



How has it been for you, dear?

- ❖ 'Required information' is not necessarily required and a letter before action amounts to a grievance...? Welcome to the Alice in Wonderland world that is now employment law a year after the Dispute Resolution regulations and the Employment Tribunal procedural rules have been in force.
- ❖ Have the rules achieved their objective? If the aim was to ensure that cases settled at any early stage and new case management powers allowed chairmen greater involvement in controlling the progression of cases, then reviews are mixed. ACAS reports that there has been no increase in the number of cases settling as a result of the introduction of the new fixed conciliation period. It appears that chairmen are being forced to hold more review hearings and pre-hearing reviews because there is a dispute as to whether or not one or other party has complied with the new requirements.
- ❖ If the aim was to reduce the number of claims coming before tribunals then for the first six months or so they certainly did that, it seems this trend is unlikely to continue. The idea of resolving workplace disputes amicably without recourse to litigation seems wishful thinking. Many employees dislike issuing grievances because it marks them out, in the eyes of management, as troublemakers. Ironically, the need to serve a grievance before going to tribunal may result in more grievances being issued at an earlier stage which may lead to a very acrimonious and hostile working environment indeed. This, in turn, is likely to be instrumental, ultimately, in the breakdown, rather than the maintenance, of the working relationship.
- ❖ The employment tribunal is no longer a place for the impoverished dismissed employee to seek redress. The absence of legal aid and the absence of legal advice may be

fatal to many a meritorious claim. This is why every assistance is being given to claimants whose claim is arguable but whose right of access to justice is being thwarted by secondary legislation. In *Grimmer v KLM Cityhopper UK* [2005] IRLR 596 Judge Prophet noted that the rules of procedure cannot cut down on an employment tribunal's jurisdiction to entertain a complaint which the primary legislation providing an employment right empowers it to determine and, if there is a conflict, the rules must give way. Indeed, Judge Prophet asked:

- ❖ *What is the purpose of insisting through rules that a failure to provide all the 'required information' can lead to a claim not being accepted as a valid claim? If the primary responsibility for making judicial rules rests, not with the judicial body but with the executive, there is a danger that executive objectives may gain precedence over the interests of justice.*
- ❖ The scathing comments of Judge Prophet and Sir Michael Burton, President of the EAT show the mounting frustration of the judiciary. Sir Michael Burton in *Richardson v U Mole* [2005] IRLR 668 has emphasised that these new rules should not be allowed to degenerate into injustice.
- ❖ There has been an unprecedented boom in employment legislation and employee rights in the last five years. Government heeded the concerns of industry about over-regulation and mounting costs. One might be forgiven for concluding that the combined draconian effect of the dispute regulation rules and the tribunal procedural rules is the government seeking to remove by stealth the rights which it granted to great acclaim and much fanfare. For those of us working at the coal face this means that we are thrown back to the days of *Jarndyce v Jarndyce*. Black letter lawyers may be having a field day but for the rest of us this is not exactly why we became lawyers. The answer to an employment question may vary depending on whether you are in Croydon, Bristol or Newcastle. When we use a word does it mean precisely what we expect it to mean or does it mean what it ought to mean? Humpty ... help me!

◆ Susan L. Belgrave

Susan Belgrave is a member of the ELA working party monitoring the implementation of the tribunal rules of procedure. These comments do not reflect the view of the working party.

In this Issue:

- ❖ How has it been for you, dear? p1
- ❖ Will you still want me, when I'm 64? p3
- ❖ Oh What a carver up? p 2
- ❖ So you want to complain? p4



Oh What a Carver Up?

Unfair Dismissal and the Territorial Jurisdiction of Employment Tribunals.

❖ As workplaces and practices become ever-more internationalised, the scope of the territorial jurisdiction of employment tribunals becomes increasingly relevant to practice. Unfortunately, the definition of this scope in particular in relation to the law of unfair dismissal continues to vex the courts.

❖ *Background: Carver v Saudi Arabian Airlines*

❖ By way of background, up until 1999, Section 196 of the Employment Rights Act 1999 (“ERA”), set out a number of excluded classes of employment. Certain rights including the right not to be unfairly dismissed, would not apply in relation to employment during any period when the employee was engaged in work wholly or mainly outside Great Britain unless the employee ordinarily worked in Great Britain. The case law focused on how to determine where an employee “ordinarily worked” – and in particular whether this was determined by the contract of employment or the country in which the employee was based. In *Carver v Saudi Arabian Airlines* [1999] IRLR 371, the Court of Appeal upheld the contract test. Mrs Carver was denied jurisdiction because, despite having worked in the United Kingdom for a number of years from her employer’s base at London Heathrow, her contract had actually been formed in Jeddah.

