CONTENT

THIS MONTH'S CONTRIBUTOR

Daniel Clarke

Click here for Daniel's website profile.

Seminars & workshops

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate to contact our marketing manager, Mika Thom.

Employment Law Update - March 2013

Welcome to the next edition of 3 Hare Court's Employment Law Update. 3 Hare Court's employment practice group provides commercial and sensitive advice to employers, employees and employment agencies. In these monthly email updates we highlight recent devel opments in employment law and provide analysis on recent noteworthy cases. We hope you enjoy this March edition!

Arriva London Ltd v Eleftheriou, UKEAT/0272/12/LA

Reinstatement and reengagement are remedies rarely pursued and even more rarely granted. However, the recent EAT decision in Arriva London Ltd v Eleftheriou may offer claimants increased encouragement to pursue them.

Mr Eleftheriou, a bus driver, was dismissed in May 2010 while he was waiting for surgery following a shoulder injury that prevented him from driving. He had been off sick for about 4 months. In breach of its policy, his employer did not seek any medical opinion as to when he would be fit for work before deciding to dismiss. Mr Eleftheriou subsequently had the surgery, was recovered by January 2011 and was back driving buses for a different company by February 2011, although at a much lower salary.

He brought a claim for unfair dismissal. This was heard in February 2012. The dismissal was found to be unf air on account of his employerôs failu sought reinstatement. This also succeeded. The ET then went on to apply a 60% Polkey reduction to the loss of earnings he had suffered between dismissal and reinstatement, i.e. on the basi s that there was a 60% chance that he would have been fairly dismissed in any event given time and a fair procedure.

Neither party was entirely happy with the result. Both appealed. The parties were compelled to agree it had been wrong to make any Polkey r eduction where reinstatement was ordered. The ET had misconstrued section 114 Employment Rights Act 1996. The ET had no jurisdiction to reduce the sums to be paid to the complainant on an order for reinstatement in this way.

The only matter left in issue w as whether the discretion to order reinstatement was wrongly exercised for failure to take account of the Polkey determination. Arriva contended

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with our marketing manager, Mika Thom .

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively please contact the Senior Clerk, James Donovan .

Feedback

As always at 3 Hare Court we welcome your feedback. In particular, any feedback or suggestions on this and forthcoming updates will be gratefully received.

Please contact our marketing manager, Mika Thom with any queries. Alternatively, do contact the barrister responsible for this update, Daniel Tivadar .

Employment Law at 3 Hare Court

We regularly appear in the employment tribunals and EAT. Silks in chambers have experience of employment and discrimination issues in the High Court and Court of Appeal.

Members deal with a range of work from straightforward issues

that the ET would never have ordered reinstatement had it not made the error with regard to the scope of its ju risdiction to reduce the award. Further, the 2 orders were inconsistent. It was unfair to order reinstatement where there was a greater than evens chance, here 60%, that there would have been a fair dismissal given time and a fair procedure.

The EAT reject ed all these contentions. An ET is obliged to consider reinstatement and reengagement first, before considering compensation. Certain factors which could lead to a reduction in compensation, such as misconduct, are also relevant to reinstatement. However, the employer's procedural failings were not of this nature. The ET was therefore correct to consider and determine the issue of reinstatement without taking these matters into account. Further, Mr Eleftheriou's having gained an alternative job did not disq ualify an ET from ordering reinstatement.

Although historically little used, reinstatement and reengagement may become more popular with claimants. They will remain unsuitable in many cases, especially those involving small scale employers. However, for fo rmer employees of large organisations and in a difficult job market, they offer real advantages.

Chhabra v West London Mental Health NHS Trust [2013] EWCA Civ 11

In *Chhabra* the Court of Appeal allowed an appeal against a decision of the High Court to grant a consultant forensic psychiatrist an injunction effectively restraining her employer, the Trust, from holding a disciplinary hearing concerning her conduct. The judgment serves as a reminder of how high the hurdle is likely to be f or employees to obtain such relief.

Dr Chhabra was alleged to have breached patient confidentiality while travelling on a train. A disciplinary investigation was conducted by an external case investigator under the Trust's procedures. Following a review of the investigator's report, the case manager decided to refer the allegations of misconduct to a disciplinary panel to be considered as potential gross misconduct. One of the possible sanctions was dismissal.

There were other concerns relating to Dr Chhabr a's ability to work in a team. These problems were agreed to be matters of capability. These were directed away from formal disciplinary proceedings and referred to NCAS.

