

EMPLOYMENT EBULLETIN - 14 MAY 2010

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Inability to cross-examine witnesses does not breach right to a fair trial

In the case of *Power v Greater Manchester Police*, the Employment Appeal Tribunal (the "EAT") had to consider whether a denial of an opportunity to cross-examine witnesses during an employment tribunal hearing breached the right to a fair trial set out in Art. 6 of the European Convention on Human Rights ("ECHR").

The pursuer argued that his dismissal from his employer was related to his belief in spirituality and therefore breached the Employment Equality (Religion or Belief) Regulations 2003. At the hearing, it emerged that among the material that influenced the employer at the time of the claimant's dismissal was a letter written by a former officer of the employer. The employer had been unable to call this former employee as she herself had been dismissed by the time of the tribunal hearing.

The EAT found that the claimant's human rights were not breached. It held that the right to examine witnesses, which is stipulated in Art 6(3) (d) of the ECHR, applies to the confrontation of accusers in a criminal case, not to claimants in employment tribunal proceedings. The EAT noted that if the employer did not produce relevant witnesses to support its cases, then its explanation will simply be less credible.

HSE issues guidance on Working Time Regulations

The Health and Safety Executive (HSE) has this week updated its guidance on the Working Time Regulations 1998. The latest guidance reflects the HSE's own experiences of enforcing the Regulations. It also takes into account various amendments to the Regulations, including the limited derogation for doctors in training in July 2009. The guidance is designed to be used by those who enforce the Regulations (with the target audience being HSE staff and local authority inspectors), but it is useful guidance on the application of the Regulations.

<http://news.hse.gov.uk/2010/04/20/local-authority-circular-the-working-time-regulations-1998-guidance-on-the-legislation/>

Misconduct dismissals and police involvement

The Employment Appeal Tribunal (the "EAT") held in *Secretary of State for Justice v Mansfield*, an unfair dismissal case, where an employee faced a police investigation in relation to allegations of planting drugs, it was not unreasonable to postpone internal disciplinary proceedings pending completion of the police enquiry.

Moreover, the EAT held that the Employment Tribunal had erred in confusing the lack of honest belief in the alleged misconduct with the lack of reasonable grounds for such belief. The EAT held that it was not for the Tribunal to say who they believed in respect of the misconduct. The EAT confirmed that the Tribunal should instead have focussed on whether the employer had acted fairly and reasonably in all of the circumstances at the time of the dismissal.

Previous incident where no formal warning is given can be considered when deciding to dismiss



In the case of *Brent v Fuller*, the Employment Appeal Tribunal (the “EAT”) had to consider whether in dismissing for gross misconduct, an employer was entitled to take into account previous actions of the employee even where no formal warning had been given for those previous actions.

The employee was an administrator at a school for children with particular social difficulties. In May 2007, she intervened when staff members were restraining pupils. She was told at that time by the Head Teacher not to interfere with staff when they are restraining pupils but no formal warning procedure was taken against her. In October 2007, a similar but more serious incident took place. Again the administrator intervened when staff members were restraining a child. This resulted in her dismissal for gross misconduct, for failure to follow reasonable management instructions. In reaching its decision to dismiss, the school took into account that, because of what had been said during the previous incident, the employee knew that she should not interfere when the next incident occurred.

The employment tribunal found in favour of the employee, holding that the first incident had been built up to more than it was and that the one off incident in October was not a sacking

offence in itself. The tribunal therefore held that the dismissal was unfair.

The EAT overturned the decision holding that the first incident was relevant to the background of the second incident. The EAT referred to the case of *Airbus v Webb* which stated that all relevant factors should be taken into account when deciding whether to dismiss. The EAT held that the tribunal had substituted its own view rather than considering the band of reasonable responses.

Employment Status under Race Relations Act



In the case of *Leeds City Council v Woodhouse*, the Court of Appeal provided further guidance on the meaning of a “contract worker” as defined in s7 of the Race Relations Act 1976.

The case involved an individual who issued a claim of race discrimination against Leeds City Council, a housing arm of Leeds City Council, and an employee of Leeds City Council. Following a government initiative to improve the efficiency of running housing operations, the employee, together with other staff, transferred under TUPE from the Council to the housing arm of the Council. The Council argued, that the employee had no jurisdiction to bring a race discrimination claim as he was not a “contract worker” as defined under s.7.

The Court of Appeal held, endorsing the first instance decision that the legislation should be broadly constructed. They noted that a purposive approach should be taken and held that it is not necessary for a claimant seeking to prove they are a “contract worker” to establish a respondent has control or influence over what he does. The Court also gave reasoning that there was no need to show the primary purpose of obligation between the two contracting parties was the supply of labour. The housing arm could not perform its obligations without employing labourers to carry out the work. The court therefore held that the supply of workers was pursuant to an obligation under the contract. The Court of Appeal noted that in the future, the tribunal is to take a pragmatic view and focus on the factual nature of the employer/worker relationship rather than focussing on the terms of service.

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