

# EMPLOYMENT LAW BULLETIN

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9 GOUGH SQUARE

## *Stuart Peters Ltd v. Bell* [2009] EWCA Civ 938



James Holmes-Milner

*When does an ex-employee have to give credit in an unfair dismissal claim for post-dismissal earnings?*

*Summary: in an unfair, non-constructive dismissal claim where notice was not worked out and full payment in lieu was not made, no credit need be given for earned income during that notice period.*

The Norton principle: it is long-established that an employee who has been dismissed without notice is not required to give credit for earnings from any new employment during what should have been the notice period. The principle was laid down in *Norton Tool Co Ltd v Tewson* [1972] ICR 501 where it was held to be "good industrial practice" to make payment in lieu of notice at the time of dismissal absent gross misconduct and an employer who failed to comply with that practice should not be in a better position than he would have been in if he had followed that practice. As a result the employee may, effectively, be overcompensated since section 123(1) ERA 1996 confines compensation to "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant".

*Stuart Peters Ltd v. Bell* [2009] EWCA Civ 938, [2009] IRLR 941: the Court of Appeal refused to extend the Norton principle. The issue was whether it applied to constructive dismissal. The answer was "no" because the employer, whilst in repudiatory breach of the contract, was still willing to continue the contract and to pay the wages. Elias LJ said:

*"I appreciate that this does lead to differences in compensation between those constructively dismissed and those whose contracts are terminated by the employer. ... The Norton principle is not designed to give full compensation during what would have been the notice period had the contract been terminated on notice. Rather it is to*

*uphold expectations that will result from the application of good industrial relations practice where the employer has chosen to terminate the contract with no (or inadequate) notice, even where he genuinely believes that he is entitled to do so. As the Court of Appeal emphasised in *Burlo*, the Norton principle should not now be extended".*

This followed a similar attempt to restrict the application of the Norton principle in *Burlo v Langley* [2007] ICR 390. There, the principle was restricted to pay. An employee on sick leave during what should have been her notice period sought to recover full pay relying on the Norton principle. She lost. It was held that she could only recover whatever sickness absence benefits she would have actually received. It was observed not to be good industrial practice for an employer to pay wages in lieu of notice at the full weekly rate to an employee who is unfit to work through sickness. Furthermore, it would not be "just and equitable" to require an employer to over-compensate an employee.

Practical consequences: the Norton principle is particularly important for those with long notice periods whose lost earnings claim is punctuated by short periods of well-paid work. In a schedule of loss it is usually sensible to compartmentalise lost earnings during the notice period and lost earnings thereafter: in a pure compensation claim it allows easier application of the Norton principle; in a mixed compensation and contract (i.e. wrongful dismissal) claim it makes for easier calculation of the 2 claims. Give credit only for earnings

made in the latter stage. If the employee takes up better-paid temporary work to mitigate the earnings loss, the excess income can only be set off against lost earnings from the date the new job began rather than from the entire claim.

Wrongful dismissal: in a wrongful dismissal claim, the analysis is different. The key issue is whether the employee was contractually entitled to a payment in lieu of notice. If so, there is no duty to repay or give credit for income earned during notice period. If a contractual PILON is not paid on dismissal the employee may sue for the debt and there is no duty to give credit for income earned during notice period. (There is no duty to mitigate in a debt claim as opposed to a damages claim.) However, where there is wrongful, summary dismissal with no contractual entitlement to a PILON the employee must give credit for all income earned during the notional notice period.

Reform: it is only a matter of time before the Norton principle is re-considered by the Supreme Court. The decision of the House of Lords in *Dunnachie v Kingston upon Hull City Council* [2005] 1AC 226; [2004] ICR 1052 suggested (1) that any attempt to extend the narrow principle in *Norton Tool* must not be allowed if that would lead to the award of a bonus and (2) that even the narrow principle in *Norton Tool* offends section 123 ERA 1996 because it can and often does lead to the award of a bonus.



# Private sector transferees not bound by public sector pay settlements



Ben Rodgers

## The facts

The Claimants were, until 2002, employees in the leisure services department of the London Borough of Lewisham. In that year Lewisham outsourced the work to a company called CCL. The employees were TUPE transferred across. In 2004 CCL transferred them again, and they became employees of Parkwood Ltd, the Respondent.

