looks at upcoming changes in the CPR.
- and writes a bit more about employment.

Happy reading!

Legislation

Housing and Regeneration Act 2008

Note the bit about Family Intervention Tenancies (s.298-299) came into force on 1.1.2009.

Case reports

Employment – sick leave – right to paid annual leave accrued during sick leave - *Directive 2003/88/EC* (Working Time Directive)

Hoff v Deutsche Rentenversicherung Bund; Stringer and Others v Her Majesty's Revenue and Customs

ECJ C-350/06 and C-520/06 on 20.1.2009 *Coram* the Grand Chamber

This was a series of cases. One came from Germany. The other concerned former employees at HMRC here in Blighty. Our chaps had been off work ill and then their employment ended. During the time on sick leave they had accrued holiday time. Could they claim the holiday time (or pay in lieu) when their employment ended?

Held: (1) The Working Time Directive does not prohibit any rule that a worker on sick leave is not entitled to take paid annual leave during that sick leave.

(2) However it does prohibit a rule that the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law. This is so even where the worker has been on sick leave for the whole or part of the leave year and where his incapacity to work has persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave.

(3) Furthermore the Working Time Directive prohibits national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave. For the calculation of the allowance in lieu, the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive.

Employment – strike out of claim – relevant factors – CPR 3.9 - appeals

NEARY v GOVERNING BODY OF ST ALBAN'S GIRLS SCHOOL and another

UKEAT/0281/08/LA Coram HHJ Peter Clark

N had had his case struck out by the Employment Tribunal and the tribunal had refused him a review. The tribunal had not applied any of the factors in *CPR 3.9* (provisions for the relief from sanctions imposed under the CPR).

Held: Whilst it is necessary for the Judge to consciously consider all nine factors in *CPR 3.9(1)* when reviewing the imposition of a sanction, if in his reasons he omits to mention one or more of the nine factors he will only fall into error if the omission is relevant to the facts of the particular case. If it has no application he will not be corrected on appeal simply because he has failed to mention all those factors. That accords with the well-established principles for interference on appeal with a case management decision.

Insolvency – Bankrupt's Home – Possession – Home occupied by wife and children – child severely disabled – whether to grant possession – whether immediate or long stop – *Family Law Act 1996 – Insolvency Act 1986 s.336, s.337*

Re Haghghat(a bankrupt): Brittain v Haghghat and another

Ch.D. 189 of 2002 (12 January 2009), Coram George Bompas QC as a Deputy High Court Judge

This case is interesting for seeing how the court balances the needs of the creditors with the needs of severely disabled son.

H was a bankrupt. B was the trustee. H was the owner of the matrimonial home, now vested in B. If the home was sold it would still leave a substantial debt. The home was occupied by H's wife and 3 children including a severely disabled son (congenital quadriplegic cerebral palsy with learning disability and epilepsy, was doubly incontinent, and had to be fed overnight through a percutaneous gastrostomy tube). Expert evidence stated that W provided daily care for M and that she was vulnerable as suffering from a range of chronic illnesses as a result of caring for him, and that the present care arrangements for M's care at the property were dependent on W having H there to assist her with moving H and his wife were estranged and she intended to move out. B relied on the *Family Law Act 1996 s.33* as modified by the *Insolvency Act 1996 s.336 and s.337*. B sought an immediate possession

order as there would be an obligation on the local housing authority to rehouse them and so they would not be homeless.

Held If B's application were simply to be dismissed, they would be deprived of any expectation of receiving anything from H or his estate in the foreseeable future. Further, unless B disclaimed the property, she would in the meanwhile remain responsible for its ground rent and service charges. However, the son's needs made this an exceptional case. It was appropriate to allow the local authority to make provision for wife and son be rehoused Also an orderly change to be effected in the son's care arrangements. Accordingly, an order was made for possession of the property to be given to B, to be deferred for the sooner of 3 years or 3 months after the son ceased permanently to reside at the property.

Costs – funding-conditional fee agreements – retrospective effect –validity - *Conditional Fee Agreements (Revocation) Regulations 2005 - Conditional Fee Agreements Regulations 2000 reg.4*

Birmingham City Council v Forde

[2009] EWHC 12 (QB) *Coram* Christopher Clarke J

CFAs are back in the Courts with this challenge by the BCC to avoid having to cough up some dough to pay F's brief.

F had signed a CFA with her solicitors. The case settled. BCC had challenged a load of CFAs similar to the one between F and her solicitors, so they asked her to execute a new one. The letter to her said the legal costs up to that date would be dealt with under the new CFA unless the court ruled it invalid, in which case they would revert to the old CFA, and that the second CFA contained a success fee, whereas the first did not. The consideration expressed in and for the second CFA was that the solicitors would continue to act for F.

Held: Well BCC tried every argument they could think off. But they failed ultimately. The court decided

(1) The letter had been part of the retainer. Not only did it invite acceptance of the new CFA, it also contained two provisions that the parties must have intended to be part of their agreement.

(2) As the new CFA had been entered into under the regime applicable after the *2005 Regulations* it had not been necessary for F to sign the letter for it to have contractual

effect, nor did a CFA have to be contained in one document, *Jones v Wrexham BC* [2007] EWCA Civ 1356, [2008] 1 WLR 1590 applied.

(3) The consideration consisted of continuing to act in circumstances where, if BCC were right, the old CFA was invalid and the solicitors did not have to continue to act: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 CA and *Arrale v Costain Civil Engineering* [1976] 1 Lloyd's Rep 98 CA considered.

(4) The provision of an enforceable obligation to provide services in place of one which the BCC asserted to be unenforceable was consideration for a fresh promise to pay. Further, the second CFA provided a benefit to F that the first had not because it extended the scope of work covered by the retainer.

