

EMPLOYMENT EBULLETIN - 11 JUNE 2010

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## Inflating redundancy score of employee on maternity leave constituted sex discrimination against male colleague



In the case of *De Belin v Eversheds Legal Services Limited* an employment tribunal had to consider whether a male lawyer was discriminated against on the grounds of sex where, in a redundancy situation, his female colleague received an inflated score due to favourable criteria for her being used.

The claimant was employed as an associate in an international law firm. In July 2008, it became apparent that redundancies would be made and the respective employees were scored against five redundancy criteria. One of the financial criteria was called "lock up" and measured the amount of time between a lawyer undertaking a piece of client work and receiving fees for it, with more points being awarded where there was a quick turnaround between undertaking the work and being paid. The relevant reference period was taken as the 12 months preceding 31 July 2008. The claimant, whose lock up was over 160 days, scored 0.5 points - the lowest available score (with 2 being the highest possible score). The female employee, who was on maternity leave in July 2008, was awarded a notional score of 2. Overall, the claimant was scored at 27 points and the comparator employee was scored at 27.5. The company began a consultation with the claimant on 16 September 2008, and this is where he first raised concerns about the apparent unfairness of his colleague being given the maximum available score despite being on maternity leave. The pursuer argued that if his female colleague had been measured before she went on maternity leave, she would have scored 0.5. The pursuer submitted a written grievance. The central issue was that by artificially inflating his colleagues score, the company had treated him unfairly and in a discriminatory way. The respondent did not uphold the grievance or the appeal and the claimant was made redundant in January 2009. The claimant brought a claim for direct sex discrimination and for unfair dismissal.

The tribunal had to consider the application of the Sex Discrimination Act 1975 (the "Act"), which prohibits less favourable treatment of a woman on the grounds of sex. This principle does also apply equally to men, however, under s.2(2) of the Act, it provides that in application of equal treatment to men, no account shall be taken of a special treatment afforded to women in connection with pregnancy or childbirth. Therefore, the tribunal had to decide what was meant by "special treatment", to what extent it shall be allowed to impinge on the principle of equal treatment between men and women and whether the respondent's actions fell within the parameters of the Act.

The tribunal found that the pursuer had been discriminated against on the grounds of his sex and also that he had been unfairly dismissed. The application of the lock-up criteria was unreasonable and also constituted less favourable treatment on the grounds of sex. The tribunal noted that employers should assess the possible ways in which the unfairness of a maternity absence can be mitigated, rather than automatically favouring the employee above others. Special treatment cannot mean a blanket protection for women. It is understood that this case is going to be appealed so there may be further clarification available on special treatment in due course.

## 12 month post termination non-solicitation clause held unenforceable



The High Court had to consider in the case of *Associated Foreign Exchange Ltd v International Foreign Exchange (UK) Ltd* and another whether a restriction of 12 months on soliciting former customers less three months spent on garden leave went further than was necessary to protect business interests.

In this case an employee was employed firstly by one company before moving to a similar position at another company after three months of garden leave. The companies were competitors in the foreign currency exchange market. The first employer sought to enforce a post termination restrictive covenant which stated that the employee could not solicit business from customers or potential customers or entice customers away from that employer. The contract also contained a six month non-dealing clause and set out that both clauses should be reduced by any period spent on garden leave.

The first employer sought an injunction to prevent the employee from soliciting its customers for nine months from the employee's last day of employment, taking into account the three months that the employee had spent on garden leave.

The High Court held that the six month non-dealing clause provided adequate protection. Six months was long enough for the employers to

acquaint themselves with the previous account manager's customers. The High Court also pointed out that the foreign currency exchange business was not particularly loyal, with customers habitually shopping around for the best deal. The Court also held that if it had found the 12 month non-solicitation clause was reasonable, it would not have extended that to potential customers.



## Intention to give notice does not constitute actual notice

In the case of *Mitie Security (London) Ltd v Ibrahim*, the Employment Appeal Tribunal (the "EAT") had to consider whether actual notice was given to an employee on the strength of a letter stating "*the company could have no alternative other than to issue you notice and terminate your employment*". This letter was dated 22 September. The employee never returned to work but lodged a grievance on the grounds of unfair dismissal and race discrimination. The employment tribunal found that the effective date of termination was 23 October, as the employment had been terminated by the employer in their letter dated 22 September. The tribunal found the fact that the company had stopped paying the employee as conclusive evidence that it was in the process of terminating his employment.

The EAT overturned the tribunal's decision noting that while the terms of the letter made clear that notice might be given in the future, this was

not the same as actually giving notice. The EAT noted that these actions were not uncommon in the security industry. It was noted that stating dismissal being likely or even that dismissal is inevitable by a certain date will not amount to a dismissal. The EAT held that notice to terminate a contract of employment must either state the date of termination or contain material from which the date can be positively ascertained.

## Fake "fit notes" being sold online

It has been reported that employers may be fooled by workers taking improper days off work after a website began selling fake fit notes. Although the site claims the fit notes are for novelty value, employers are being warned to be careful, particularly until HR staff become more familiar with the new fit note system.

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