❖ *Lawson v Serco to the Rescue*

❖ To overcome the injustice of the contract test, with effect from the 25th October 1999 Parliament repealed Section 196. To cut a long and tortuous story short, the courts were thrown into some disarray as to how then to define territorial jurisdiction in the light of this repeal until the Court of Appeal decision in *Lawson v Serco* [2004] ICR 204. Territorial jurisdiction in relation to unfair dismissal is currently defined by Pill LJ’s sensible approach in *Serco* – hailed by some as the “pill of sanity”.

❖ The facts in *Serco* were that Mr Lawson was employed by Serco, an English company, to work as a security guard at an RAF base on Ascension Island. Mr Lawson never worked for Serco in the UK but was recruited in the UK and received his salary in UK sterling. He resigned in a dispute over working hours, claiming constructive dismissal relating to his assertion of a statutory right. The employment tribunal declined jurisdiction on the basis of Mr Lawson’s overseas employment. The EAT reversed this on the basis of Rule 11(5) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2000, which provide that the rules applied in proceedings where the respondent resided or carried on business in England and Wales.

❖ The Court of Appeal held that the tribunal did not have jurisdiction. The EAT had asked the wrong question. The correct question was what employments were covered by Section 94(1) ERA which sets out the right not to be unfairly dismissed.

The answer was quite simply: “employment in Great Britain.”. Neither the tribunal Rules of Procedure nor the governing law of the contract have any relevance.

❖ The reassuring simplicity of this approach is belied by the practicalities of application, in particular in relation to borderline cases. Pill LJ recognised that there was a need for a degree of flexibility in applying the test, in particular having regard to the Posted Workers Directive which provided protection in a jurisdiction visited. A dismissal during a single, short absence from Great Britain would not normally exclude the protection of the ERA. Pill LJ stated that: “borderline cases will depend on an assessment of all the circumstances of the employment in the particular case. The residence of the parties may be relevant to where the employment is, but the emphasis must be upon the employment itself. That, we repeat, is the “legislative grasp” of the 1996 Act.”.

❖ *Applying Serco at the Borderline*

❖ It did not take long for the classic borderline case to appear: in *Crofts & Ors v Cathay Pacific Airways* [2005] ICR 1436 the Court of Appeal had to determine jurisdiction in relation to airline pilots employed by Cathay Pacific, Hong Kong’s major airline. The pilots’ contracts were governed by Hong Kong law; they held Hong Kong pilots’ licenses; their personnel files were kept in Hong Kong; all training was devised and carried out in Hong Kong; and flight instructions were issued from Hong Kong. Each pilot had a home base at which his flight cycle would start and end. There were various groups of pilots but the home base of those employed by V Limited was London Heathrow.

❖ By a majority, the Court of Appeal, in a judgment handed down on the 19th May 2005, held that the pilots employed by V Limited were employed in Great Britain. Maurice Kay LJ, while acknowledging that a reversion to the “base test” as “the test” had been rejected, found the fact that the pilots were based in Great Britain of particular relevance where the employment was “inherently mobile and international”. Meanwhile Waller LJ focused on the fact that the contracts of the V Limited pilots based them in England.

❖ If the majority were not wholly consistent in their reasoning as to why the pilots were employed in Great Britain, the dissenting judgment of Lord Phillips, MR illustrates the difficulties further. Lord Phillips MR involved himself in near-philosophical considerations as to the meaning of the word “employment” and decided that, in the *Serco* sense, it meant the work on which the employee is employed, namely where the employee worked. It was not possible to say that the international airline pilots had one particular country as their place of work. Their situation was comparable to that of mariners, for whom express provision was made in Section 199 ERA. In a nod towards the contract test, he went on to say that he considered that the law of Hong Kong was the appropriate law to regulate their employment, which reaction was strengthened by the fact that the contractual terms of their employment subjected their contracts to the provisions of Hong Kong Ordinances governing employment rights.

❖ *The Way Forward?*

❖ *Serco* is on its way to the House of Lords, to be heard in November. It is hoped that clear guidance will be provided to enable employers and employees to know where they stand. As usual, watch this space, wherever that might be!

◆ Laura Elfield

Will you still want me, when I'm 64?

The new draft age discrimination regulations and the consultation paper have been issued. It is probably fair to say that we are all likely to modify our ageist tendencies whether we are for or against the 'very' old or the young. One of the more disappointing features of the regulations has been the decision to set a default retirement age at 65 rather than simply scrap the retirement age altogether. This is to be reviewed in 2011 and will probably be raised or removed.