While they were employed by Lewisham, the Claimant's employment contracts provided that their terms and conditions would be in accordance with collective agreements negotiated from time to time by the National Joint Council for Local Government Services ("NJC").

When the employees were transferred to CCL in 2002 there was already in place a 2-year NJC settlement. CCL Ltd honoured it. After the transfer to Parkwood, the NJC announced a new settlement to run until 2007. Parkwood said it was not bound. The Claimants brought claims for unlawful deductions.

The ET dismissed the claims; the EAT allowed the Claimants' appeal; and in January of this year the Court of Appeal allowed the Respondents' appeal.

## UK law prior to January 2010

Few common lawyers would disagree with the proposition that a contracting party can agree to be bound by terms fixed by a third party. Thus in decisions like *Whent v. Cartledge Ltd* [1997] IRLR 153 and *BET Catering Services Ltd v. Ball* EAT/637/96, the EAT more or less took it for granted that rights identical to that which the Claimants in the instant case had against Lewisham continued, after transfer, against parties in identical positions to the Respondent in the instant case. As the EAT put it in

*Glendale Grounds Management v. Bradley* EAT/484/97, the transferee takes the employees, "warts and all".

*Werhof v. Freeway Traffic Systems GMBH* C-499/04, [2006] IRLR 400

On the other hand, the layman might feel that it cannot be right that an employer is bound ad infinitum by the terms of a collective agreement negotiated by bodies other than himself. That is precisely the view that the ECJ took in the case of *Werhof*, decided in 2006. This was a reference from a German court for a preliminary ruling on the meaning of A3(1) of the Acquired Rights Directive 77/187/EEC. The facts of *Werhof* were identical to the instant case.

In its judgment the ECJ created a distinction between "dynamic" and "static" obligations. A dynamic obligation is one which can change from time to time after the transfer. A static obligation is one which does not. According to *Werhof*, A3(1) of the Acquired Rights Directive does not require Member States to ensure that dynamic obligations transfer.

## Problems with the ECJ judgment

It may be that some of the judgment has been lost in translation, but it is an understatement to describe – as Rimer LJ did describe – paragraphs 23 to 37 of the judgment as "not in all respects easy to summarise".

The ECJ provided three main reasons for its conclusion: first, A3(2) of the Acquired Rights Directive shows that the EC legislature did not intend for transferees to be bound by collective agreements after those agreements are renewed; secondly, it would make business difficult for transferees if they had to submit to decisions of third parties on the pay and

conditions of their employees; and thirdly, transferee's human right to freedom of association would be infringed by requiring them to submit to such decisions.

The first reason is wrong. As Rimer LJ tactfully observed in the instant case, the ECJ effectively confused two concepts: (a) the enforceability of a contractual term which provides for conditions of employment to be determined from time to time by a third party; and (b) the extent to which collective agreements already made with the transferor continue to bind the transferee. The Claimants' submission in the instant case was that the EC legislation, and the UK legislation implementing it, while providing for the latter, is silent on the former. Thus, if the employment contract has a provision of the former type, it is transferred, because the law does not say that it is not transferred.

The less said about the other two reasons, the better.

## Application of *Werhof* by the Court of Appeal

The Court of Appeal held that *Werhof* states the meaning of the Acquired Rights Directive as it is and always has been. Accordingly, because TUPE 1981 – and TUPE 2006, for that matter – simply transposed the Directive into UK law, *Werhof* is the definitive guide to what rights are transferred by TUPE.

Rimer LJ's judgment is a great read. He does a fine job of pointing out, in the most courteous possible way, the manifold deficiencies in the ECJ judgment. Then at the end he simply says, "English courts are nevertheless bound by it", and decides the appeal in favour of the Respondents.



# Buckland v Bournemouth College [2010] EWCA Civ 121

*Infighting in the world of academia can make the machinations of Westminster look tame. Professor Buckland was employed as a Professor of Environmental Archaeology at Bournemouth College for four years until his resignation in February 2007.*



Susan L. Belgrave

Over the previous summer he had been involved in marking re-sit papers where he had failed 14 of the 16 candidates. Those papers had been second marked by another examiner and upheld by the Board of Examiners. It was obviously a matter of academic concern that there should be such a high failure rate. At this stage the Programme Leader for archaeology decided to remark the papers himself. He then sent a note to the Claimant and second marker criticising their original scores. On hearing of this, the chair of the Board of Examiners had the scripts re-marked by a third member of the academic staff. When this was brought to his attention in September 2006 the Claimant complained to the Head of the School stating that if the decision of the Board of Examiners could be overturned by the whim of an individual it made a complete mockery of the process. Some students' marks were increased and they were notified accordingly without this having been discussed with the Claimant. Following further protests from the Claimant, it was eventually decided that an enquiry would be set up. Fans of Westminster soap will scream 'whitewash' as did Professor Buckland who declined to participate. He decided to look for another position and resigned on 22 February, departing from the college at the end of the academic year in July 2007.