(5) There is no undue influence: *Royal Bank of Scotland Plc v Etridge (No2)* [2001] UKHL 44, The reason he signed the new CFA was accounted because F wanted representation to continue.

(6) The success fee was an additional liability. However it was subject to assessment as to reasonableness by the costs judge, and if and to the extent that F was liable to pay it, it would be recoverable from BCC

(7) There was no prohibition on CFA's being retrospective. Therefore there is no reason why any retrospective success fee was contrary to public policy: *Adam Musa King v Telegraph Group Ltd* Unreported disapproved.

(8) A court could always disallow or reduce retrospective fees that were unreasonable. Indeed there is no reason why the court could not delete the success fee leaving the obligation to pay unaffected.

(9) The regulations do not require a retrospective CFA to comply with *regulation 4* of the 2000 regulations.

Employment Act 2008

As Saint Bernard of Clairvaux is supposed to have said "Hell is paved with good intentions." And one of the flagstones in Hell's pavement is likely to be the Employment Act 2002's dispute resolution procedures. A nice idea but not exactly well thought through. It was full

of man traps and nastiness that both innocent employees and employers found themselves in all sorts of bother.

Well, soon they will be no more. *Sections 1-7 of the Employment Act 2008* will remove this evil bit of Hell's paving and replace it with lovely gravel. That will happen on the 6 April 2009, thanks to the snappily entitled *The Employment Act 2008 (Commencement No. 1, Transitional Provisions and Savings) Order 2008*. I expect that they will continue to have an influence through for the future.

What does Part I of the Employment Act 2008 provide?

Section 1 repeals the statutory dispute resolution procedures which came in with the *Employment Act 2002*. Good.

Section 4 restricts when a tribunal can determine a case without a hearing.

Sections 5 and 6 modify conciliation procedures.

Dispute resolution

Section 2 repeals *section 98A* of the *Employment Rights Act 2002*. That's the odd provision that if you fail to comply with the statutory procedure the dismissal is automatically unfair but that if you did, and the person would have been dismissed anyway, it's fair.

Section 3 inserts a new *section 207A* into the *Trade Union and Labour Relations (Consolidation) Act 1992*. This is a biggie. Basically, if an employee brings a claim of a specified type and it appears to the employment tribunal that (quote)

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

or

If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

So what is there to note:

- This is similar to what went before but there is no presumption in statute of automatic unfair dismissal,
- the uplifts and reductions are now a more modest 25%,
- the sections only kick in if the complaint is made out,
- the uplift or reductions only kick in if the failure to comply was unreasonable,
- Even it was unreasonable, the uplift or reduction is not compulsory so the undeserving employer or employee should not get a windfall.

A relevant Code of Practice is any code of practice which relates exclusively or primarily to procedure for the resolution of disputes. ACAS has published a draft code of practice and it is currently before Parliament awaiting approval.

What claim is of a specified type? Here we troll on over to a new schedule added to the *TULR(C)A 1992* numbered A2. The list is huge and can be changed by the secretary of state. However it covers the usual suspects: sex, race, age, sexual orientation and disability discrimination, unfair dismissal, breach of contract on termination and redundancy.

What are the transitional provisions? If the standard disciplinary or dismissal procedures applied on or before 5 April 2009 and the employer has complied with them, taken relevant disciplinary action or dismissed the employee, the old law continues to apply.

As for grievances, if it was covered by the grievance procedures and the act complained of occurs wholly before 6 April 2009, then the old law continues to apply.

However if it was covered by the grievance procedures and the act complained of begins on 5 April 2009 and continues beyond that date and the employee either presents a complaint

or complies with the relevant parts of the *Employment Act 2002 schedule 2* then there are a variety of cut off dates that vary depending on the nature of the complaint. They are too cumbersome to list here but can be found in the statutory instrument.

Compensation in unlawful deduction and redundancy cases

Section 7 makes 2 amendments. In unlawful deduction of wages or payment to employer cases, where the tribunal makes a declaration, it can award such additional amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

In relation to redundancy payments, if it finds the employee is owed redundancy money, it may order the employer to pay to the worker such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the non-payment of the redundancy payment.

The consequence is the employer who does not pay could well find himself liable for, say, the extra bank charges the employee incurs because he has not been paid what he is entitled to and so ends up in debt.

These do not have effect to any complaint presented to a tribunal before 6 April 2009.

Civil Procedure Updates

As from 6 April 2009, there will be changes to the CPR. Most notably:

- The fast track limit is increased from £15,000 to £25,000 for cases issued after 6.4.2009. The advocate's fees for cases between £15,000 and £25,000 will be £1,650 + VAT.
- In CPR 55.10 (notice to occupiers in mortgage possession cases) the claimant must send a notice to the property addressed to the "the occupiers" within 5 days of receiving notification of the date of the hearing by the court.
- PD 54D comes into existence to deal with the venue for administrative court hearings. The administrative court will sit in Birmingham, Cardiff, Manchester and Leeds also from 6.4.2009.
- There is a new practice direction to part 14 concerning pre-action conduct.

- There are new rules on costs capping orders.
- There is a new practice direction for parties litigating cases where the subject matter of the case does not have a pre-action protocol.

Employment facts and figures

Tribunal Awards: these limits increased on 1 February 2009.

- 1 week's pay - £350
- maximum basic award/stat redundancy payment - £10,500
- maximum compensatory award - £66,200

Note: The new rates apply where the 'appropriate date' occurs on or after 1 February (e.g. for unfair dismissal the effective date of termination) and not the date of the actual tribunal hearing.

Statutory Maternity Pay: From 5 April 2009, the standard rate of statutory maternity, paternity and adoption pay increases to £123.06 per week.

Statutory Sick Pay: From 5 April 2009, the standard rate of statutory sick pay increases to £79.15.