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Employment Law Update

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THIS MONTH'S CONTRIBUTOR

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Seminars and workshops

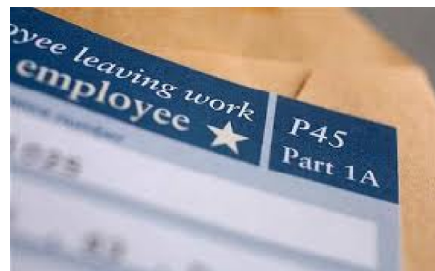
3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or

October 2013

In this month's update we look at a Court of Appeal decision in **Singh v Moorlands Primary School Governing Body [2013] EWCA Civ 909** on the scope of judicial immunity and the EAT decision in **Brito-Babapulle v Ealing Hospital NHS Trust [2013] UKEAT 0358/12/1406** on whether a dismissal for proven gross misconduct is always fair.

Judicial Immunity in ET proceedings

In *Singh v Moorlands Primary School Governing Body* the Court of Appeal was required to consider the scope and application of judicial immunity, where the respondent body had allegedly used undue pressure in obtaining a witness statement in defence of a race discrimination claim.



The claimant, a headteacher, brought a claim for race discrimination, harassment and victimization against the governing body. She contacted H, a work colleague, to see if she would be a witness for her in the proceedings. H replied, stating that she had been instructed not to have any contact with her. Later, the claimant received a witness statement from H in support of the governing body.

She resigned on the grounds of breach of mutual trust and confidence, and sought to amend her ET1 to include constructive dismissal and an allegation of undue pressure by the governing body in obtaining H's witness statement, alleged to contain false and inaccurate evidence. Both the ET and the EAT refused the amendment on the basis that the governing body was protected by judicial immunity.

However, the Court of Appeal did not accept that judicial immunity applied. It was no longer correct to view the protection as extending to "anything said or done" by anyone in the course of judicial proceedings whatever the nature of the claim. The real purpose of judicial immunity, which extended to statements of case and other documents before the

would like further information then please do not hesitate to contact our marketing manager, [Carolyn Harris](#).

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, [Carolyn Harris](#).

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, [Carolyn Harris](#) with any queries.

Employment Law and 3 Hare Court

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

court, was to protect future witnesses from being sued for what they said in court. The protection should only extend to that which was necessary to stop the immunity being outflanked.

The respondent's reliance on judicial immunity failed because the claimant was not complaining about what might or might not be said in the ET; rather, her allegation was about the means by which the governing body had procured H to give the statement, which was a freestanding act. Although the alleged untruths contained in H's statement might be relevant in determining the presence of undue pressure, it was the means by which they were procured that formed the allegation sought in the amendment.

This case is significant in that it reduces the scope of judicial immunity and paves the way for employees to use ancillary claims to strengthen their underlying claims before the Tribunal. Employers will have to take care in the way they respond to claims, since not all steps taken in the context of ongoing litigation will be protected by judicial immunity.

Unfair dismissals for gross misconduct

In Brito-Babapulle, the EAT was asked to consider whether, where claims of unfair dismissal are concerned, is it always reasonable to dismiss an employee where the employee is guilty of gross misconduct?



The claimant worked for Ealing Hospital as consultant but also treated patients privately. It transpired that the claimant had been working privately whilst on sick leave and in receipt of sick pay, even though she had twice been notified by her employer that she was not entitled to work privately whilst certified sick. She was dismissed for gross misconduct.

The claimant brought a case for unfair dismissal. The ET dismissed the claim, accepting the respondent's case for gross misconduct and holding that "once gross misconduct is found, dismissal must always fall within the range of reasonable responses...". One of the issues that fell for determination before the EAT was whether there was indeed such a logical connection between a finding of gross misconduct and a fair dismissal.

The EAT held that there was not. Whilst accepting that dismissals were almost inevitable following gross misconduct, the EAT held that the ET went too far. The ET's approach ignored the possibility of mitigating circumstances rendering the dismissal unfair in the particular circumstances of the case. For instance, where other employees had been treated differently in analogous situations. The employee's length of service and good conduct may also be relevant considerations.

the High Court and Court of Appeal.

Members deal with a range of work from straightforward issues 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

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On the facts, the ET had failed to consider mitigation and so the appeal was allowed on that ground and remitted to the same panel.

The question of gross misconduct, a contractual issue, is not determinative of the statutory test to be met for a fair dismissal. It is always necessary to consider the test of reasonableness under s98 Employment Rights Act 1996, irrespective of the nature of the act which leads to dismissal. Even in cases of gross misconduct, the employer is well advised to consider whether there are any mitigating factors that might render a subsequent dismissal unfair.

Book launch

We are pleased to announce the forthcoming publication of *The Protections for Religious Rights: Law and Practice*, co-authored by Sir James Dingemans, our former head of chambers, and [Hafsah Masood](#).

The book covers:

- The protections for religious rights in the employment context, including discussion of the recent decision of the European Court of Human Rights in *Eweida & others v UK*.
- An examination of the provisions of the Equality Act 2010 and other applicable domestic and international instruments.
- Comparative perspectives in an extensive chapter drawing on expertise from the United States, Canada, South Africa, Australia, India, Ireland, New Zealand, and Turkey.

The book is due to be published by OUP on 24 October 2013.

For further details, please [select here](#).

Get in touch

We hope you have enjoyed this issue of the Employment Law Update. If you are dealing with a similar case or wish to discuss any area of employment law, please [get in touch](#) to arrange a short informal discussion.

The next edition of the Employment Law Update is due in November 2013. Until then!

Chambers of Peter Knox QC

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