Dr Chhabra applied successfully to the High Court for an order restraining the Trust from proceeding with the proposed conduct hearing.

The Court held as follows. The proposed hearing amounted to a breach of the doctorôs con obliged, in accordance with the Trust's procedure, to make a decision on the way forward based solely on the material in

of unfair dismissal and redundancy to issues of equal opportunities, discrimination and human rights. This includes the seminal case of Bull & Bull v Hall & Preddy & Hall [2012] EWCA Civ 83 where the Court of Appeal determined whether it was discrimination not to provide goods and services on the grounds of sexual orientation.

Additionally, members regularly deal with the full range of discrimination claims under the Equality Act 2010 including direct and indirect discrimination, whistleblowing, victimisation and harassment in multi-day hearings for both Claimants and Respondents.

For more information and examples of cases, please visit our Employment Law page.

About Us

For further information about chambers, please see our website.

To Subscribe or Unsubscribe

If you wish to subscribe to or unsubscribe from this update, please email our marketing manager, Mika Thom or click on the 'Unsubscribe' link below.

the investigation report. The case investigator's acceptance in the report that the doctor did not appreciate that she was breaching confidentiality precluded a charge of gross misconduct. Further, given the doctor had accepted the allegations against her, the Trust was contractually obliged to deal with the concerns in accordance with its "Fair Blame" procedure - for use in cases of less serious misconduct. Further still, the Trust could not deal with the confidentiality concerns separately from the capability process being applied to the concerns about teamwork.

The Trust appealed successfully to the Court of Appeal. The Court considered that the issue was narrow. It was whether the case manager had acted in breach of contract on receipt of the investigating officer's report in deciding on to convene a disciplinary panel to consider the allegations of breach of confidentiality and to consider them as potential gross misconduct.

It was for the case investigator to provide sufficient information for the case manager to decide whether there was a case of misconduct that should be put to a conduct panel. There was a threshold to be crossed, in terms of seriousness, before a decision to refer to a panel could properly be taken. But, on the facts, the Trust was entitled to regard the breaches of confidentiality as potentially serious and to refer the allegations to a disciplinary panel as matters of potential gross misconduct.

The procedure was for a conduct panel to make findings of fact. It was not confined to considering findings of fact already made by the case investigator. The case investigator reported and the panel decided. The case manager was required to exercise judgment as to the seriousness of the alleged misconduct and whether a panel hearing was required. The case manager had the case investigator's report, the evidence reported and the findings made, well in mind. It was for him to make a judgment whether the conduct reported was sufficiently serious to require a panel hearing.

Further, while the "Fair Blame" procedure was encouraged the relevant policies repeatedly reserved a power to refer disciplinary matters to a conduct panel.

While the case turned on the detailed procedures set out in contractual documents applicable in the particular case, it is of more general interest. The procedure adopted is by no means unusual. Further, the case makes it clear that employees may apply to the Court for an injunction to restrain the conduct of disciplinary procedures. But to succeed, a present or apprehended breach of contract must be made out. If there is evidence disclosed by an investigation (notwithstanding an investigator's view that it may not merit being treated as gross misconduct) which justifies the decision to convene a conduct hearing injunctive relief is unlikely to be appropriate.

Legislative changes in February and March 2013

2013 is set to be a busy year for legislative change, some of which has already begun.

One, very much expected, change was the new tribunal award limits. These apply where the date of dismissal (or other event) is on or after 1 February 2013. In short:

- The guarantee pay limit for a week's temporary lay off increased from £23.50 to £24.20 (this is subject to a maximum of 5 days or £121 in any 3 months).
- The maximum amount of a week's pay for redundancy awards increased from £430 per week to £450 per week.
- The maximum compensatory award for unfair dismissal increased from £72,300 to £74,200.

On 8th March 2013 (before the deadline set by the EU Parental Leave Directive), the amount of Parental Leave that can be taken increases from 13 to 18 weeks per child. Parental Leave remains unpaid and limited to a maximum of 4 weeks per year.

March is also due to see the repeal of section 40(2) and 40(4) of the Equality Act 2010, i.e. third party harassment provisions, meaning employers will no longer have to take reasonable steps to protect employees from third-party harassment. The discrimination questionnaire procedure under section 138 of the Equality Act 2010 is also to be abolished.

The next edition of 3 Hare Court's Employment Law Update is due out in April 2013. Until then!

3 Hare Court
Temple
EC4Y 7BJ
DX: 212 LDE
T: 020 7415 7800