The broad tenets of the regulations mirror those of existing discrimination legislation in other areas. It is obviously the areas where they diverge which will be of greatest interest to practitioners and human resources. Akin to the sexual orientation regulations it will be possible to discriminate on the basis of perception: so that if a person's actual or *perceived age* accounts for the difference in treatment there may be liability for direct discrimination. The issue is then whether this treatment can be objectively justified. The provisions relating to indirect discrimination mirror those in other legislation. The consultation document states that requiring applicants to pass a health or fitness test for recruitment or promotion would not constitute direct age discrimination but it may possibly amount to indirect discrimination unless a certain level of fitness were required to perform that particular job.

Both direct and indirect discrimination can be justified if the measure taken is proportionate when balanced against a legitimate aim. Some existing practices will remain lawful:

- ◆ the setting of requirements as to age in order to ensure the protection or to promote the vocational integration of people in particular age group, or
- ◆ the fixing of a minimum age in order to qualify for certain advantages linked to employment or occupation in order to recruit or retain older people, or
- ◆ the fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post in question, or
- ◆ the need for a reasonable period of employment before retirement.

Various examples of what might constitute a legitimate aim are:

- ◆ health;
- ◆ welfare and safety (including protection of young or older people);
- ◆ facilitation of employment planning;
- ◆ particular training requirements;
- ◆ encouraging and rewarding loyalty;
- ◆ the need for a reasonable period of employment before retirement; and
- ◆ recruiting or retaining older people.

Since the directive did not cover goods and services, insurance provision is not within the scope of the draft regulations but where an employer differentiates between categories of employees who enjoy certain benefits then liability may arise. If, for instance, an employer does not offer free health insurance to employees in a certain age bracket because it is more expensive then he may be discriminating against workers in that category.

In such cases an employer will need to show that such a decision is objectively justified.

Another problem area is the use of age (disguised as length of service) as a means of access to employment benefits. This will continue to be lawful if it reflects a higher level of experience of the employee or to reward the loyalty of the employee, or to increase or maintain the motivation of the employee. There may also be a benefit to the business which results from rewarding loyalty or increasing staff motivation.

Where an employer is complying with a statutory provision then he will have a complete defence to a claim of age discrimination. For instance, current banding by age for younger workers in the national minimum wage legislation will continue to be lawful.

Complex changes are proposed to existing legislation relating to unfair dismissal. The national default retirement age will be 65. An employer is only going to be able to retire its workers compulsorily before then if it can objectively justify a lower retirement age. Employers will now have a duty to consider a request by an employee to work beyond retirement age. An employee will be able to challenge any dismissal which he considers to have taken place because of his age even if the employer has cited another reason for the dismissal. If the retirement has been planned the employee will have some difficulty in showing that it was for a different reason and the employer will still be under a duty to consider an employee's request to continue working. If the dismissal takes place around the employee's 65th birthday, the burden of proof will be on the employer to justify the decision, if it is not a planned retirement.

There will also be concomitant changes to the calculation of a basic award, where the employee's age determines the amount of award and to redundancy payment where younger employees are entitled to half a week's wages per year of service and older ones to one and a half week's per year of service subject to a cap of 20 years.

Court of Appeal says stress at work cases should be mediated

In the psychiatric stress through over-work case of Vahidi v Fairstead House School Trust Ltd the Court of Appeal expressed its exasperation with parties who engage in long trials and appeals where the Court of Appeal has already laid down settled principles. In the words of Lord Justice Longmore:

"One shudders to think of the costs of this appeal and of the trial which apparently took as long as 9 days. As the courts have settled many of the principles in stress at work cases, litigants really should mediate cases such as the present"

9 Gough Square offers a team of CEDR accredited Mediators

Andrew Baillie QC

Giles Eyre

Grahame Aldous

Christopher Wilson

See www.9goughsquare.co.uk for more details

So you want to complain?

If a claimant has failed to follow the dispute resolution procedures brought into force on 1 October last year (as to which, see below), the consequences can be severe. The claimant may be precluded from bringing any Tribunal proceedings if a grievance could have been but was not brought in relation to the same complaints. Inevitably, Tribunals have now started to consider how to recognise a grievance and what the claimant has to have done in order to launch a grievance against the employer. As yet there are no reported cases on the point (although dog-eared copies of ET decisions have started doing the rounds) and Tribunals are thrown onto interpreting the very basic requirements of the legislation itself.