The Tribunal at Southampton upheld his claim for constructive unfair dismissal on the basis that adjusting the marks of the students without the Claimant's knowledge was an act calculated or likely to destroy the relationship of trust and confidence between the Claimant and the university. The Vinney report did not cure that breach although the Claimant's position had been exonerated nor had the Claimant affirmed the contract by remaining in post until the end of the academic year.

The College appealed to the EAT where His Honour Judge Peter Clark, following a

magisterial tour of the authorities, allowed the college's appeal. One of the issues which arose at this hearing was whether the range of reasonable responses test used to judge the employer's behaviour in unfair dismissals ought to be applied to constructive dismissals as well and at what stage: at the stage of trying to determine whether they were in fundamental breach of the contract or in trying to determine whether the constructive dismissal was fair. The EAT concluded that the test ought not to be imported at the stage of whether a fundamental breach of contract had occurred as this would amount to grafting a statutory test into an area determined as a matter of pure contract. He suggested:

- *in determining whether the employer is in fundamental breach the unvarnished Mahmud test should be applied;*
- *acceptance of that breach entitled the employee to leave and claim constructive dismissal;*
- *it is open to the employer to argue that the dismissal was for a potentially fair reason;*
- *the tribunal will have to consider whether that dismissal substantively and procedurally fell within the range of reasonable responses and was fair.*

The appeal thus turned on the question of whether having been in fundamental breach of contract for authorising a further re-marking and adjustment of grades behind the Claimant's back, the decision and outcome of the Vinney report were sufficient to 'cure' the original breach. Professor Vinney had acknowledged that the Claimant should have been consulted about that decision and thus the Claimant was overwhelmingly vindicated. The Tribunal at first instance had concluded that *'the University had been guilty of a fundamental breach of contract and in our view it needed to do something very clear to rectify that breach if indeed it were possible to do that.'* Judge Clark

accepted the analogy that the enquiry was akin to an appeal against dismissal, if the appeal is successful then the dismissal vanishes. So in the present case the Claimant exercised his right to permit the employer to remedy the breach; the Vinney report cured the breach and at the time when the Claimant tendered his resignation the Respondent was no longer in repudiatory breach. The tribunal had fallen into error in applying a subjective test – did the Claimant consider himself exonerated by the Vinney report.

The Court of Appeal approved of the detailed and thoughtful analysis given to the authorities by the EAT and endorsed its reasoning and conclusion on the state of the authorities. However; Lord Justice Sedley, giving the leading judgment noted that the original tribunal's balanced and fair-minded conclusion was that the Claimant's own petulance had kept the wound festering, although the Vinney report had vindicated him the breach of contract had not been cured because of the slur on the Claimant's reputation.

Reviewing the authorities, Lord Justice Sedley concluded that while an *anticipatory* breach of contract might be cured as it might not occur, the same is not possible in respect of a *fundamental* breach. It is the innocent party who, finally, has the option of acceptance of the breach or affirmation of the contract. The Court of Appeal was reluctant to introduce into employment law the doctrine of a breach capable of cure unless it could be applied to other areas of contract. Further, it had been entirely reasonable for the Claimant to await the outcome of the Vinney inquiry and to give a long notice period to protect his students without prejudicing his position on the Respondent's initial breach. This did not mean that the tribunals could not take a robust approach to affirmation of the contract simply that the Claimant's actions in these circumstances did not amount to such.

# Compensation for stigma

## *Chagger v Abbey National*



Ed Lamb

A concern frequently raised by Claimants after a successful tribunal is what happens when the dust has settled, who is going to employ me following a successful claim for discrimination?

News travels fast in professions and businesses: what of the discriminated pharmacist based in a small market town, where next?