Those requirements are contained in the following key provisions:

- (1) Section 32 of the Employment Act 2002 bars the right to present a claim to the Tribunal if either the standard or modified grievance procedure (see Sched. 2 for the definitions) should have been used by the claimant but was not.
- (2) Both the standard and the modified grievance procedures are triggered by the employee setting out the grievance in writing and sending it to the employer. The modified procedure also requires the basis for the grievance to be set out.
- (3) Regulation 2 of the Employment Act 2002 (Dispute Resolution) Regulations 2004 provides the only definition of a grievance. It is "a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him". (Where this leaves unintended failures to act is an interesting question which will no doubt be debated in due course – but not in this article).
- (4) Reg. 2(2) states that in determining whether a written communication fulfils a requirement of Sched. 2 to the Act, it is irrelevant that it might also deal with any other matter.
- (5) Reg. 6 specifies that the standard grievance procedure will apply subject to 5 exceptions. Use of the modified grievance procedure where the employment has ended and the parties have agreed in writing to use the modified procedure is the first exception. The second exception disapplies the grievance procedures altogether where the employment has ended without a grievance having been started and it is no longer reasonably practicable to comply with either procedure.

Distilling down these requirements, it seems that a grievance under the procedure is merely a written complaint made by the employee about an act/intended act of the employer and which has been sent to the employer. If the complaint fulfils these requirements, it is irrelevant that it might be contained in a document which also deals with other matters.

It follows that a letter before action which recites the employee's complaints before concluding with the traditional exhortation to "pay up or else" may well meet these basic requirements, even though it makes no explicit reference to a grievance and no request

to initiate the grievance procedure. This was the result in Stewart v Barnetts Motor Group Ltd, a decision of the Edinburgh ET on 30.5.05 (and also, anecdotally, last month before a chairman, Mr Carstairs, sitting alone at London Central). The fact that the complaint might have been embedded in a letter that was confrontational in tone and constituted more a declaration of war than an attempt at "dispute resolution" was not relevant in considering whether the very basic statutory requirements had been met. The employer in Stewart tried to argue that in order to meet the requirements a grievance had to be set out personally by the employee and not communicated via solicitors. That argument was rightly rejected. For his part the claimant adopted a fall-back position that if the letter before action was not a written grievance within the standard procedure, in fact neither of the procedures applied. This was on the basis that the employment had ceased and the respondent could no longer remedy the matters complained of (except through financial compensation, which it was clearly unwilling to do) and that therefore it was not reasonable practicable to comply with the grievance procedure. The Tribunal did not have to and did not reach a decision on the fall-back argument. It is difficult to see that the decision would have gone in the claimant's favour.

It is rumoured that the decision in Stewart is being appealed. If not, the point will be making its way to the EAT soon enough. Clearly the EAT will have to strike a balance between the undesirability of loading the statutory grievance procedures with technicalities (detailed technical requirements being notably absent) and the desirability that an employer should know in clear terms when the grievance procedure is triggered.

Pending clarification from the EAT, this is potentially a real problem for employers. If they miss the fact that a grievance is being made and therefore do not ensure that the procedure is completed, they will face the minimum 10% increase in compensation imposed by s.31 of the Employment Act 2002. Unless a grievance has already been initiated, employers should therefore treat letters before action as a request triggering the grievance procedure. If the employer does not agree to the modified grievance procedure, this might then put the pressure back on the claimant. How many ex-employees will be willing to return for a meeting to discuss the subject matter of the grievance?

No doubt the DTI thought that the provisions of Schedule 2 to the 2002 Act were admirably pared-down and free from cluttering technicalities. In fact they provide plenty of blank spaces allowing room for lawyers to operate. Working through the ramifications is likely to take some time and will cause considerable uncertainty on the way.

◆ Philip Jones

Bulletin Editor: Susan L. Belgrave
General Enquiries: John Kerr

9 Gough Square, London EC4A 3DG
Tel: 020 7832 0500, Fax: 020 7353 1344
E-mail: clerks@9goughsquare.co.uk
www.9goughsquare.co.uk

Employment Team at 9 Gough Square:

John Foy Q.C.	Susan Belgrave	Tom Little	Shahram Sharghy
Grahame Aldous	Stephen Glynn	Perrin Gibbons	Emily Radcliffe
Simon Carr	Philip Jones	Cleo Perry	Dorothea Gartland
Gaurang Naik	Daniel Lawson	Busola Johnson	Louise Jones
Vince Williams	Laura Elfield	Giles Mooney	Esther Pounder