The recent decision of the Court of Appeal in *Chagger v. Abbey National PLC and Another* [2009] EWCA Civ 1202 has gone some way to codifying the approach to assessing and compensating such a disadvantage on the labour market for Claimants. Whilst greeted by some with fanfare, 'stigma' damages will simply form a further consideration when considering what loss and/or disadvantage flows from discriminatory and unlawful behaviour of employers.

Mr *Chagger* was employed as a trading risk controller at the respondent bank and was of Indian origin. At first instance Mr *Chagger* was awarded just under £3 million pounds, the tribunal having upheld, amongst other claims, his claim for discrimination on the grounds of race. This award included a 2% uplift pursuant to section 31(4) of the Employment Act 2002. The Tribunal found that Mr *Chagger* had made 'the most thorough, extensive and well documented' attempts to find post dismissal employment as they had ever seen: including applications for 111 roles. Mr *Chagger* identified a number of issues that he felt were damaging for him in the job market as a result of Abbey's discrimination/dismissal: one being stigma. Abbey responded and sought a *Polkey*-like reduction to damages on the basis that Mr *Chagger* would have been dismissed absent their discriminatory behaviour; in any event, and that they should not be held liable for 'stigma' on the basis that they are not liable for third party discrimination. The tribunal rejected Abbey's submissions.

The EAT found that the tribunal had been wrong in failing to apply *Polkey* and found that it would be wrong for the Respondent to be held liable for the actions of a third party: therefore Mr *Chagger's* loss flowing from the discriminatory act was confined to the period during which Mr *Chagger* would have been employed by the Respondent. The EAT distinguished Mr *Chagger's* case from one where stigma damages are recoverable where employers carried on a dishonest business that had adversely affected the standing of their employees: *Malik v. Bank of England (Bank of Credit and Commerce International SA)* [1997] ICR 606. At the Court of Appeal Mr *Chagger* appealed the EAT's findings and the tribunal's uplift of 2%.

The Court disagreed with the EAT and overturned their judgment in 2 important respects: first, the tribunal's initial view that the losses stemming from the discriminatory act were not limited to the loss of income with Abbey was correct. Second, stigma damages flowing from a discriminatory act were, in principle, recoverable. A failure of a third party to employ a person, perceiving them as a 'troublemaker' for example, is a loss flowing directly from an unlawful act. It is difficult for an employee to prove that he is subject to unlawful victimisation discrimination and a failure to recognise stigma damages in such circumstances, would be to limit the protection afforded to those discriminated against. Moreover it would be anomalous for a former employee to be 'lawfully' stigmatised by an employer for having brought an unfair dismissal

claim and therefore being protected under the victimisation provisions, but not if he had brought a claim for discrimination.

The Court of Appeal were at pains to state that whilst stigma loss in these circumstances was recoverable, it would simply fall alongside those other considerations used in determining whether a Claimant has mitigated his/her loss. Further the number of cases where such stigmatisation will be a relevant factor will be limited. Tribunals should be robust in their assessment of damages, particularly in the face of limited evidence of the Claimant being stigmatised and the difficulty an employer has rebutting evidence of the same. However in a case such as Mr *Chagger's* the evidence of stigma was compelling and therefore a tribunal should not shy away from considering it.

The Appeal Court upheld the EAT on two points however: first that the level of compensation could form an exceptional circumstance under section 31(4) of the Employment Act 2002, thereby reducing an uplift to 2% and second, that the tribunal should take into account the fact that Mr *Chagger* may have been dismissed in any event.

Where does this leave Claimants? Whilst Mr *Chagger's* case provides helpful guidance in dealing with stigma damages, it does not prove seminal. Provided that a Claimant can support his 'stigma' claim with compelling and cogent evidence, there is nothing to stop a tribunal considering the same: reasonableness remains at the heart of assessing a Claimant's attempts to mitigate his loss.

## EMPLOYMENT SEMINAR

### Employment Seminar Discrimination Update

Susan Belgrave and Laura Elfield

- TOPICS • Equality Bill  
• Disability Discrimination  
• Recent Case Law Update

#### VENUE

9 Gough Square  
London EC4A 3DG

#### DATE

Wednesday 28th April 2010  
Time: 5.30 - 6.30pm  
Refreshments will be provided

#### COST

£20.00 + VAT (£23.50) | 1 hours CPD



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